GEORGE MALACHI MABUYE v COUNCIL OF LEGAL EDUCATION (1985) Z.R. 10 (S.C.)

SUPREME COURT
NGULUBE, C.D.J., GARDNER, J.S., AND SAKALA, AG. J.S.
21ST DECEMBER, 1984 AND 8TH FEBRUARY, 1985
(S.C.Z. JUDGMENT NO. 1 OF 1985)

Flynote
Legal Practitioners Act - Student - Enrolment - Character - Fitness -Previous Misconduct - Redemption of.
Supreme Court - Appeals - Facts not in dispute - Duty to substitute own views.

Headnote
The appellant was employed as a lay magistrate in Zambia in 1971. While so employed, in 1978 he enrolled as a student with the respondent; but that enrolment expired for non-fulfilment of certain conditions. In March 1980 he was dismissed from the bench for misconduct. Thereafter he obtained employment in Zimbabwe as a magistrate and was still so employed when in 1983 he applied to renew his enrolment which had expired. The application was rejected on the ground that the misconduct which led to his dismissal from the Zambian bench made him unfit for enrolment as a law student. He appealed.

Held:
(i) The overriding criteria for fitness to enrol as a law student is integrity; and for disqualification to be justified it should be made to appear that the misconduct complained of not only seriously undermines such integrity but also that no amount of repentance and subsequent good conduct could be regarded as having repaired and redeemed the applicant's integrity;
(ii) The Supreme Court, where the question is purely one of inference from facts about which there is no dispute, has both the right and the duty to substitute its own views for those of the tribunal below.

Cases referred to:
(1) Glynn v Keele University and Anor [1971] 2 All E.R. 89.
(2) Leslie Thomas Hayes v The Bar Council of Zimbabwe judgment No AD 83/81 of the Appellate Div. of the High Court of Zimbabwe.
(3) Wasamunu v The People (1978) Z.R. 143.

(4) Benman v Austin Motor Co. Ltd. [1965] 1 All E.R. 326.
(5) Re Hill [1867-68] 3 L.R. Q.B. 543.

(6) Re Weare [1893] 2 Q.B. 439.

Legislation referred to:
Legal Practitioners' Act, Cap.48, Student Rules, r.6(1).

For the appellant: H. Mbaluku of Mbaluku, Sikazwe and Company.
For the responent: J.M. Mwanakatwe, of M.M.W. and Company

Judgment

NGULUBE, D.C.J.: delivered the judgment of the court.

This appeal is brought in terms of Rule 6 (5) the Students Rules under the Legal Practitioners' Act, Cap. 48. The appellant is dissatisfied by a decision of the Council of Legal Education (the respondent) which had determined, vice Rule 6(1), that it was not satisfied as to the appellant's character, fitness and suitability to be a student.

The brief facts of the case are as follows: The appellant was a lay magistrate in Zambia from August, 1971 until his dismissal from the bench in March, 1980. Thereafter, he obtained employment in Zimbabwe as a magistrate and is still so employed to date. Meanwhile, he was enrolled as a student with the respondent in August, 1978, but that first enrolment expired for non-fulfilment of the relevant conditions set out in Rule 7. In 1983, the appellant attended classes at the Law Practice Institute but was advised that since his first enrolment had expired, he should re-apply. He submitted his new application for re-enrolment as a student but this was rejected on the ground that he was not considered to be of acceptable character, fitness and suitability to be a student of law and, thereafter, by necessary implication, to be an advocate.

It is common cause that the appellant was found unsuitable because of certain events which led to his dismissal from the Zambian bench in 1980. These were that on four separate occasions in 1978, he had abused his authority as a magistrate by improperly and unjustifiably causing the arrest, on bench warrants, of a number of individuals in circumstances wholly unconnected with the due performance of his duties. The Judicial Service Commission found him guilty and dismissed him.

One of the grounds of appeal is to the effect that, in taking the dismissal into account, the respondent must have received a complaint against the appellant from one of its members and in failing to give the appellant an opportunity to defend himself, the respondent had acted in breach of both natural Justice and Rule 26, which requires that the student or former student be given an opportunity to answer the complaint. Mr Mbaluku submits, therefore, that in the event this appeal should be allowed on that ground. On behalf of the respondent, Mr Mwanakatwe has argued to the effect that the argument concerning the right to be heard ought not to be entertained, having regard to the relationship between Rule 6(1) (which requires the applicant to satisfy the Council as to his character, fitness and suitability) and Rule 26 which

refers to complaints received and the applicant's right to an opportunity to exculpate himself. We find that there was a complaint raised within Rule 26 and that the appellant should have been given

an opportunity to be heard in his own behalf. But the appeal cannot be allowed on this ground. We agree with Mr Mwanakatwe's submission which was that no unfairness attached to the failure to give the appellant a hearing in the matter, where the disciplinary charges and the dismissal were never in dispute. There is, we find a great deal of force in Mr Mwanakatwe submission which is supported by the case of *Glynn v Keele University and Anor* (1).We agree with the proposition in that case, and repeated by Mr Mwanakatwe, that a decision cannot be reversed for failure of natural justice, in not hearing the other party, if in fact that other party was guilty of the matters alleged against him and no dispute existed as to the facts upon which the finding of guilty was based. The party who has not been heard cannot be said to have been prejudiced or to have suffered any injustice in those circumstances. The ground of appeal in this regard cannot be upheld.

The major ground of appeal is to the effect that the refusal to re-enrol the appellant and the finding that he is not a fit and proper person, based on the old misconduct, was not justified. Mr Mbaluku submits that having regard to the more recent character references and also having regard to the fact that the appellant has continued to work satisfactorily as a magistrate in Zimbabwe, the respondent ought to have found that the appellant was now a reformed and rehabilitated person. It was argued that while the appellant might have behaved irresponsibly and unreasonable in 1978, he has since changed for the better and he is now a reasonable and responsible person. It is argued, therefore, that it cannot be inferred from the dismissal of 1980 that the appellant continues to be of bad character.

On the other hand, Mr Mwanakatwe, submits that the question for determination is whether the respondent exercised its discretion unfairly or improperly or without justification. It is his submission that the offences for which the appellant had been dismissed left a permanent stigma on his character since they were of a serious nature and indicative of the appellant's state of mind and propensity. He urges us to find that there are no grounds upon which we can interfere with the findings of the respondent Council.

We must record our indebtedness to Mr Mbaluku for drawing our attention to the very useful case of *Leslie Thomas Hyes v The Bar Council of Zimbabwe* (2). In that case the bench, which was presided over by Fieldsend, C.J., included no less distinguished judge than Baron, J.A., erstwhile Deputy Chief Justice of Zambia. After their Lordships had reviewed a number of South African as well as English cases, in *Hayes*, they were all agreed that the question whether an applicant is a fit and proper person is one of fact and not one of discretion. With that approach, we respectfully concur. It follows therefore that we do not accept Mr Mwanakatwe's submission that the question in this case concerns the

exercise of discretion by the respondent. Quite clearly, there can be no question of discretion with regard to the qualifications which the Rules have laid down. If for instance, an applicant is found to be unfit, there can be no question of the respondent, in its discretion, waiving the unfitness, for the Council would then be acting against the provision in the Rules. However, though the question is one of fact, it is not without its own difficulty. As Baron, J.A., put it in *Hayes*:

> "But insofar as this court is called upon to determine whether an applicant is a fit and proper

person, it makes, as Mr. Jagger puts it, a value judgment."

The objection to the appellant was that he had been dismissed in the circumstances to which we have made reference. Mr Mbaluku argues that, as was recognised in *Hayes*, the majority of cases where an applicant was disqualified were concerned with dishonesty or other serious disgraceful misconduct rendering the applicant unfit and unsuitable to be allowed to practise. Mr Mbaluku argues that, as the appellant has repented of his previous misconduct, he should be given another chance. Mr Mwanakatwe, however, argues that this court has a duty to ensure that persons who, because of what is already known about them, cannot be expected to uphold the dignity and standards of the profession and who do not show that they can be relied upon by the courts and by their clients, are not allowed to join the noble ranks of the legal profession. It is Mr Mwanakatwe's submission that the appellant's indictment and conviction for abuse of authority indicated a propensity and state of mind which renders the appellant unsuitable.

There is force in the opposing submissions and much depends on the circumstances of each given case. On the one hand, we do not believe that the integrity of a person cannot be redeemed, after a previous lapse, if an applicant can show that he has in fact redeemed himself by the time he makes the application called in question. On the other hand, we recognise that there is certain conduct or misconduct, even an isolated incidence of which, would tend to show that there is an inherent defect in the applicant's integrity, making it difficult to visualise how the courts or the potential clients might be expected to trust the applicant in their dealings with him. The functions of an advocate demand that he be of reliable and responsible character and the question which arises in this case, is whether, on the undisputed facts, the respondent made a finding of fact which we must reverse, as we have been asked to do.

As already noted, the basic facts leading to the dismissal of the appellant from the bench are not and have never been in dispute. On the basis of such facts, which at the time clearly indicated an unreasonable and irresponsible attitude, the respondent came to the conclusion that the appellant was even at this stage not a fit and proper person. The position of this court in these situations, where we are asked to reverse a finding made by a lower court or other tribunal of fact, was clearly stated by

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Baron, D.C.J., in *Wasamunu v The People* (3), when he said, at page 144:

> "I stress that this court, where the question is purely one of inference from facts about which there is no dispute, has both the right and the duty to substitute its own views for those of the trial judge."

In *Wasamunu*, the court cited *Benmax v Austin Motor Co. Ltd*. (4), and we wish to cite only from the headnote which reads (omitting the irrelevant):

> "Where there is no question of the credibility of witnesses but the sole question is the proper inference to be drawn from specific facts, an appellate court is in as good a position to evaluate the facts as the trial judge and should form its own independent opinion though it

will give weight to the opinion of the trial judge."

We are here dealing with an appeal from a statutory body charged with the responsibility of overseeing Legal Education leading to the admission of persons as advocates; but the principles to which reference has been made are applicable.

We have considered the submissions and the undisputed facts. On the authorities to which we have referred, it is open to this court to draw its own conclusions on the facts and to decide whether the appellant is or is not fit and proper person. The overriding criterion for fitness to practice is integrity and for a disqualification to be maintainable, it should be made to appear quite clearly that the misconduct complaint of not only seriously undermined such integrity but also that no amount of contrition and subsequent good conduct can be regarded as having repaired and redeemed the applicant's integrity. In this regard, the nature and quality of the misconduct and any evidence of subsequent good conduct became relevant. In *Re Hill* (5), an application was made to strike an attorney of the roll, on account of his having stolen some money . The misconduct was undoubtedly a serious one but because, for a period of three years after the theft, Hill had conducted himself well and done nothing wrong, he was not struck off. Instead, he was suspended for a year because their Lordships in that case (Cockburn, C.J., Blackburn, J., Mellor, J., and Lush, J.) all felt that the subsequent good conduct was a factor in his favour. Again in *Re Weare* (6), the question arose, as to the striking off of a solicitor who had been convicted of a criminal offence of letting his houses to be used as brothels. In the course of his judgment Lord Esher M.R. observer, at p.446:

> "The court is not bound to strike him off the rolls unless it considers that the criminal offence of which he has been convicted is of such personally disgraceful character that he ought not to remain a member of that strictly honourable profession."

In the same case, Lopes, L.J., observed, from the bottom of p.449 to the next page :

> "I wish to make only one observation with regard to a point that arose about the conviction. It is perfectly clear that the mere fact

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> that the person has been convicted of a criminal offence does not make it imperative on the court to strike him off the roll. There are criminal offences and criminal offences. For instance, one can imagine a solicitor guilty of an assault of such a disgraceful character that it would be incumbent on the court to strike him off the roll. On the other hand, one can imagine an assault of a comparatively trifling description, where in all probability the court would not think it its duty to interfere."

In this appeal, the appellant was, of course, not convicted of any criminal offence. He was convicted of abuse of office in disciplinary proceedings before the Judicial Service Commission. The misconduct consisted of improper use of his powers to issue bench warrants and this took place some six years ago. Can it be said that the misconduct involved was "of such personally disgraceful character" that it left a permanent stigma on the appellant, as contended by Mr Mwanakatwe? We do not see that it necessarily follows that this isolated misconduct in his capacity as magistrate must

result in a permanent disability to redeem his integrity and so remain forever condemned as unsuitable material to join the noble ranks. But in fact the appellant has placed before us evidence of redemption. He has produced two affidavits - one from a practising advocate and another from a chief magistrate in Zimbabwe - both of which have vouched for his good conduct since the misconduct complained.

There is evidence that he has been a magistrate in Zimbabwe for over three years during two years of which he was known to the Chief magistrate who has deposed to his good character and conduct. Since the respondent's record of proceedings was not made available to us, we do not know what sort of character references, if any, they had obtained in respect of the appellant, but we do realise that the affidavits before us came into existence after the decision refusing to re-enroll the appellant had already been communicated. Had such evidence been available to the respondent it is our view that it is unlikely that they would have made a finding to the effect that the old misconduct attached a permanent stigma or propensity to the appellant.

It follows from what we have said that this appeal should succeed.

We set aside the determination of unfitness. In all the circumstances of the case, we consider that there should be no order for costs.

Appeal allowed
