

**REPORTABLE** (7)

**MOSES SHINGIRIRO CHINYENZE**  
**v**  
**THE LAW SOCIETY OF ZIMBABWE**

**SUPREME COURT OF ZIMBABWE**  
**GUVAVA JA, MAVANGIRA JA & MAKONI JA**  
**HARARE 11 JUNE 2020**

T. *Magwaliba*, for the appellant

N. R. *Mutasa*, for the respondent

**MAVANGIRA JA:**

1. This is an appeal against the whole judgment of the Legal Practitioners' Disciplinary Tribunal (the Tribunal), handed down on 3 April 2019 in which it ordered firstly, that the appellant's name be deleted from the register of Legal Practitioners, Notaries Public and Conveyancers, secondly, that the respondent's law firm be placed under curatorship for the administration of its trust accounts and/or business accounts and thirdly, that the appellant pays all the expenses incurred by the respondent in connection with the proceedings.
2. After hearing the parties on 11 June 2020 we dismissed the appeal with costs and indicated that our reasons for the decision would be availed in due course. Our reasons now appear hereunder.

## FACTUAL BACKGROUND

3. The appellant was admitted as a legal practitioner on 16 January 1985.
4. The respondent is the Law Society of Zimbabwe which is responsible for regulating the conduct of legal practitioners in terms of the Legal Practitioners Act, [*Chapter 27:07*].
5. On 30 January 2018 the respondent filed with the Legal Practitioners' Disciplinary Tribunal an application for the deregistration of the appellant. The specific terms of the order sought were as follows:

**“IT IS ORDERED THAT:**

1. In terms of Section 28(1)(a)(i) of the Legal Practitioners Act 27:07, the Respondent be deleted from the Register of Legal Practitioners, Notaries Public and Conveyancers in Zimbabwe;
  2. The Respondent be and is hereby prohibited from operating any trust account or business account of his own accord in terms of the Legal Practitioners Act [*Chapter 27:07*]
  3. Respondent's law firm be and is hereby placed under curatorship to administer trust accounts or business accounts with such rights, duties and powers in relation thereto as the Legal Practitioners Disciplinary Tribunal may consider fit.
  4. Respondent pay the expenses incurred by the applicant in connection with these proceedings”
6. The basis of the application was that the respondent was not a fit and proper person to remain registered as a legal practitioner as he had acted in an unprofessional, dishonest and unlawful manner, the specifics of which will appear in the narrative below.
  7. On 30 October 2015, the respondent received a complaint on the conduct of the appellant from one Mrs Noreen Chikaka of Regional Executors and Trust (Private) Limited. She alleged that she had been appointed the executrix of the estate of the late Christopher Taruvinga Chimbumbu on 24 May 2014. She indicated that before the

demise of the said Christopher Chibumbu, he had been married to Florence Chibumbu but the two had since divorced.

8. The two had entered into a consent paper in terms of which they donated to their five children an immovable property known as No. 2 Wessex Drive, Cotswold Hills, Mabelreign, Harare. Pursuant to the consent paper, the appellant had been appointed by the Registrar of the High Court (the Registrar), as conveyancer for the purposes of transferring the immovable property into the names of the five children.
9. In terms of the order of the High Court, the transfer to the children was to be effected by 31 October 2007. However, this stipulation was not met. As at 22 August 2013, that being the date of Christopher Chibumbu's death, the transfer to the beneficiaries had still not been effected.
10. In the course of her duties as the executrix of the estate, Mrs Chikaka sold the immovable property to one Joseph Ngondonga after having sought and obtained the consent of both the Master of the High Court and the beneficiaries. Mrs Chikaka appointed the appellant's law firm to execute the transfer of the property to Mr Ngondonga as the appellant had previously been appointed as conveyancer before the death of Mr Chibumbu. She handed over to the appellant letters of administration and consent to sell from the beneficiaries, fees for rates clearance and capital gains tax clearance certificate so that he could facilitate the transfer.
11. The appellant then apparently instructed Mr Ngondonga to pay US\$8 450,00 which amount was paid directly into the appellant's trust account. The appellant was also said

to have been paid for the transfer of the property during the lifetime of the late Mr Chibumbu. Despite these respective payments having been made, the transfer was not effected. Mrs Chikaka's futile attempts to contact the appellant resulted in her writing a complaint about the matter to the respondent.

12. There was also, in the application, an allegation that the appellant had overcharged on the Government stamp duty and that such overcharged amount was never refunded to the purchaser. It was further alleged that after having been paid the said amounts, as at 31 May, 2015, the appellant's trust account only had a balance of US\$205.25 when no disbursements had been made in respect of the anticipated transfer. In the absence of a valid explanation, the respondent concluded that the funds were misappropriated, in breach of By-law 70E of the Law Society By-laws, 1982.
13. For these reasons the respondent prayed for the deregistration of the appellant as a legal practitioner, notary public and conveyancer on the basis that he was not a fit and proper person to remain registered. It was also on the basis that he had acted in an unprofessional, dishonest and unlawful manner in that he:
  - Failed to account to client or the purchaser;
  - Overcharged stamp duty;
  - Abused his client's or purchaser's trust monies;
  - Failed to update the client on progress and properly advise the client.
14. In his response to the allegations raised against him the appellant raised several points *in limine*. He stated that following the complaint by Mrs Chikaka, the matter was reported to the police and he was arraigned before the Magistrates Court for theft of

trust property as defined in s 113 (2) of the Criminal Law (Codification and Reform) Act, [Chapter 9:23]. After the close of the state case he had made an application for discharge and it was dismissed. He thereafter successfully filed an application for review before the High Court and was thus discharged at the close of the state case. He argued that in light of the discharge, the proceedings by the respondent's tribunal were therefore inconsequential and unwarranted. He argued that pursuance of the matter would result in him suffering double jeopardy.

15. The appellant also raised the issue of *res judicata* and argued that the matter had already been determined by the Magistrates Court. He further raised the issue of prescription on the basis that the respondent had not taken action from 2015 when the complaint against him was made until 2018 when it filed the application before the tribunal.
16. The appellant also denied misappropriating funds, maintaining that all his actions were above board. He claimed that he had professionally appropriated the monies that had been paid by the purchaser for his fees in accordance with the Law Society tariffs. He also claimed that Mrs Chikaka, the beneficiaries and the purchaser had pressurised him to do a direct transfer of the property from Christopher Chibumu to Joseph Ngondonga thereby disregarding the High Court order in terms of which the property had to be transferred to the children first. Furthermore, Mrs Chikaka had proceeded to seek the consent of the Master of the High Court without informing the Master about the High Court order. He claimed that he advised them that a direct transfer was prohibited by s 11 of the Deeds Registries Act, [Chapter 20:05]. He, nevertheless, tried to effect such direct transfer but to no avail.

17. It was also the appellant's argument that the matter had been set down prematurely as the respondent's response to his notice of opposition had raised a new issue which he was never given an opportunity to respond to. He further complained that the charges laid against him were not clear and it was not the duty of the tribunal to plough through the papers and try to establish what the respondent intended to charge the appellant for. He averred that the matter could not be resolved on the papers without adducing oral evidence as the charges had to be proved beyond reasonable doubt.
  
18. The appellant also argued that, of the money that had been paid by the purchaser, he took 80 per cent as legal fees and this amounted to \$3 200 per transaction; therefore for the three transactions this amounted to \$9 000. He argued that if the purchaser wanted transfer to be effected, he ought to have paid more money for the transfer fees, rates and stamp duty and all other related charges. He further argued that there was therefore lawful cause for retention of the money that was paid to him. He complained that the offence of overcharging was raised for the first time in the respondent's heads of argument and he was never given an opportunity to address it, in his statement to the respondent's Council.
  
19. After hearing the parties, the Tribunal granted the respondent's application. The appellant's point *in limine* on *res judicata* and double jeopardy was dismissed on the authority of *Law Society of Zimbabwe v Douglas Mwonzora* HH 306/18. For convenience, the pertinent portions of the judgment in the said matter state as follows at p3:  
  
"The third issue was that the respondent had been prosecuted in a criminal court and acquitted of contravening section 113 (2) (d) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] the allegations having been that he had stolen money due to Everson Shepard Dandadzi (the complainant in

respect of paragraphs 4.2-4.3). Mr *Maanda* submitted that the allegations before the Tribunal are the same as those presented before the Regional Magistrate Court. Further, the proof required before the Tribunal in a matter involving theft is the same as in a criminal matter that is proof beyond reasonable doubt. The respondent referred to *Law Society of Zimbabwe v Mugabe & Anor* 1994 (2) ZLR 356 where it was held that proof beyond reasonable doubt is required in a charge of theft of funds. He therefore raised the defence of *autrefois acquit*.”

And at p 9:

“In other words, even where the legal practitioner is acquitted in a criminal court on facts relied on in a disciplinary hearing, the Tribunal is not precluded from hearing the disciplinary matter as long as the applicant is required to prove its case beyond reasonable doubt. Where a respondent before it has been acquitted of a criminal offence, the Tribunal will require the applicant to prove its case beyond reasonable doubt. Section 28(3) therefore allows for a respondent who may have been convicted of an offence to be referred to the Tribunal. This is recognition of the fact that proceedings in a criminal court and before the Tribunal are different processes for different purposes with different requirements despite arising from the same facts. Criminal proceedings are generally initiated by the police for breach of criminal law regarded as a wrong against society as a whole. Disciplinary proceedings are on the other hand initiated by the applicant with the aim of regulating the relationship between a legal practitioner and the applicant and maintain discipline in the legal profession. Had the proceedings been the same, a legal practitioner convicted before a criminal court would escape proceedings before the Tribunal on the basis that he/she would suffer double jeopardy. That is not the position. The defence raised by the respondent is therefore not applicable in the present disciplinary proceedings.”

20. The point *in limine* with regard to prescription was also dismissed on the basis that it was not applicable *in casu*. On the issue of the alleged premature set down of the matter, the Tribunal conceded that the matter had been pre-maturely set down but found that it would not render the proceedings to be improperly before it and was not prejudicial to the parties in any way.
21. The raising of the issue of overcharging stamp duty in heads of argument was found to be prejudicial to the appellant and consequently all portions of the papers on which the averment was contained were struck out. With regard to the issue of the lack of

clarity of the charges levelled against the appellant, the Tribunal found that the respondent had not specified the conduct of the appellant that could be considered unprofessional and unworthy under s 23 (2) (b) of the Legal Practitioners Act. On the last preliminary point that the matter could not be heard without the calling of *viva voce* evidence, the Tribunal held that there were no material disputes of fact in the matter.

22. On the merits, the Tribunal found that apart from his mere say so, the appellant had failed to place any evidence before it to substantiate his defence. No transfer documents had been placed before the Tribunal to show that he had drafted any. No evidence was placed before the Tribunal to show that he had made a formal request to the Registrar of Deeds to make a direct transfer of the immovable property. The appellant also failed to produce invoices to show that he was accounting to the beneficiaries or the purchaser. In the absence of such evidence, which it considered to be fundamental, the Tribunal found itself unable to accept the appellant's defence. On the issue of the appellant having allegedly taken 80 per cent of the money paid as his fees and his failure to produce before it the transfer documents that he claimed to have worked on, the Tribunal found the appellant had misappropriated the funds.
23. On the question of who was supposed to meet the payment of the transfer fees, the Tribunal found that the beneficiaries of the estate of the late Mr Chibumbu were supposed to cater for the transfer fees for the transfer from their parents to them. The purchaser would then meet the transfer costs for the transfer from the beneficiaries to him. The Tribunal also found that no evidence had been placed before it to show that the purchaser was, nevertheless, willing to meet the transfer fees for the two transfers.



24. Having received money from the purchaser and thereafter failing to account for it, the appellant was found to be in breach of By-law 70E of the Law Society By-laws.
  
25. The Tribunal also found that the delay in the conveyancing of the property dated back to the time when Mr Chibumbu was still alive and had initiated the process of transfer of the property to his children. Mr Chibumbu had paid capital gains tax and had obtained the certificate thereof, which certificate he handed to the appellant. He had also had the property valued. The Tribunal found that there was no meaningful explanation as to why transfer had not yet been effected by the time that Mr Chibumbu died in 2013. On the basis of all these findings, the tribunal came to the conclusion that the respondent had established its case beyond reasonable doubt. Consequently, the application for the appellant's deregistration was granted.

#### **THIS APPEAL**

26. Aggrieved by the determination of the Tribunal, the appellant lodged this appeal on the following grounds and seeking the following relief:

#### **“GROUNDS OF APPEAL**

1. The Legal Practitioners Disciplinary Tribunal (“the Tribunal”) erred in not finding that the premature set down of the application for deregistration of the appellant before the closure of pleadings was prejudicial to the appellant in the preparation of his case.
2. The Tribunal further erred in not finding that there were material disputes of fact which could not be resolved on the papers without leading evidence particularly relating to:
  - 2.1 The amount and the purpose of a payment allegedly made by the late Christopher Chibumbu to the appellant;
  - 2.2 The terms of the discussion between the appellant and the Registrar of Deeds;
  - 2.3 The liability of Joseph Ngondonga to pay transfer fees for the three transfers, him having been liable for payment of occupational rent upon taking occupation of the property before transfer; and
  - 2.4 Whether or not the appellant, who denied all the charges had abused the trust funds in issue, had not accounted for the funds, had not

executed his client's instructions or had failed to update his client on the progress of the matter.

3. The Tribunal further erred in finding that the appellant was obliged to communicate with the Registrar of Deeds through letters when the relevant regulations require that all communication with the Registrar must be conducted in person.
4. The Tribunal further erred in finding that the appellant must not have attempted a direct transfer of the property from the estate of the late Christopher Chibumbu to Joseph Ngondonga when the absolute discretion to determine whether or not exceptional circumstances exists is that of the Registrar of Deeds and not that of the Tribunal.
5. The Tribunal erred in not finding that the appellant was entitled to charge 80% of the fees for the three transfers to Joseph Ngondonga when the evidence in the record of the criminal proceedings which was placed before the Tribunal contained the draft deeds in respect of each of the transfers.
6. The Tribunal further erred in finding that the appellant failed to account in respect of trust funds which he received when it was apparent that such accounting had been done in advance upon presentation of the proforma statement of account as is the practice in conveyancing.
7. Alternatively, should it be found that the disputes of fact could be resolved on the papers, the Tribunal further erred in finding that the amount allegedly paid by Christopher Chibumbu was in respect of transfer fees for the same property and therefore that the appellant was paid twice for the same transfer when there was no evidence that this was so.
8. The Tribunal further grossly erred in making a finding that the appellant was not a fit and proper person to remain in practice as a legal practitioner, notary public and conveyancer before the appellant even made submission in mitigation.
9. The Tribunal further erred in imposing a penalty of deleting the appellant's name in the register of legal practitioners, notary public and conveyancers which penalty induces a sense of shock and is grossly disproportionate to the offence committed.

## **RELIEF SOUGHT**

**WHEREFORE** the appellant prays for an order allowing the present appeal with costs and setting aside the judgment of the Legal Practitioners Disciplinary Tribunal and substituting it with an order that:-

***“The application is dismissed with costs.”***

27. It is opportune to state at this juncture that in his heads of argument as well as in oral submissions before us, Mr Magwaliba, for the appellant, submitted that the third and

fifth grounds of appeal are dispositive of this appeal. He also stated in heads of argument that the appellant would not be pursuing the first and second grounds of appeal. With regard to the fourth, sixth and seventh grounds of appeal, the submission was that they were also dispensed with as they were canvassed under the third and fifth grounds. In any event, no meaningful submissions were made in heads of argument to motivate the said grounds. The eighth and ninth grounds of appeal seem to be raising one issue; and counsel did not extensively dwell on them. However, it is noted that the issues arising from the said grounds will be addressed in the court's determination of this appeal. This Court will, in this judgment, accordingly pay extensive regard to the third and fifth grounds of appeal.

28. It is my view that the two grounds of appeal that the appellant mainly relies on essentially raise one issue, viz, whether or not the finding by the Tribunal that the respondent had managed to prove its case against the appellant beyond reasonable doubt was proper. This is against the appellant's contention that he was improperly convicted owing to the Tribunal ignoring or disregarding evidence that was before it.

#### **ISSUE FOR DETERMINATION**

**Whether the finding by the Legal Practitioners Disciplinary Tribunal, that the respondent had proved beyond reasonable doubt its case of misconduct against the appellant, was proper.**

29. The charges levelled against the appellant were that he had abused his client's trust monies, failed to account to client, failed to execute the client's instructions and failed to update the client on the progress of the matter. It was the respondent's contention

that the appellant was thereby in breach of By-law 70E of the Law Society By-laws, 1982.

30. The appellant had been appointed by the High Court to facilitate the transfer of the immovable property from the late Mr Chibumbu and his wife to their five children. This was pursuant to a consent order in terms of which the transfer was to be effected on or before 31 October, 2007. As at the time of the hearing of this appeal, some thirteen years later, the transfer had not been effected. The late Mr Chibumbu had, before his demise, initiated the transfer process. He died in 2013 before the completion of the process. The Tribunal *a quo* did not find any valid explanation from the appellant for this state of affairs, particularly in view of the fact that the late Mr Chibumbu had paid capital gains tax, obtained the certificate thereof and had had the property valued.
31. After the demise of Mr Chibumbu the appointed executrix, with the consent of the beneficiaries, sought to sell the immovable property. The appellant was again instructed to handle the conveyancing work and to facilitate transfer to Mr Joseph Ngondonga, the purchaser. Despite the payments that were made to the appellant for the said purpose, the appellant had not effected such transfer as at the date of the application *a quo* by the respondent and even as at the date of the hearing of this appeal. This is what triggered the complaint to the respondent by the executrix of the estate of the late Mr Chibumbu and the consequent application for his deregistration.
32. The appellant did not deny that he appropriated the sum of \$8 450 that was paid by the purchaser, Mr Ngondonga. On 19 April, 2016, presumably after having been

served with the complaint, the appellant, in his response addressed to the respondent stated:

“The purchaser had paid transfer costs for one transfer only. He had paid us for the following:

Stamp duty	\$4 200.00
Transfer fees	\$4 200.00
Registration fees	\$ 20.00
Petties	<u>\$ 30.00</u>
	<b>\$8 450.00 Total</b>

I had to get an additional \$4 200,00 for transfer fees since there were 2 transfers. I also had to get value added tax for the two transactions amounting to \$1 260.”

33. In his defence outline dated 11 November, 2016, before the Magistrates Court the appellant stated *inter alia*:

“9. The accused professionally appropriated the payment that had been made by the complainant for his fees in accordance with the Law Society Tariffs; S 2 of SI 24 of 2013 (Law Society of Zimbabwe (Conveyancing Fees, By-laws 2013)” (sic)

34. In its judgment the Tribunal stated:

“... the following facts as appear in the complaint, the respondent’s response to the complaint and the counter-statement are common cause: Following the divorce ... the late Chimbumu initiated the process of transferring the property into the names of the beneficiaries. He paid the capital gains tax and obtained the capital gains tax certificate in 2008. He handed over the certificate to the respondent. He had the property valued in 2009. He paid the respondent certain monies (although there is a dispute as to what the money was intended for).

... The complainant, as the executrix of the estate ... instructed the respondent to transfer the property into Joseph Ngondonga’s name. She gave the respondent the consent by the Master to sell the property, rates clearance certificate and Capital Gains Tax Clearance Certificate. The respondent gave the complainant a statement for the purchaser to pay the requisite fees. Joseph Ngondonga paid into the respondent’s account with ZB account number ... a total of \$8 450 by way of three payments. According to a statement of the transaction history of the respondent’s account, the first payment of \$2 000 was made on 6 January 2015. The second payment was effected on 19 January 2015 with the last payment of \$4 450 on 5 May 2015. Of that amount, \$4 200 was for stamp duty, \$4 200 for Transfer fees, \$20 for Registration fees and \$30 for petty fees.

The statement reflects that before the payment of the first \$2 000 the respondent’s account had a debit balance of \$1 789,00. After the payment the account had a credit balance of \$211,00. On 19 January 2015 the account had a debit balance of \$1 791,05 and with the deposit of the next \$2 000 a credit balance of \$208,05. On 5 May 2015,

the account was in the red by \$4 494,25 following a withdrawal of \$4 400,00. The purchaser deposited \$4 450,00 leaving the account in credit by \$205,25. It is quite clear that the only meaningful deposits into that account for the five months between 1 January and 30 May 2015 were by the purchaser and the most that was in the account was \$255,20. The deposits by the purchaser, once they were made, went in to clear debit balances. Therefore at no given time were the deposits retained in the account.

The respondent does not dispute being placed in funds by the purchaser. He does not dispute that he did not have the funds so deposited into his account at the time the complaint was lodged. He however denied any wrongdoing.”

35. The Tribunal also remarked that there was no meaningful explanation from the appellant as to what happened during the four-year period from 2009 to 2013.

36. In heads of argument dated 7 January, 2020, filed before this Court on behalf of the appellant, the following submissions are made:

“17. The Tribunal accepted that the appellant was entitled to 80% of the fees which were chargeable in respect of the transfer. The Tribunal in this regard stated that:-

‘Further, the respondent’s conveyancing fees according to his breakdown were \$4 200,00. He was therefore entitled to 80% of the \$4 200,00.’

18. In view of the fact that the record confirms that Appellant did in fact carry out instructions and prepared three drafts of conveyancing papers for three separate sets of transfer, the Appellant would have been entitled to the sum of \$3 360,00 per transfer. In respect of the three transfers the total fees chargeable were \$10 080,00.”

37. In so submitting, counsel selectively read the Tribunal’s clear judgment and unfortunately, not only cherry-picked the quoted excerpt, but did so out of context.

The plain text and context are very clear from a holistic reading of the judgment. The Tribunal stated as follows:

“In terms of the Law Society of Zimbabwe (Conveyancing Fees) By-Law, 2013 (SI 24 of 2013) if a conveyancer draws up documents and the transfer does not go through, the conveyancer is entitled to charge 80% of the conveyancing fees. Paragraph 2 to the Schedule to the By-Laws reads:

‘When a transfer, mortgage bond or other matter referred to in this tariff is not proceeded with before registration and all documents have been prepared and

all work has been substantially carried out to the point of lodging, the fee to be charged shall be 80 per centum of the tariff fee'

Two issues arise from that paragraph. Firstly, in order for a conveyancer to claim entitlement to 80% of the conveyancing fees, all the work must have been substantially carried out to the point of lodging with the Registrar of Deeds of the transfer documents. Secondly, a conveyancer is entitled to 80% of the conveyancing fees only. As alluded earlier, the respondent has not produced any documents that he had worked on to show that "all the work must have been substantially carried out to the point of lodging." In other words he failed to account that he had done any work at all. Even if we were to accept that he did some work, he would not have been entitled to the 80% for drawing up transfer documents for a direct transfer in breach of the law.

Further, the respondent's conveyancing fees according to his break down were \$4 200. He was therefore entitled to 80% of the \$4 200. He was therefore required to account for the \$ 200 paid towards stamp duty. He would not have been entitled to that money as it does not constitute the conveyancing fees. He should have held the \$4 200 in his trust account. As at 30 May 2015, he only had \$205,25 in the trust account. Further, assuming he would have been entitled to withhold the 80% of the conveyancing fees, he in essence, overreached by withholding an amount exceeding the prescribed fee." (the underlining and emphasis are added)

38. Counsel's submission that the Tribunal accepted that the appellant was entitled to 80 per cent of the fees which were chargeable was therefore not borne out by a reading of the judgment and is misleading. The Tribunal made a clear finding that there was no evidence of the appellant having carried out any work or such work as would have entitled him to 80 per cent of the fees chargeable. His claim that the Magistrates Court record contains such draft transfer papers failed to avail the appellant any credit or relief *a quo* because what was attached to the record before the Tribunal were the court proceedings but not the evidence. All that the Tribunal had in this regard was therefore the appellant's mere say so.
39. It is trite that courts, and indeed the Tribunal, decide matters on the basis of evidence that is placed before them and not on the mere say so of a litigant. Every averment made must be substantiated by evidence in order for the court to place any weight on it. Bald assertions will not assist a litigant who desires to establish his case. The

appellant's denial of misappropriating funds thus remained a bare denial in circumstances where the alleged documentary proof were documents that he authored and which he thus must be presumed to have had control of. In these circumstances, the error, if any, of the Tribunal in concluding that the appellant misappropriated funds, has not been exposed or established.

40. By-law 70(E) which the appellant was found to have fallen foul of provides as follows:

“(1) Within a reasonable time after performance or earlier termination of its mandate every firm shall deliver to the client concerned a written statement setting out with clarity-

- (a) Details of all amounts received by the firm in connexion with the matter concerned, with appropriate and adequate explanatory narratives; and
- (b) Particulars of all disbursements and payments made by the firm in connexion with the matter; and
- (c) All fees and other charges raised against or charged to the client, and where any fee represents an agreed fee, a statement that it was agreed and the amount so agreed; and
- (d) The amount payable to or by the client.”

41. The contention by the appellant that Mr Ngondonga was not his client and that he thus had no duty to account to him does not hold. As it turns out, the appellant did not even account to the executrix or to the beneficiaries of the estate. His contention also cannot stand because he received money from the said Mr Ngondonga. He was therefore legally bound, in terms of the above provision, to account to him. The Tribunal aptly stated:

“... The respondent clearly overlooked the fact that he was not paid by the executrix but by the purchaser. There was therefore need to account to the purchaser particularly where the property had not been transferred to him.”



42. The appellant's failure to account and the baseless claim that he was entitled to the money as his fees do not assist the appellant's quest for a reversal of the decision of the Tribunal that he was guilty of misappropriating trust funds. On the evidence that was placed before it in the form of the appellant's bank account, the Tribunal correctly held, as it was evident, that all the monies that were deposited by Mr Ngondonga cleared debit balances in the appellant's bank account. It is evident from the record that at no time were the deposits retained in the account, in itself a disturbing fact on how the appellant was handling his accounts. Taking this into account, the Tribunal cannot, in my view, be said to have misdirected itself when it stated and concluded as follows:

"It follows that once allegations of failure to account are raised, the respondent must satisfy not only the applicant, but also the Tribunal that he had accounted to his client by producing the written statement of account that he authored and delivered to the client in compliance with By-law 70E. The respondent failed to produce the requisite statement. The conclusion that can be drawn from the failure is that the respondent abused client's funds."

43. The Tribunal noted further on the issue of the trust funds that the appellant attempted to cover for the shortfalls of monies by belatedly claiming to have applied the purchaser's payment towards his fees, which said or alleged fees he had not earned and was not entitled to. It is telling that, in his initial response to the complaint dated 19 April 2016, the appellant did not allege that he had applied the purchaser's payment towards his fees. His position then was that he required payment to be made, for the first transfer to be registered before he could register the second transfer in favour of the purchaser. Allegations that he had appropriated the purchaser's payment towards his fees were thus properly viewed by the Tribunal as an afterthought and this is fortified by the fact that no statement of account was ever sent to the purchaser to account for the alleged appropriation. The appellant's belated contention was further

weakened by the fact that, assuming he was entitled to claim 80 per cent as his fees, from the sum of \$4 200,00, he inexplicably appropriated the entire payment and ended up taking a total sum of \$8 450,00 instead. More damningly, this amount was inclusive of stamp duty. This overreaching aspect itself would amount to the misconduct of abuse of trust funds. There is therefore no merit in the complaint raised on this aspect.

44. The eighth ground of appeal states:

“The Tribunal further grossly erred in making a finding that the appellant was not a fit and proper person to remain in practice as a legal practitioner, notary public and conveyancer before the appellant even made submission in mitigation.”

In the respondent’s heads of argument, this is aptly responded to as follows:

“29. It is this position which the Tribunal concluded that it renders Appellant not a fit and proper person to remain on the register of legal practitioners, Notaries Public and conveyancers unless if any circumstances in mitigation would outweigh those in aggravation and that is why the tribunal heard the parties in mitigation and aggravation before passing its sentence.”

45. Whilst the court’s pronouncement might give the impression of a pre-determination on sentence, it is clear, on a reading of the judgment in context, that the pronouncement was made in relation to conviction. As is evident from the record, the parties were thereafter given the opportunity to address the Tribunal in mitigation and aggravation of sentence after which the Tribunal assessed and passed the appropriate penalty. The complaint raised in the eighth ground of appeal is therefore without merit.

46. In addition to the above and with specific reference to the third ground of appeal, the Tribunal was not satisfied, and rightly so, by the appellant’s allegation which was not substantiated by any proof of formal communication to that effect, that he had

consulted the Registrar of Deeds on the possibility of a direct transfer from Mr Chibumbu to the purchaser, Mr Ngondonga. As the Tribunal rightly noted, had he done so, he would not have proceeded, as he claimed, to have drafted any transfer papers in breach of s 11 of the Deeds Registries Act. This also further confirms that the appellant was not entitled to claim the 80 per cent fees, an issue that, we accept, was belatedly raised as an afterthought.

47. It is also pertinent to note the Tribunal's observation that:

"... The thread permeating throughout this application is that the respondent failed to place before the Tribunal any document that he authored prior to the lodging of the complaint. All the documents filed of record related to communication and events post the complaint. ...

Except for the first two letters, all the communication referred to by the respondent and purporting to explain what had been happening was authored after the complaint. Had the respondent been accounting to client as expected, he would have been able to place before the applicant and the Tribunal the requisite proof."

48. On a holistic view of the matter, the finding by the Tribunal that the respondent had proved beyond reasonable doubt its case of misconduct against the appellant was proper as it is borne out by the evidence on the record.

49. The ninth ground of appeal challenges the propriety of the penalty imposed by the Tribunal on the appellant. It is contended that the penalty of deleting the appellant's name from the register of legal practitioners, notaries public and conveyancers induces a sense of shock and is grossly disproportionate to the offence committed. In this regard, the starting point, in my view, is the acknowledgment of the trite position that sentencing is in the sole discretion of the primary court or tribunal seized with a matter. An aggrieved party would have to show that the sentencing discretion was not properly exercised. It was thus incumbent upon the appellant to show this court that

the Tribunal did not exercise its discretion judiciously. As matters stand, this ground was not motivated to any meaningful extent. This court has previously enunciated the need for litigants to motivate arguments or contentions placed before it. In *Delta Beverages (Pvt) Ltd v Murandu* SC 38/15 this Court stated:

“I take this time to point out that parties are expected to argue their cases so as to persuade the court to find merit, if any, in the arguments advanced for them. They are not expected to make bald, unsubstantiated averments and leave it to the court to make of them what it can.”

The ninth ground not having been motivated and the court finding no basis for interfering with the exercise of discretion by the Tribunal, the court finds no merit in the said ground.

50. For completeness, this Court finds no misdirection on the part of the Tribunal in imposing the penalty that it did when consideration is given to the following. As at the date of the determination of the matter by the Tribunal, twelve (12) years had elapsed with the appellant failing to effect the transfers of an immovable property as prescribed by an order of court, initially, during the lifetime of Mr Chibumu and subsequently, after the death of Mr Chibumu, as mandated after appointment by the executrix. There was no evidence of the necessary efforts having been made to ensure the execution and completion of his mandate. He misappropriated funds and failed to account for them to those who paid him. What is also more damning against him is the apparent or simulated belief that his actions in his dealings in this matter were innocent.
51. It is our view that the penalty imposed by the Tribunal is unassailable on the facts of this matter.

52. In conclusion, it is our view that the appeal has no merit and it is for these reasons that we dismissed it in its entirety after hearing the parties.

**GUVAVA JA** I agree

**MAKONI JA** I agree

*Muzangaza, Mandaza & Tomana*, appellant's legal practitioners

*Costa & Madzonga*, respondent's legal practitioners.