THE LAW SOCIETY OF ZIMBABWE

versus

IGNATIUS MURAMBASVINA

LEGAL PRACTITIONERS DISCIPLINARY TRIBUNAL

HARARE, 11 June & 9 July 2021 and 25 January 2023

Before: CHATUKUTA J (Chairperson), MUSAKWA J (Deputy Chairperson)

Mr. D Kanokanga & Mrs. S. Moyo (members)

Mr. B. Pesanai, for the applicant

Mr. M Ndlovu, for the respondent

CHATUKUTA J: On 9 July 2021 the respondent was found guilty of unprofessional, dishonourable and unworthy conduct. He had been charged with contravening s 23 (1) (c) of the Legal Practitioners Act [*Chapter 27:07*] (the Act) as read with sections 70 E and 70F of the Law Society of Zimbabwe Regulations, 1982 (SI 314 of 1982) and s 23 (2) (b) of the Act. It had been alleged that he failed:

(a) to provide his client with a comprehensive debt collection report;

(b) to account for the deposit the client had paid to his firm.

(c) to renounce agency at the request of his client when complainants sought alternative legal representation."

The evidence placed before the Tribunal was as follows:

With regards the first act of misconduct, the applicant received a complaint dated 17 March 2014 from Messrs Chitewe Law Practice. The complaint was that the respondent had been instructed by a client, Maraja Investments (Private) Limited t/a Kurima Gold to collect various amounts totaling US$ 114 705.56 owed to the client by some 33 debtors. Despite having been paid a deposit of US$ 1 000.00 towards his fees, the respondent failed to fully account to the client in respect of the collections. The client then instructed Messrs Chitewe Law Practice in December 2013 to ascertain from the respondent the status of the collections.

The complaint regarding the second charge was that Messrs Chitewe Law Practice engaged the respondent starting in December 2013. A meeting was held between the firm and the respondent whereat the respondent attributed to a clerk at his firm improper handling of the client's portfolio. The respondent undertook to conduct investigations and revert to Messrs Chitewe Law Practice in January 2014. As at the date of the letter of complaint, the respondent had not furnished Messrs Chitewe Law Practice or client with an account of the client's portfolio despite numerous communications with the respondent both telephonically and in writing.

Regarding the third charge, when Chitewe Law Practice did not get a response, client instructed the firm to proceed against two of the clients. On 17 February 2014, Messrs Chitewe Law Practice requested in writing that the respondent renounce agency to enable the firm to carry out the client's instructions. The respondent did not respond to the request. Messrs Chitewe Law Practice was not therefore able to assume agency on behalf of client.

The respondent failed to file a counter-statement as is required by the Regulations. At the commencement of the hearing of the application, the respondent applied for condonation for late filing of counter-statement and for postponement of the hearing to enable him to file the counter-statement. *Mr.* Ndlovu, for the respondent, made the following concessions: The respondent was served with the application on 29 August 2019. He was required to have filed his counter-statement within 21 days of the service of the application, that is on or before 26 September 2019. The delay of almost two years was inordinate. The respondent did not have any explanation for the failure to file the counter-statement timeously.

Mr. Ndlovu further conceded that in spite of the respondent having been served on 3 June 2021 with the notice of set down of the hearing for 11 June 2021, the respondent only instructed *Mr.* Ndlovu on 10 June 2021, that is on the eve of the hearing. In fact, the respondent had been initially served on 26 May 2021. The notice was served on the respondent again on 3 June 2021

Given the concessions by *Mr.* Ndlovu, the Tribunal dismissed the application for condonation. The delay was undoubtedly inordinate. It was evident that the respondent had failed to advance any reason for failing to file his counter-statement as is required by the Regulations. The inordinate delay and failure to advance any reason for a delay of that magnitude by a senior legal practitioner reflected a willful disregard of the Regulations. The respondent therefore did not deserve the indulgence of the Tribunal.

The hearing continued on 9 July 2021 as an undefended application. The respondent was not in attendance. *Mr*. Ndlovu applied for a postponement of the application to allow the respondent to attend the next hearing on the basis that the respondent intended to lead oral evidence on the merits in default of the counter-statement. He submitted that the respondent was unavailable because he had tested positive of COVID 19 on 5 July 2021. Counsel had been so advised by the respondent on the 6 July 2021.

Mr. Ndlovu submitted that the Regulation require that a respondent be given notice of the date of hearing of an application even when he/she would not have filed a counter-statement. He submitted that the order of the Tribunal denying the respondent condonation of failure to file a counter-statement did not deny him the right to address the Tribunal orally on the merits of the application. He contended that a postponement of the hearing was therefore merited.

The application was opposed by the applicant. *Mr*. Pesanai, for the applicant, submitted that the respondent had been barred for failing to file a counter-statement. It was contended that this meant that the respondent did not have audience before the tribunal be it in writing or orally. It was further submitted that to accord the respondent audience on the merits would be contrary to the order of the Tribunal barring the respondent.

The Tribunal dismissed the respondent's application. It found that the respondent spurned the right to be heard when he failed to file his counter-statement. The procedure leading to the referral of a matter to the Tribunal set out in the Act and the By- Laws provides for a legal practitioner's right to be heard where he/she is facing allegations of unprofessionalism. Once the Tribunal accepts the application filed by the applicant, it directs the Registrar in terms of s 4 (b) of the Regulations to serve a copy of the application on the respondent and call for the respondent to file a counter-statement. The respondent is required to lodge his/her counter-statement with the Registrar within 21 days of the date of the service of the application on the respondent (s 5 (1)). The applicant may respond to the counter-statement and lodge its response with the Registrar within 14 days (or any additional period approved by the chairperson) of the date of service of the counter-statement on it (s 6).The Tribunal shall thereafter consider whether or not to hold an inquiry (s 7 (1)). If the Tribunal decides to hold an inquiry, the Chairperson shall set down the application and the Registrar shall give the parties at least 14 days' notice of the date of hearing (s 8).

A counter-statement is a means by which a respondent exercises his/her right to be heard. In the event that the respondent opposes the application, the counter-statement sets out the basis of the opposition. Faced with a counter-statement, the applicant can decide whether or not to proceed with the application. The Tribunal can, at its discretion, decide whether or not to proceed in terms of s 7(1) to hold an inquiry based on the nature of the opposition. However, once a respondent who has been given due notice of the application, decides not to file a counter-statement he/she would have forfeited the right of audience before the Tribunal. The application will be treated as unopposed. The respondent can only have audience at the discretion of the Tribunal. The Tribunal would, on good cause shown, allow the respondent to file a counter-statement. Thereafter the Tribunal and the parties to the application proceed in terms of the Regulations. It is only then that a respondent may lead oral evidence to supplement what will have been stated in the counter-statement. A counter-statement is therefore a prerequisite to the leading of oral evidence. This is evident from s 5 (1) which provides as follows:

> "5(1) The respondent may make a counter-statement in writing, setting forth his replies to the allegations contained in the application, which counter-statement shall be accompanied, where appropriate, by a list of witnesses whom the respondent proposes should be called by the Disciplinary Tribunal, should the disciplinary Tribunal decide to hold an inquiry, together with a brief summary of the evidence of each witness."

Whilst the section, by use of the word "may" gives the respondent the option whether or not to file a counter-statement, where the respondent intends to adduce evidence, he/she is required to provide a list of the witnesses who will give oral evidence and a brief summary of that evidence. This shows that both the Tribunal and the applicant must have prior notice of the witnesses from whom the respondent intends to adduce oral evidence and a summary of that evidence. A respondent cannot therefore, without having filed a counter-statement, seek to lead oral evidence on the date of hearing.

The respondent in this case did not file a counter-statement. The Tribunal issued an order that the respondent was barred from filing a counter-statement after the *dies inducia*. The effect of the order of the Tribunal was that the respondent could not adduce oral evidence as no prior notice of such evidence had been given. The application for a postponement was accordingly dismissed.

The Tribunal proceeded with the hearing with the applicant making submissions on the merits as is required by the Regulations. The applicant relied on the papers filed of record. These

are the letter of complaint by Messrs Chitewe Law Chambers which formed the basis of the charges; and the response by the respondent in a letter dated 16 April 2014 to the complaint. The respondent, in his response to the complaint, alleged that a para-legal clerk under him who was responsible for debt collection misappropriated moneys paid by and due to various clients including Kurima Gold. The firm instituted investigations into the clerk's conduct and a disciplinary hearing was conducted leading to the discharge of the clerk. The investigations to establish the exact extent of prejudice to clients was protracted and hampered by floods in Gokwe. The respondent therefore sought to place the blame for his failure to discharge his statutory obligations on his para-legal clerk. He attached to his response letter of suspension of the clerk and a record of the disciplinary proceedings leading to the dismissal of the clerk.

As rightly submitted by the applicant, the responsibility to account to a client rests with the legal practitioner. It is dereliction of duty and an abrogation of responsibilities to lay the blame on an assistant. It is trite that a legal practitioner is mandated to act on a client's instructions. A para-legal clerk only assists him/her to discharge that mandate. It is the legal practitioner who should therefore account to client with regards to instructions given, and monies deposited with the legal practitioner's firm. The respondent failed to discharge the statutory duties placed on him. The respondent conceded to this fact in his response to the complaint when he remarked after para 5 that:

> "Let me conclude by stating that I will be able to fully account for the USD 1 000 paid by Maraja Investments and any money for that matter if I am allowed to complete the exercise."

The above remarks were an admission that he had failed to account to client for the deposit paid by client and for any money due to client. The respondent also admitted in his response that he had failed to report to client either directly or through Messrs Chitewe Law Practice. He remarked that:

> "5. I was of the view that doing piecemeal reporting to Messrs Chitewe Law Practice would be inadequate."

It was apparent that over a period of five years between the date of the complaint and the date of the filing of the application there was no remedial action which was taken by the respondent. The respondent did not give an explanation why he did not renounce agency as

instructed by client other than to state that he was still conducting some investigations into the complaint and did not want to make a piecemeal report to Messrs Chitewe Law Practice.

It is for the above reasons that the Tribunal held that the conduct of the respondent was not consistent with his duties as a legal practitioner, was unprofessional, dishonorable and unworthy of a legal practitioner. We accordingly found the respondent guilty of the three counts preferred against him.

The Tribunal took note of a letter from Chitewe Law Practice to the applicant dated 7 June 2021 in which the complainant withdrew its complaint against the respondent and requested a termination of the disciplinary proceedings against the respondent. Once a complaint has been lodged the integrity of the profession is in issue and can only be atoned either with the applicant accepting the withdrawal or the Tribunal making a finding in favour of the respondent. The applicant, being *dominus litis*, did not accept the withdrawal and rightly so. The letter did not state how the issues raised in the letter of complaint were addressed. In any event, it was stated in the letter that the complainant company had since been liquidated. It was not clear from the letter who gave Chitewe Law Practice instructions to withdraw the complaint.

PENALTY

The respondent was given audience in so far as the penalty was concerned. The respondent was directed to file his submissions on the appropriate penalty by the 15th of July 2021. He only filed his submissions on 28 July 2021. He explained that the delay was due to poor health. The applicant was directed to file its submissions by the 21st of July 2021. The applicant timeously filed its submissions without the benefit of the respondent's submissions.

The respondent submitted the appropriate penalty is a fine or suspension from practice for a period of one year. In support of the proposed penalties, the respondent submitted as follows: The Tribunal must take into account the amount deficient or missing. The respondent was not charged with misappropriation or theft of trust funds. The applicant did not state how mush had been misappropriated or was missing. He kept client's money safe and released the money upon demand. Chitewe Law Practice had withdrawn the complaint which is an indication that there was no money missing.

The applicant submitted that accounting to client and terminating mandate given by the client when called upon to do so form part of the foundation of the legal profession. It was submitted that the respondent failed to adhere to both. It was further submitted that the fact that

the respondent was found guilty of having breached two fundamental obligations is justification for his deregistration. It was contended that the respondent did not take the disciplinary proceedings seriously as evidenced by his failure to file a counter-statement for a period of two years. The applicant submitted that the deletion of the respondent's name from the Register of Legal Practitioners, Notaries Public and Conveyancers is warranted.

As indicated earlier, the respondent admitted in his response to the complaint that client's funds were not accounted for. This is contrary to his submissions on sentence that he kept client's money safe and accounted for same. The admission is in essence an admission of misappropriation of or theft of trust funds. The responsibility to manage trust funds is placed on a legal practitioner. The response to the complaint by the respondent that a para-legal clerk stole client's funds is in fact an indictment on the respondent. The clerk was found guilty of theft of clients' funds and fraud. The stolen funds included the complainant's funds. The respondent ought to have been supervising the clerk and ensure that no such misappropriation/theft would occur. In fact the money collected by the paralegal clerk ought to have been deposited into the firm's trust account and could only be withdrawn with the authority of the respondent. The respondent, by his own admission, has still to "fully account for the USD 1 000 paid by Maraja Investments and any money for that matter". He has failed to account for the money that he admits to have received from and still does not know what other monies belonging to the complainant that he must account for. It is the highest show of violating the trust bestowed on a legal practitioner when the practitioner cannot even account for client's funds that he admits to have received as a deposit to discharge instructions given by a client. The respondent therefore failed to safeguard client's funds.

The probative value of the withdrawal by Messrs Chitewe Law Practice was alluded to earlier. The letter of withdrawal does not state that any money was released to client.

In *Muskwe* v *Law Society of Zimbabwe* SC 72/20, GWAUNZA DCJ remarked at paragraph 9 that:

> "9. A look at the relevant cases and other authorities clearly suggests that courts of law take a very serious view of the abuse of trust funds by a legal practitioner. Further, that lawyers, as a class, generally hold themselves up to very high standards of honesty, integrity and professionalism in the discharge of their legal duties. In the case of *Incorporated Law Society Transvaal v Behrman*, 1977(1) SA 904(T) at 905 H the court unequivocally stated that a practitioner who contravened the provisions relating to his trust account was guilty of unprofessional conduct and liable to be struck off the roll or suspended from practice."

The respondent is the senior partner of I. Murambasvina Legal Practitioners. His conduct was inconsistent with being a senior partner of a law firm. He cannot therefore be trusted with handling clients' funds. Further, he placed the complainant out of pocket. The complainant had to incur expenses to engage another legal firm to complete the instructions he had been given and to follow up with the respondent. The respondent hindered the complainant's effort by refusing or failing to renounce agency so that the new firm would execute the complainant's instructions. He is incorrigible, totally oblivious of the gravity of his conduct. He failed to file a counter-statement and did not proffer any explanation for the failure. In spite of being invited to address the Tribunal on sentence, he again failed to make any submissions within the time given by the Tribunal. As rightly submitted by the applicant, the respondent's conduct does not inspire confidence that he will change his conduct if allowed to remain on the roll. The imposition of a fine or suspension of the respondent would trivialize the offences that the respondent was convicted of.

In *Botha & Ors* v *Law Society* (50/08) [2009] ZASCA 13, SNYDERS JA remarked thus:

> "The appellants have been dishonest, have shown a lack of integrity and openness and have shown no insight into the extent of their transgressions. An attorney should not have these character traits. An order suspending them from practice would only be appropriate if there was some way in which the court could expect them to overcome these character traits during the time of their suspension. It is simply impossible to look into the future and know that the public would be adequately protected after a period of suspension. Hence the logical and sensible approach must be that the appellants be prevented from practicing until they can convince a court that they have in fact reformed to the point that they could be allowed to practice again."

We can do no better that refer to the remarks of the disciplinary hearing officer during the disciplinary proceedings against the clerk. He remarked as follows on the penalty to be imposed against the clerk:

> "He (the clerk) also accepted that what he had done was wrong. That he had already commenced the payment of the money is also commendable. However, regard must also be had to the fact that his actions are the type that would bring the name of the any employer into disrepute. This is even more so when the employer is a law firm. The employer has certain standards of behaviour or conduct to maintain in the eyes of the Law Society, the clients and indeed the public. These parties have a vested interest in how we conduct our business. Aspects of ethical behavior and honesty in general are fundamental. Mr Msipa may not be a legal practitioner. However, that does not in way

reduce the seriousness of his actions. Debt collection is a key area where, among other responsibilities, one handles money for clients……"

Following these remarks, the clerk was dismissed from employment. The hearing officer was cognizant of the seriousness of the clerk's conduct and its impact on the respondent's firm and therefore equally so on the respondent as the senior partner of the law firm. As stated earlier, the buck stopped with the respondent. Once the clerk was dismissed from employment, the respondent cannot escape a similar penalty. In his case, it is deregistration.

His conduct has tarnished the integrity of the legal profession. The respondent has shown no remorse. He is not a fit and proper person to continue practicing law.

It is accordingly ordered as follows:

1. The respondent's name be deleted from the Register of Legal Practitioners, Notaries Public and Conveyancers.
2. The respondent shall pay the expenses incurred by the applicant in connection with these proceedings.