THE LAW SOCIETY OF ZIMBABWE
versus
TERERAI HILLARY GUNJE

LEGAL PRACTITIONERS' DISCIPLINARY TRIBUNAL
MANGOTA J (Chairperson), MUREMBA J (Deputy Chairperson),
MR D KANOKANGA & MRS S. MOYO (members)
HARARE, 10 and 11 October 2022; 21 June 2023 & 2nd July 2024

G Ranganayi, for the applicant
M Ndhlovu, for the respondent

MUREMBA J: The Respondent is a registered legal practitioner who at the material time practised law under the style Gunje & Chasakara Law firm. The Applicant filed the present application seeking the deregistration of the Respondent as a Legal Practitioner, Notary Public and Conveyancer and that the Respondent pay the Applicant's expenses incurred in connection with the proceedings. It is alleged that the Respondent is guilty of unprofessional, dishonourable and unworthy conduct in terms of Section 23(2)(b) of the Legal Practitioners Act [*Chapter 27:07]* and has contravened Section 23(1)(c) of the Legal Practitioners Act as read with By Laws 70E and 70F(2) of the Law Society of Zimbabwe By -Laws, 1982 (SI 314 of 1982) and By - Law 65 of the Law Society of Zimbabwe By Laws in that he:

1. Failed to account to clients within a reasonable time after executing clients' instructions.
2. Failed or neglected to preserve or protect the client's best interest by taking reasonable steps.
3. Failed to account for trust funds.
4. Failed to respond to correspondence sent from the applicant's secretary.

Point in limine

In response to the application, the respondent filed a counter statement in which he raised a point *in limine* challenging the legality of the application for his deregistration on the ground that the disciplinary proceedings amounted to a violation of his constitutionally guaranteed right to a fair hearing within a reasonable time as provided for in s 69 of the Constitution of

Zimbabwe, 2013 owing to the applicant's filing of the present application for his deregistration six and half years after the original complaint was lodged with the applicant. At the hearing Mr. *Ndlovu* argued that the application violated the respondent's constitutional right to a fair hearing within a reasonable time and made an oral application for us to refer the proceedings to the Constitutional Court for determination of the constitutional issue. He submitted that the time lag between the submission of the complaint to the applicant on 30 June 2014 and the institution of the deregistration proceedings on 26 October 2020 was unreasonable. He argued that the submission by applicant that the initial delay was occasioned by respondent's failure to respond to its correspondence in 2014, was not plausible as it did not explain the time lag between 2015 and 2020. More so as By-law 61 of the Law Society of Zimbabwe By-Laws, 1982, sets out the manner in which an investigation into alleged misconduct must be proceeded with in the absence of a legal practitioner's substantive response to a complaint of misconduct.

Mr. *Ndlovu* submitted that the Disciplinary Tribunal is a quasi-judicial body and must, upon request by a party to proceedings before it, refer a constitutional matter arising in proceedings before it to the Constitutional Court. He argued that the referral to the Constitutional Court is necessary as it will determine whether the respondent is entitled to an order for the permanent stay of these disciplinary proceedings. He submitted that unlike the High Court, the Disciplinary Tribunal does not have inherent constitutional jurisdiction and is bound by section 2(2) as read with section 44 and section 175(4) of the Constitution of Zimbabwe. However, he conceded that a judicial forum before whom a request for referral to the Constitutional Court is made, is required to assess whether or not the request is frivolous or vexatious. If the presiding court is of the view that the request is frivolous or vexatious, it shall refuse the request. He cited the case of *Levi Nyagura* v *Lanzani Ncube, N.O & 3 Others* CCZ 7/19 in which the Constitutional Court said,

> *"It is the request to refer a constitutional question to the [Constitutional] Court which must have been found to be frivolous or vexatious. It is not the constitutional matter itself that has to be found to be frivolous or vexatious."*

Mr. *Ranganayi* for the applicant submitted that the point raised *in limine* is frivolous and vexatious and an abuse of court process. He denied that the delay in the filing of the application for disciplinary proceedings against the respondent violated his right to **"**a fair and public trial within a reasonable time before an independent and impartial court" as provided for in section

69(2) of the Constitution of Zimbabwe. He submitted that apart from the fact that enquiries conducted by the Disciplinary Tribunal under the Disciplinary Tribunal Regulations, 1981 (S.I 51 of 1981) are *sui generis*, and neither civil nor criminal in nature, there is no statute of limitation for the investigation and determination of disciplinary actions filed against errant legal practitioners.

Mr. *Ranganayi* further submitted that the respondent's request for a referral to the Constitutional Court was insincere and an attempt to waste the Disciplinary Tribunal's time as this was not the first time that the respondent had alleged a violation of his constitutional rights and attempted to stymie these proceedings on those grounds. In support of this submission Mr. Ranganayi produced an order of the Disciplinary Tribunal dated 8 December 2021 which showed the removal of LPDT 13/2020 from the roll pending the determination of the constitutional proceedings filed by the respondent under CCZ 32/21. The constitutional proceedings under CCZ 32/21 were however not prosecuted to finality, and the respondent withdrew the application on 2 February 2022 and tendered payment of the applicant's costs. Thereafter, the respondent filed another constitutional application under case number CCZ 07/22. The respondent once again failed to prosecute the second constitutional challenge and he was notified by the Registrar of the Constitutional Court that the matter was regarded as abandoned for failure to file Heads of Argument and deemed to have been dismissed in terms of Rule 39(5) of the Constitutional Court Rules, 2016 (S.I 61 of 2016). Mr. *Ranganayi* submitted that the respondent took no action to remedy his default and to reinstate the constitutional application in question, and 7 months later the constitutional application remained dismissed.

In reply, Mr. *Ndlovu* confessed ignorance of the previous constitutional challenges which the respondent had failed to prosecute to finality in 2021 and 2022, and accordingly abandoned the request for referral of the constitutional issue to the Constitutional Court. On this basis we proceeded to deal with the merits of the application.

The merits

In response to the merits of the application the respondent denied that he is guilty of the charges of unprofessional, dishonourable and unworthy conduct. He averred that this is a case where he should not be found guilty at all and prayed for the dismissal of the application with costs on a higher scale. He further averred that however, if he is to be found guilty, the charges

are wrong and a lesser sentence should be imposed on him. Before we deal with the four charges that the respondent is facing, we shall outline the law that forms the basis of the charges. As already stated in the first paragraph of this judgment, it is alleged that the respondent is guilty of unprofessional, dishonourable and unworthy conduct in terms of Section 23(2)(b) of the Legal Practitioners Act [*Chapter* 27:07] and has contravened Section 23(1)(c) of the Legal Practitioners Act as read with By Laws 70E and 70F(2) of the Law Society of Zimbabwe By - Laws, 1982 (SI 314 of 1982) and By - Law 65 of the Law Society of Zimbabwe By Laws.

Acts which constitute unprofessional, dishonourable or unworthy conduct by legal practitioners, notaries public or conveyancers are outlined in s 23 (1) of the Legal Practitioners Act. S 23 (1)(c) goes on to say unprofessional, dishonourable or unworthy conduct also includes contravening or failing to comply with any provision of the Act or any regulations, rules or by-laws made thereunder. Furthermore, s 23 (2) (b) provides that *subsection (1) shall not in any way limit the discretion of the Council of the Society, the Disciplinary Tribunal or a court in determining whether or not any act or omission, which is not specified in subsection (1) or in by-laws, constitutes unprofessional, dishonourable or unworthy conduct on the part of a registered legal practitioner, notary public or conveyancer*. These provisions simply mean that acts which constitute unprofessional, dishonourable or unworthy conduct by legal practitioners, notaries public and conveyancers are not limited to those that are outlined in s 23 (1) of the Legal Practitioners Act, in the regulations, rules or by-laws. They include acts or omissions that are not specified in the Act, regulations, rules or by-laws which in the discretion of the Council of the Society, the Disciplinary Tribunal or a court constitute unprofessional, dishonourable or unworthy conduct.

In *casu* it is alleged that the respondent violated by-laws 70E, 70F (2) and 65 of S.I 314 of 1982. By-law 70E(1) requires that a legal firm gives account to its client within a reasonable time after the performance or termination of its mandate in the form of a written statement setting out with reasonable clarity— (a) details of all amounts received by the firm in connection with the matter concerned, with appropriate and adequate explanatory narrative; and (b) particulars of all disbursements and payments made by the firm in connection with the matter; and (c) all fees and other charges raised against or charged to the client; and (d) the amount payable to or by the client. In terms of by-law 70E(2), unless otherwise instructed, every firm

shall pay any amount due to its client within a reasonable time. In terms of by-law 70F (2) whenever any money deposited in a trust account of a firm becomes payable to any person, the firm shall pay the money promptly to the person entitled to it. In terms of by-law 65, if a legal practitioner unreasonably neglects or wilfully refuses to furnish to the Secretary, the disciplinary committee or the Council, in connection with any proceedings, any statement, affidavit, particulars, book, deed, document, paper or other writing required of him, he shall, *ipso facto*, be guilty of unprofessional conduct, and the Council shall refer the papers to the Disciplinary Tribunal for inquiry.

We now turn to deal with the four charges that the respondent is facing hereunder *seriatim*.

(i) *Failure to account to clients within a reasonable time after executing clients' instructions*

The applicant averred the following. On 30 June 2014, the applicant received a letter of complaint from Letwina Warinda-Ndanga who indicated that on 1 June 2012 she and her husband, Happy Jabulane Ndanga, entered into a Memorandum of Agreement of Sale for the joint purchase of 5 Uxbridge Close, Bluffhill, Harare from Felix Garise and Esmery Daveson. Messrs Gunje & Chasakara Law Firm were appointed the "Conveyancers for the Sellers". In terms of the sale agreement, the purchase price was to be paid into the conveyancers' trust account. At the joint request of the parties to the Memorandum of Agreement of Sale, the respondent was further instructed and directed to settle the electricity charges outstanding on the property upon registration of the transfer of the property to Mr. and Mrs. Ndanga. The respondent accepted the instruction from the parties and wrote a letter to the Area Sales Manager of ZETDC on 19 December 2012 in which he notified ZETDC of the sale of the property and undertook to "clear the arrears on the account upon transfer" from funds held in trust. He further requested ZETDC to "kindly assist the purchasers (Mr. & Mrs. Ndanga) to open a new account." The complainant and her husband settled the purchase price on 25 October 2012, and after protracted delays, the transfer of the property into their names was registered on or about 24 April 2014. The complainant further alleged that despite the undertaking to settle the sellers' electricity account at ZETDC from funds held in trust for that purpose, the respondent failed to settle the ZETDC debt upon the transfer of the property. The complainant alleged that despite email reminders and demands sent to the respondent by both herself and her husband, and Felix

Garise, during the period 12 June 2014 to 22 September 2014, the respondent failed and neglected to settle the ZETDC debt. This resulted in her and her husband being subjected to deductions of 20% each time they made electricity purchases. The deducted money would go towards the settlement of the sellers' debt at ZETDC.

It is the applicant's averment that on the basis of the foregoing the respondent had an obligation to ensure that any instructions given by a client are carried out within the stipulated time. Furthermore, the respondent had an obligation to ensure that upon transfer being finalized the payment of the ZETDC should have been paid but he failed to do so.

In denying this charge the respondent made the following averments. An application succeeds or fails on the basis of its founding papers. The present application should fail because the applicant placed insufficient information before the tribunal to enable it to make a fair and just decision. The applicant did not mention that the sale agreement for the house involved four parties, namely Felix Garise and Esmery Daveson who the sellers and Letwin Warinda Ndanga and Happy Jabulane Ndanga who were the buyers. Nothing is said about Esmery Daveson and Happy Jabulane Ndanga yet they were crucial players in the transaction. The respondent averred that he was not the complainant's representative because he was the conveyancer appointed by the sellers to pass transfer to the purchasers. Whilst, the respondent confirmed that he wrote a letter to ZETDC making an undertaking that he was going to pay the outstanding bill on the property after ZETDC had opened a new account for the purchasers, he averred that the parties' request for him to settle the sellers' electricity account was not a term of the agreement of sale. Therefore, there was no obligation on his part in terms of the sale agreement to pay ZETDC. He averred that ZETDC however refused to open an account for the purchasers. The undertaking that he had made therefore fell away because it was conditional upon an account being opened for the purchasers. He further averred that upon transfer of the property he reverted to the default position of accounting to the sellers. On that basis he released the full purchase price to them and it was up to them to clear their electricity arrears, which they did not do. It is for this reason that the purchasers (the complainant and her husband) instituted legal proceedings by issuing summons against the sellers seeking payment of the electricity bill and even succeeded in obtaining judgment in their favour. The respondent averred that he was not made a party to those proceedings and the complainant made no mention of his name in the pleadings of those

proceedings (the summons was attached). The respondent averred that the sellers never complained that they were not given their money or sought to join him in the law suit. He further averred that his accounts with the sellers were beyond reproach. The respondent averred that he is not aware of any instruction that had a stipulated time frame that he was given that he failed to execute.

In reply the applicant averred that in emails that it attached to the application it gave the respondent instructions to clear the electricity debt on multiple occasions, which instructions he ignored. The applicant further averred that the Law Society By-laws state that a legal practitioner must at all times be accountable to his or her clients. Failure to account is a clear indication of lack of professionalism and a clear disregard of obligations. The applicant further averred that a conveyancer in any transaction is expected to protect the interests of both the seller and the purchaser. This is why the seller had paid the funds which were to clear the ZETDC debt. Although the obligation to clear the debt was not part of the sale agreement, the respondent was still accountable and had an obligation to settle the debt because he had been put in funds for that purpose. He did not provide a valid explanation for his failure to act. So, his actions are dishonourable and dishonest.

The applicant's counsel, Mr. *Ranganayi* argued that in addition to his mandate as "conveyancer for the sellers", the respondent accepted the further assignment from the parties including the assignment to settle the sellers' electricity debt upon transfer of the property from the sellers to the complainant and her husband. Mr. *Ranganayi* argued that the so called "informal arrangement" that the parties subsequently entered into about the payment of the electricity debt should be regarded as a verbal agreement which is recognized in our law as valid. In his heads of argument, Mr. *Ranganayi* stated that on the basis of this verbal agreement, the respondent had an obligation to open a new account and to clear the outstanding debt, which he did not do. He further argued that, whilst the respondent stated that he returned to the sellers the money that he was holding in trust for the payment of the debt, he did not notify the purchasers about it. He also owed a duty of care and this is tantamount to failure to account to client. The respondent had to be chased up for an update and still did not provide an adequate update.

The argument on behalf of the respondent was simply that he owed no duty of care to the purchasers because he did conveyancing on behalf of the sellers.

We hasten to point out that whilst the respondent averred that the present application should fail because the applicant placed insufficient information before the tribunal by not mentioning that the sale agreement for the house involved four parties, namely Felix Garise and Esmery Daveson who were the sellers and Letwin Warinda Ndanga and Happy Jabulane Ndanga who were the buyers and that nothing is said about Esmery Daveson and Happy Jabulane Ndanga, we do not appreciate how this affects the application. The respondent just made this averment but did not go on to explain in his opposing affidavit how the mentioning of these people would exonerate him. So, on this basis we cannot strike off the application. In any case, the applicant attached to the application the agreement of sale and the letter that the respondent wrote to ZETDC on 19 December 2012 which documents show that the agreement of sale was entered into by the four parties the respondent mention. The documents speak for themselves.

In addition, the email correspondence from the complainant Mrs. Ndanga to the Applicant on 2 July 2014 confirmed that the letter of complaint dated 30 June 2014 which she delivered to the applicant was made on behalf of her husband and herself. The email of 2 July 2014 was copied to Mr. Ndanga. Similarly, the email correspondence of 12 and 21 June 2014 and 22 September 2014 between the complainant's husband and the seller, Mr. Garise, shows that the complainant's husband was fully aware of the complaint lodged by his wife, more so as the respondent and the applicant were copied in such emails. With respect to the absence of the second seller, Esmery Dawson from the email correspondence, it is our considered view that her exclusion from the correspondence does not affect the validity of her husband's singular communication with the purchasers, as the content of his emails confirmed the veracity of the complaint made to the applicant. Furthermore, the applicant as regulator of the profession is entitled and obliged to investigate an allegation of misconduct levelled against a legal practitioner, even in circumstances where a party to a transaction has not directly joined himself or herself to the original complaint or made a direct complaint to the applicant, but further acts of misconduct have been uncovered by the applicant in the course of investigating a formal complaint. See by-law 61 (4) of S.I. 314 of 1982

In respect of the respondent's defence that he owed the purchasers no duty of care, we are in agreement with him that the case of *Scapelox Trading (Pvt) Ltd* v *Mashangwa Family Trust* HH 91-14 cited in his Heads of Argument confirms the practice in this jurisdiction that it is the

seller who appoints the conveyancer of his or her choice to pass transfer of property to the purchaser. The case does not however deal with the issue where the seller and the purchaser assign a further task to the conveyancer arising out of the conveyancing transaction as what happened in the present case. While the additional assignment to settle the electricity debt on the property cannot be said to have become an implied term of the conveyancing transaction or the Memorandum of Agreement of Sale, it is clear that in accepting the additional assignment to settle the electricity debt, the respondent became the agent of both parties to the transaction. This is confirmed by the respondent's undertaking to ZETDC that he was holding funds in trust, that he was going to clear the arrears on the account upon transfer of property and his request that ZETDC assist the purchasers to open a new account. Since the respondent accepted the parties' instruction to apply a portion of the proceeds of the sale towards settlement of the sellers' electricity debt on the property, the respondent owed a duty of care to both parties to ensure that the instruction was diligently and competently executed in order to avoid any form of prejudice to either of them as what resultantly happened to both parties. The respondent made an undertaking to clear the debt upon transfer of the property. Despite the purchasers having paid the purchase price in full by 25 October 2012, transfer only went through on 24 April 2014 due to some delays that were attributed to the respondent. Despite transfer going through, still the respondent did not pay the debt to ZETDC. The emails attached by the applicant show that both the purchasers and sellers tried in vain to engage the respondent over the issue. In particular there is an email dated 12 June 2014, that was addressed by the complainant's husband to the respondent and copied to Felix Garise, one of the sellers expressing his disappointment over deductions that were being made over the electricity purchases since January 2013. He was pleading with the respondent to pay the bill but the respondent never responded to this email. On 21 June 2014 the seller, Felix Garise also sent an email to the respondent saying that he had received a call from the complainant over the non- payment of the debt and the cost the purchasers were incurring each time they were buying electricity. Again, the respondent did not respond. The complainant eventually filed a letter of complaint with the applicant on 30 June 2014.

When the complainant complained to the applicant, the applicant's secretary had to write three letters to the respondent on 11 July 2014, 21 November 2014 and 15 December 2014

before the respondent responded to the complaint raised against him. Whilst the respondent then sought to explain why he had not paid the debt, it is clear that he had never explained to any of the parties why he had failed to pay the debt upon transfer of the property or any time thereafter. He owed a duty of care to both parties. According to the letter that he personally wrote to ZETDC, the deadline for paying the debt was the transfer date of the property. This means that he ought to have paid the debt by 24 April 2014 when transfer went through. This in turn means that he ought to have accounted to the parties within a reasonable time after 24 April 2014, the challenges that he had met in trying to execute their instructions, which thing he never did until the complainant was left with no option but to approach the applicant with a complaint on 30 June 2014. The complainant and her husband suffered prejudice by having 20% levied by ZETDC on each electricity purchase they made in order to pay for the debt that remained outstanding because of the respondent's failure to pay. Even the sellers were also prejudiced because they were eventually sued by the purchasers for the recovery of the electricity debt as well as the 20% deductions levied by ZETDC on the purchasers. The institution of legal proceedings between the parties is in fact evidence of the respondent's culpability for the economic loss suffered by the parties as a result of his failure to execute the parties' payment instructions and his failure to account to them. The correspondence attached to the applicant's application is proof that as at 22 September 2014, the respondent had not notified the parties of his efforts to settle the electricity debt, and neither had he remitted the full proceeds of the sale to the sellers with notification of the necessity for them to settle the electricity account directly to ZETDC on their own.

The foregoing shows that the respondent clearly failed in his duties to account to clients within a reasonable time after executing clients' instructions and is guilty as charged in respect of the present charge.

(ii) *Failure or neglect to preserve or protect the client's best interest by taking reasonable steps*

The applicant averred that the respondent was supposed to protect the interests of the sellers as their conveyancer. It further averred that upon the completion of the transfer, it is alleged that the respondent only wrote letters to the ZETDC promising to clear the previous debt. However, the respondent to date has not made any payment towards extinguishing the sellers' debt.

In response the respondent averred that the undertaking that he made to pay the electricity debt was pursuant to an informal arrangement between the sellers and the purchasers. However, ZETDC refused to grant the request of a new account being opened in the names of the purchasers because the electricity account was not in the names of the sellers but one Masvingwa. The respondent averred that the applicant had attached the electricity bill statement to the present application and it confirms his averment. He averred that ZETDC having refused to open an account for the purchasers, he accounted to the sellers all their money according to the instructions they gave him and it is for this reason that the complainant and her husband then sued the sellers for the payment of the electricity debt. The respondent averred that he is not sure what reasonable steps he was supposed to have taken to protect any interests that were not protected by the sale agreement the parties executed through an estate agent of their choice.

In reply the applicant maintained that the respondent failed to take reasonable steps to settle the sellers' electricity debt.

It is common cause that the respondent conceded that he failed to settle the sellers' electricity account upon transfer of the property to the complainant and her husband and anytime thereafter. It is our considered view that the respondent's defence for failing to settle the account was couched as bare statements which were not supported by any documentation or bank statements that could be said to be satisfactory proof of the following: how, when and where he attempted to settle the electricity account at ZETDC; how, when and where ZETDC rejected his attempt to settle the sellers' electricity account in circumstances where the sellers had previously purchased electricity on an account that was not in their name, and on which the purchasers were themselves able to make electricity purchases for their use; and how, when and where the respondent communicated to the parties ZETDC's refusal to accept payment on the basis that the account on the property was in the name of Masvingwa Suspicious. The end result of the respondent's actions was that the sellers were sued by the buyers for the electricity bill that he did not settle. In *Law Society of Southern Rhodesia v Q* 1958 R7 N 495 (SR) it was held that a lawyer must represent his client with diligence, with reasonable skill and learning, and with competence and honesty. The response given by the respondent in the present case shows that he did not represent the sellers with competence and diligence. Nothing shows that he made any effort to settle the electricity debt and failed. It is common knowledge that one does not need to

be the owner of an account to pay an electricity bill. This is even evidenced by the fact that both the sellers and the purchasers were able to pay the bill and purchase electricity even though the account was in the name of Suspicious Masvinga. On this basis we are satisfied that the respondent acted incompetently by failing to take reasonable steps to protect the sellers' best interests by failing to extinguish the debt until they were sued by the purchasers on 6 January 2015.

(iii) *Failure to account for trust funds*

The applicant averred that as per the agreement between the parties, the seller had transferred USD 1415.60 to the respondent's trust account. The parties had agreed that the said amount would be paid to ZETDC upon the completion of transfer. The respondent, in the letter dated 19 December 2012 which was addressed to ZETDC, acknowledged that the monies had been paid into his trust account. However, he has since failed to account for the money. When requested by the applicant to respond to the allegations the respondent did not respond. The respondent failed to fulfill his obligation and therefore it is clear that he converted the money to his own use.

In response the respondent averred that he disbursed and accounted for all the trust funds he received as per the joint instructions of the sellers. The sellers received all their money.

The averment by the applicant that the sellers had deposited USD 1415.60 into the respondent's trust account specifically for the payment of the outstanding electricity bill is not correct. The applicant does not say when the sellers deposited this amount and the truth of the matter is that the sellers never deposited this specific amount into the respondent's trust account. Whilst the respondent does not clearly say it in his response, the submissions by the parties' counsel at the hearing made it clear that this amount was supposed to be deducted from the purchase price that the purchasers paid towards the purchase of the property. The respondent made an averment that after having failed to settle the ZETDC debt, he remitted the full amount to the sellers as per the joint instructions of the sellers. In *Law Society, Transvaal v Matthews* 1989 (4) SA 389 @ 394 it was held that,

> "Where trust money is paid to an attorney it is his duty to keep it in his possession and to use it for no other purpose than that of the trust. It is inherent in such a trust that the attorney should at all times have available liquid funds in an equivalent amount. The very essence of a trust is the absence of risk. It is imperative that trust money in the possession of an attorney should be available to his client the instant it becomes payable."

In *casu* whilst the respondent did not furnish proof of remittal of the funds, nothing shows that he did not remit the purchase price to the sellers. This is more so in view of the fact the sellers did not raise the complaint that they did not receive the purchase price from the respondent. Nothing shows that the respondent remitted to the sellers the purchase price less USD 1415.60 which was meant for the payment of the electricity bill. We are thus unable to convict the respondent of this charge.

(iv) Failure to respond to correspondence sent from the applicant's secretary.

The applicant's averment is that its secretary forwarded the complaint made against the respondent on 30 June 2014 by letter dated 11 July 2014 which was delivered to his office on 4 August 2014. The respondent unreasonably and /or willfully refused to respond to the complaint within the prescribed 14 days. Neither did he respond to the reminders dated 21 November 2014 and 15 December 2014 which were delivered on 1 and 18 December 2014, respectively.

In response the respondent averred that whilst the records show that there are letters that were received at his law firm on 14 August 2014, 1 December 2014, and 18 December 2014 by one E. Chibaya who was their employee, he personally did not see the correspondence because nothing was brought to his attention. He averred that upon dissolution of the law firm partnership in 2015, he did not know what became of Ms. Chibaya. Had this issue been brought up timeously, Ms. Chibaya could have explained what happened to the correspondence.

We find the respondent's submission questionable as the email of 22 September 2014 which was written by Mr. Garise to Mr. Ndanga was copied to both the applicant and the respondent. The respondent did not challenge receipt of that email which makes reference to the complaint lodged against the respondent to the applicant. The respondent's failure to approach the applicant's secretary even in the face of the emails of 21 June 2014 and 22 September 2014 which made reference to his failure to pay the sellers' debt at ZETDC suggests that he was being reticent with the truth. In terms of by -law 65 of S.I 314 OF 1982, a legal practitioner has an obligation to respond to correspondence by the Law Society's secretary. A lawyer should therefore make it possible for the Law Society to investigate issues or complaints made against him or her. Failure to respond to correspondence by the applicant is a violation of the Legal Practitioners By-Laws and this constitutes unprofessional conduct. In *Chizikani* v *Law Society of*

Zimbabwe 1994 (1) ZLR 382, Chizikani failed to respond to the Law Society's secretary's correspondence several times. He was found guilty of unprofessional conduct. We are satisfied that the respondent in the present case is equally guilty.

Conclusion

In light of the foregoing, we find that the respondent failed to account to clients within a reasonable time after executing clients' instructions. He failed or neglected to preserve or protect his clients' best interest by failing to taking reasonable steps. He also failed to respond to correspondence sent from the applicant's secretary. He is thus found guilty of unprofessional, dishonourable or unworthy conduct in terms of Section 23(1)(c) of the Legal Practitioners Act [*Chapter 27:07*]

PENALTY

In terms of s 28 (1)(a)(i) -(vi) of the Legal Practitioners Act [*Chapter 27:07*] if, after due inquiry, the Tribunal determines that a registered legal practitioner has engaged in unprofessional, dishonourable, or unworthy conduct, or is unfit to practice as a legal practitioner, notary public, or conveyancer, it has several options for action against the legal practitioner. The options are to deregister him; suspend him from practice for a specified period; impose specific conditions under which the practitioner can continue practicing; order him to pay a penalty not exceeding an amount equivalent to a fine of level six; censure him or caution him; and postpone further action for up to five years, subject to conditions regarding future conduct.

Punishing legal practitioners found guilty of unprofessional, dishonourable, or unworthy conduct in disciplinary proceedings serves several crucial purposes which include the following: maintaining professional standards as legal practitioners are forced to adhere to high ethical and professional standards; maintaining public trust and confidence in legal services; protecting clients and the public from practitioners who engage in misconduct; deterring misconduct in the profession; encouraging compliance with rules and regulations of the profession; preserving the reputation and the integrity of the legal profession; ensuring accountability within the legal community; ensuring that practitioners learn from their mistakes as they are made to reflect and improve on them.

In determining the appropriate penalty for legal practitioners found guilty of misconduct, the Disciplinary Tribunal should carefully consider and balance various factors. In *Chizikani v*

Law Society 1994 (1) ZLR 382 (S) at 391 GUBBAY CJ (as he then was) said, "*in each case the facts usually determine the punishment.*" The importance of considering the circumstances of each individual case when determining an appropriate penalty cannot be overstated. This is because every case is unique, and the circumstances surrounding the offence matter. The penalty should balance individual rights with the public interest. Here are some key considerations. (i) Nature and severity of the misconduct. The Tribunal should evaluate the specific offence committed by the practitioner. More serious violations may warrant harsher penalties; (ii) Impact on clients and public trust. The consequences of the practitioner's actions on clients and public trust are crucial; (iii) Mitigating and aggravating factors. The Tribunal should weigh any mitigating circumstances (such as the practitioner's prior record, cooperation, remorse, and willingness to rectify their conduct) against any aggravating factors (such as repeated offences and harm caused). These factors influence the severity of the penalty. A first-time offence might warrant a milder penalty. Repeat offences may require more severe consequences; (iv) The intended objective or goal of the penalty such as deterring the offender and other practitioners from similar misconduct and preventing future violations. Some penalties focus on rehabilitation and education. Practitioners may learn from their mistakes and improve; (v) Personal circumstances of the offender such as issues of health and family; (vi) Consistency and precedent. The Tribunal should look at past decisions and aim for consistency. Consistency in penalties is crucial. Similar offences should result in similar consequences to avoid arbitrariness or perceived bias.

Factors such as intent, motivation, and background provide crucial context. It is also important to consider if the misconduct was deliberate or inadvertent and if the practitioner faced external pressures or personal challenges. Understanding the practitioner's history and willingness to change also informs the penalty. The question that comes to mind is: is the practitioner remorseful and committed to improvement? The Disciplinary Tribunal balances these factors to arrive at an appropriate penalty that aligns with justice. The ultimate goal is to impose a penalty that is fair, reasonable and proportionate. Fairness, reasonableness and proportionality demand that the penalty aligns with and is proportionate to the severity of the offence committed. The penalty must not be excessively harsh or lenient. It should not induce a

sense of shock either by being too harsh or by being too lenient. The penalty should balance the need for accountability with respect for the practitioner's rights and individual context.

In the case of *Lawman Chimuriwo v The Law Society of Zimbabwe* SC 30/23 the Supreme Court outlined the three-stage inquiry that the Tribunal should employ when assessing the appropriate penalty. It said,

> "In assessing the appropriate sentence for a legal practitioner found to be guilty of any act of misconduct the Tribunal has to invoke a 3-stage inquiry as outlined in the South African case of *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA). First, the court must decide whether the alleged offending conduct has been established on a preponderance of probabilities. The second inquiry is whether the person concerned, in the discretion of the court, is not a fit and proper person to continue to practice. The third inquiry is whether in all the circumstances the person in question is to be removed from the roll of legal practitioners, conveyancers and notaries public or whether an order suspending him from practice for a specified period will suffice."

In the circumstances of the present case the respondent who is a registered legal practitioner was charged with failing to account for trust funds within a reasonable time after executing clients' instructions; failing to account to clients within a reasonable time after executing client's instructions; failing or neglecting to preserve or protect the client's best interests by taking reasonable steps; and failing to respond to correspondence sent from the applicant's secretary. However, we acquitted him of the third charge of failing to account for trust funds and convicted him of the rest of the charges. Citing the cases of *Chizikani v Law Society of Zimbabwe* 1994 (1) ZLR 382 (SC); *Muskwe v Law Society of Zimbabwe* SC 7/19 and *Law Society, Transvaal v Mathews* 1989 (4) SA 389 (T), the applicant's counsel submitted that it is settled that the penalty of deregistration applies to legal practitioners who misappropriate clients' funds. Further, he submitted that the respondent in the present matter stands convicted of offences that ordinarily carry less penalties of fines according to the Law Society Table of Fines. Failure to respond to a letter by the applicant's secretary attracts a level 2 fine of USD 200.00. Failure to account to client attracts a level 4 fine of USD 500.00. Failure to protect client's best interests attracts a level 4 fine of USD 500.00. The applicant's counsel submitted that under the circumstances the respondent must not be considered as a person who is not fit and proper to continue to practice. We are in agreement with him. The applicant's counsel went on to recommend a twelve- month suspension period, the objective being to rehabilitate and deter him and other would-be offenders.

On the other hand, the respondent, who expressed satisfaction with the applicant's acknowledgment that he remains a fit and proper person for legal practice and deserves a more lenient penalty, holds a different opinion regarding the appropriate punishment. The respondent contended that the imposition of legislated fines, which constitutes the standard penalty, should serve as the initial point for sentencing. He submitted that deviation from this ordinary sentence should occur only when the applicant presents compelling aggravating circumstances. In the present case the applicant did not put forth any such justifications for departing from the usual fine-based penalty. The respondent proposed that he be sentenced to the fines which the applicant stated in its submissions on sentence. Further, the respondent, who serves as the principal legal practitioner and sole partner at Gunje Legal Practice, presented what he said are compelling reasons for the imposition of fines. He submitted that with a professional career spanning 24 years, the present convictions constitute his first offences and are tied to a single transaction. Gunje Legal Practice employs eleven individuals across various roles, including a professional assistant with two years' experience who is currently undergoing training. His suspension from practice will pose significant challenges for the law firm, including financial strain in meeting rental obligations and remunerating its workforce. Moreover, placing the firm under administration could deter clients from retaining their services, impacting its reputation. As a family man and breadwinner, the respondent has family obligations which include supporting a child studying at a European university and two other children who are in primary school and secondary school locally. Besides, with his parents having passed on, he also takes care of the extended family. His sole business interest lies within his legal practice.

The respondent argued that a suspension from practice would be excessively burdensome for him due to his hypertension and diabetes. He explained that since the transgression occurred in 2014, he has lived with a genuine fear of being deregistered from the legal practitioners' list. The most serious charge against him pertained to failing to account for trust funds. The charge attracts a deregistration penalty. Consequently, up to the time the judgment was handed down, the charge made him feel as though he was on professional death row. The case was hanging over him like the proverbial sword of Damocles. From the nearly decade-old infractions, the respondent asserted that he has learnt from his mistakes and undergone full rehabilitation. Given that he has no other business interests beyond his legal practice, a suspension would significantly

impact not only him but also his family and the livelihoods of the staff members he employs. He prayed for the imposition of fines.

The respondent however did not present anything tangible that shows that he has since learnt from his mistakes and that he is now fully rehabilitated. It was just his word and nothing more. His conduct after conviction does not show that he is a changed legal practitioner. This Tribunal gave directions that he files his submissions on sentence on 26 June 2023. He only did so exactly a month later, on 27 July 2023. Neither did he proffer an apology nor an explanation for the delay in filing his submissions. He still persists with his conduct of not responding to matters timeously yet this is one of the very things that resulted in him being charged by the applicant. On this basis alone we do not believe that the imposition of fines will be enough to rehabilitate and deter him in future.

The applicant which had filed its submissions on sentence without the benefit of the respondent's submissions had to file supplementary submissions in response to his submissions on 8 September 2023. The applicant's counsel submitted that the Tribunal's discretion in sentencing is not fettered by the applicant's Table of Fines which the applicant's council changes from time to time. We are in agreement with the applicant's counsel. While s 28 (1) (a) (i) to (iv) of the Legal Practitioners Act gives the Tribunal the option to impose a fine it does not say that its discretion is fettered by the Law Society of Zimbabwe Table of Fines. In fact, s 28(1)(a) (iv) of the Act provides that the Tribunal can order payment of a penalty not exceeding an amount equivalent to a fine of level six as it may determine. Therefore, it is the Tribunal that determines the appropriate fine but the fine should not exceed a fine of level six of the standard scale of fines. The respondent's contention that the starting point for the Tribunal in imposing a fine is the Law Society's table of fines is therefore not the correct approach. As was correctly submitted by the applicant's counsel, the Law Society of Zimbabwe Table of Fines is meant to guide its council in its adjudication of disciplinary matters, in situations where it has chosen not to refer the matter to the Tribunal. See s 26 (2) (i) (b) of the Legal Practitioners Act. Clause three of the preamble to the Table of Fines buttresses this point by providing that, "*the council shall have the right to impose different sentence other than the penalty prescribed in the table of fines, if it is of the opinion that such departure is appropriate.*" Since the Table of Fines does not apply to an

inquiry by the Tribunal in terms of s 28 of the Act, it cannot therefore be the starting point for the Tribunal in sentencing a convict.

As has been stated elsewhere above, in terms of s 28 (1)(a)(i) - (vi) of the Legal Practitioners Act [*Chapter 27:07*] if, after due inquiry, the Tribunal determines that a registered legal practitioner has engaged in unprofessional, dishonourable, or unworthy conduct, or is unfit to practice as a legal practitioner, notary public, or conveyancer, it has several options for action against the legal practitioner. Payment of a fine is one of the options but it is not the starting point. The provision does not provide for such an approach. In any case such an approach is not possible because acts of misconduct that are unprofessional, dishonourable, or unworthy that legal practitioners get convicted of vary in nature and magnitude. Some are so serious that they warrant deregistration of a legal practitioner even if it is a first conviction. As was said in the *Chizikani* case *supra*, in each case the facts determine the punishment. In the circumstances of this case whilst the offences that the respondent was convicted of are not as serious as to warrant his deregistration, they remain serious as to justify an order for his suspension. He was convicted of three serious acts of misconduct which were committed in aggravating circumstances.

The respondent was responsible for conveyancing for the parties, which he fulfilled. He did not misappropriate any trust funds. He was supposed to deduct the money for the payment of the outstanding electricity debt from the purchase price of the house that the buyers had paid. It is a task that he had undertaken to do. However, he failed to do that additional task of paying the outstanding electricity debt owed by the seller to ZETDC. He remitted the full purchase price to the seller without deducting the amount that was supposed to be paid to ZETDC. The purchase price was paid on 25 October 2012 and transfer of the property to the buyers was done on 24 April 2014. So, for about 1½ years the respondent sat on his laurels and failed to execute his mandate of paying the electricity debt that the sellers were owing to ZETDC yet he had money for that purpose sitting in his trust account. His failure to carry out the mandate that he had undertaken to carry out inconvenienced and prejudiced the parties, leading the buyer to sue the seller for the debt payment. Before the buyer had sued the seller, both the buyer and the seller had tried in vain on numerous occasions to engage the respondent over the issue. He remained unperturbed. Several emails urging the respondent to discharge his undertakings were ignored until the buyer filed a complaint with the applicant. The respondent never explained to the parties

why he had not discharged his undertakings. The buyers were financially prejudiced as they were levied each time they purchased electricity. The sellers were also prejudiced when they were sued for the recovery of the debt.

Over and above neglecting to respond to the parties' correspondence when they were inquiring about the payment of the debt, the respondent also neglected to respond to the applicant's secretary's letters during the case investigation. The applicant's secretary had to write to him on three occasions between 11 July 2014 and 15 December 2014 before he responded. Such conduct from a legal practitioner with 24 years of experience is dishonourable and unprofessional. As correctly submitted by the applicant's counsel, it is serious misconduct for a legal practitioner to neglect to participate in an investigation. In *Hewetson v Law Society of the Free State* 2020 (5) SA 86 (SCA) at page 25 it was held that,

> "The Law Society is the watchdog of the profession, obliged to investigate complaints laid against practitioners. A practitioner has a concomitant duty to fully participate in any enquiry conducted by the Law Society, and a failure to do so serves to undermine public trust in the profession as a whole. Consequently, and as this court pointed out in *Kudo v Cape Law Society*, not only integrity but also loyalty to the Law Society is expected from an attorney, and a practitioner who does not honour and appreciate his or her professional organisation is truly a fly in the ointment."

In Law Society, *Cape* v *Visser* 1965 (1) SA 523 (C) it was held that;

> "The court (and in this case the tribunal), must take a serious view of the fact that an officer of the court, when called upon by his law society to give an explanation of what appears to be misconduct on his part, fails to give any such explanation."

These cases emphasize the point that it is a serious matter for a legal practitioner to neglect to participate in investigations. Therefore, to order a fine in *casu* would be to trivialise the matter. We are of the view that the appropriate penalty, despite the mitigatory factors that the respondent enumerated, is a period of suspension from practice as suggested by the applicant's counsel. This penalty acknowledges the seriousness of the offences that the respondent stands convicted of. The penalty will also help build public confidence in the legal profession. It will also be reformative and rehabilitative of the respondent. In future the respondent and other would-be offenders will be deterred from committing offences of this nature. Whilst the respondent has raised strong mitigatory factors in favour of himself, his family and the legal practice, these factors cannot override the need to impose a sentence that acknowledges the

serious offences that he committed. As already stated elsewhere above, the principles of fairness, reasonableness and proportionality demand that the penalty aligns with and is proportionate to the severity of the offences committed. The respondent needs to account for his misconduct. It is hoped that the respondent will learn from his mistakes.

In the result it be and is hereby ordered that:

1. The respondent is suspended from practicing as a legal practitioner for a period of 12 months.
2. The respondent's legal practice shall be placed under curatorship during the respondent's period of suspension.
3. The respondent shall attend a comprehensive risk based practical training including a one-month mentorship programme covering practice management, trust accounting and bookkeeping at the end of the suspension period.
4. The respondent shall pay the expenses incurred by the applicant in the present proceedings.

TK Hove & Partners, respondent's legal practitioners