THE LAW SOCIETY OF ZIMBABWE
versus
TAYENGWA DUGMORE MUSKWE

REGISTRAR OF THE HIGH COURT
OF ZIMBABWE
CIVIL DIVISION
08 JAN 2019
P.O. BOX CY 275, CAUSEWAY
ZIMBABWE

LEGAL PRACTITIONERS DISCIPLINARY TRIBUNAL
HARARE, 4 December 2018 & 19 December 2018
Before: CHATUKUTA (Chairperson), MUSAKWA J (Deputy Chairperson)
MR KANOKANGA & MS S. MOYO (members)

N R Mutasa,, for the applicant
W Chinamora, for the respondent

CHATUKUTA J: The respondent is a registered legal practitioner, being the senior partner of Messrs Muskwe and Associates. He was admitted as a legal practitioner on 4 March 1985. The applicant filed the present application alleging that the respondent contravened s 23 (1) (d) of the Legal Practitioners Act [*Chapter 27:07*] as read with s 3 (7) of the Legal Practitioners (Code of Conduct) By-Laws, 2018 (Statutory Instrument 37 of 2018) and sections 70E and 70F of the Law Society of Zimbabwe By-Laws, 1982 (Statutory Instrument 314 of 1982) in that he:

a) failed to pay promptly to client money deposited in his trust account amounting to $68 411 when the money was due and payable;
b) withheld payment of money without lawful excuse; and
c) failed to produce, despite demand, proof that he at all material times held the said money in his trust account.

The respondent filed a counter statement disputing the allegations. However, at the hearing of the matter he pleaded guilty to the allegations and was duly found guilty. He thereafter proceeded to address the Tribunal in mitigation.

The following facts which give rise to the conviction are common cause: Sometime in September 2013, CBZ Bank Limited (which is the complainant) sold a certain piece of land called stand 543 of the Remainder of Subdivision D of the Grange Township to Mr & Mrs Jambo for US$63 664. The full purchase price, including 15 % value added tax, was US$68 411. CBZ appointed Messrs Muskwe and Associates as its conveyancers in relation to a project called the Grange Project under which the property in question fell. The purchasers secured mortgage finance from CABS in the sum of US$54 911. On 19 December 2013 the respondent received from CABS through Messrs Wintertons a letter of undertaking for the

payment of a sum of $54 911. The purchasers were to pay the shortfall on the purchase price in the sum of US$9 546. On 12 February 2014 the purchasers paid directly to CBZ a sum of US$8 753 instead of the US$9 546. CBZ immediately refunded the purchasers the said amount as they wanted the full purchase price. After the refund, the purchasers did not pay the money to the respondent. Acting on the undertaking by CABS, and without securing the full purchase price, the respondent proceeded with the transfer of the property into the names of the purchasers and same was registered on 3 April 2014 under Deed of Transfer 194 of 2014. On 23 April 2014 CABS honoured its guarantee by paying the sum of US$54 911 into the respondent's trust account. The respondent however did not remit the amount to CBZ.

As at 9 December 2014, the purchasers had not paid the full amount required of them. However, a total of US$68 411 was subsequently paid into the respondent's trust account. The amount was not remitted to CBZ. It took the respondent two years to get the balance of the purchase price from the purchasers and pay the full purchase price to the complainant.

It appears that prior to 27 January 2016, CBZ and the respondent discussed the payment of the amount held in the trust account. The respondent requested for a grace period of up to 31 March 2016 to pay the amount. On 27 January 2016 the bank wrote to the respondent advising him that his request had been turned down and demanded full payment within seven days of receipt of the letter failing which the bank would refer the matter to the applicant. On 15 February 2016 CBZ reminded the respondent of the letter of 27 January 2016 and that the matter was being referred to the applicant. A complaint was subsequently filed with the applicant on 8 March 2016.

The respondent made a part payment of US$20 000 on 5 February 2016 leaving a balance of US$48 411. The balance was paid in two instalments of US$47 000-00 and US$1411-00 on 29 March 2016 and 22 April 2016 respectively. The last two payments were only made after the complaint had been made.

Turning to the sentence, in arriving at an appropriate sentence, the Tribunal takes into account the mitigating and aggravating circumstances as advanced by the respective legal practitioners.

The Tribunal takes note of the submissions by the respondent's counsel that the accused is 58 years old and was therefore 54 years old at the time of commission of the offence. He has been in practice for 33 years (29 years at the time of commission of the offence). During this period he has travelled the straight and narrow. He is suffering from high blood pressure and has been traumatised by the case. He paid the amount due to the

complainant as far back as 2016 and there is no longer any prejudice to the complainant. The conviction should be considered as a speck on his otherwise colourless career. The respondent prayed that he be suspended from practice for a period of between 18 and 24 months wholly suspended for a period of five years on condition that he does not offend again. In addition, the Tribunal should order that the respondent does not, during the period of suspension operate a trust account. In support of the proposed sentence, Mr *Chinamora* referred to *The Law Society of the Cape of Good Hope* v *Peter* 2009 (2) SA 18 (SCA), *KwaZulu-Natal Law Society* v *Moodley & Anor* (unreported High Court of South Africa) Case No 3072/12 and *Summerley* v *Law Society, Northern Provinces* [2006] SCA 59 (RSA) where it was decided that the cases did not warrant the ultimate sentence of deregistering the legal practitioners.

The applicant submitted in aggravation that the offence was a very serious one which reflects badly on the respondent's honesty and integrity and detracts from his fitness to continue practicing as a legal practitioner. The respondent's conduct has a negative impact on the integrity of the entire profession and should be visited with a befitting sanction which is deregistration. Mr *Mutasa* referred to the case of *Chizikani v Law Society of Zimbabwe* 1994 (1) ZLR 382 (SC) at 390 C-E where the apex court confirmed the decision of the Tribunal to deregister Mr Chizakini for misappropriating trust funds.

As rightly submitted by Mr *Mutasa*, the proper approach to be taken in arriving at an appropriate sentence is set out in the *Chizikani* case (*supra*). In that case, GUBBAY CJ (as he then was) observed at 390 C-391 H that:

> "In the first place, lawyers as a professional class live by their own high code of ethics and their own moral standards. Every legal practitioner owes a duty to his colleagues to uphold those standards of the profession to which he belongs. Secondly, if legal practitioners, as a professional group, are to earn a respected position as guardians, not only of the public, but also of private, interest, then every legal practitioner must live up to the principles of decency in the relationship of a trustee to the goods and monies entrusted to him by the person who has sought his protection. A legal practitioner who breaches this trust casts a shadow on the good name of the rest, and also remains a danger to the unsuspecting public, unless his name is expunged from the register of legal practitioners. See generally in this regard *Law Society, Transvaal* v *Matthews* 1989 (4) SA 389 (T) at 394B-396H."

It was submitted on behalf of the appellant that he was only guilty of using Mr Sibanda's money for purposes other than those intended. For the reason above given, we are unable to accept that that was all he was guilty of. On the authority of *Honoré op cit* and *S* v

Harper & Anor supra, he was guilty of theft of Mr Sibanda's money. And we reject the submission that the penalty imposed was not the inevitable consequence of such conduct.

We accept, however, that the "extreme penalty" should not be lightly imposed, but as HOLMES J (as he then was) observed in Incorporated *Law Society, Natal* v *Naude* 1959 (1) SA 2 (N) at 3E:

> "In matters of this sort the Court ever seeks to blend a measure of mercy with the justice of punishment, and would readily agree in the present case to an adjournment, or to a suspension of the respondent instead of a striking off, if some basis for such a course could be found. But unhappily the paramount factor in this case is the large amount of the deficiency, and this factor overrides the element of restitution, even if made. In the result we are of the opinion that our duty, painful though it may be, is plain and we grant the order sought by the Law Society for the striking off of the respondent's name, leaving the matter of restitution, if made, to stand as a point in favour of the respondent, if and when he should apply for the reinstatement of his name on the roll."

The deficiency we are here concerned with is not insignificant. Putting aside for the moment the appellant's lack of transparency in his dealings with the respondent, as well as his intransigence and obduracy, we find no basis for the criticism that, in imposing the penalty it did, the Tribunal failed to distinguish the appellant's case from the more serious cases before it.

Counsel for the appellant urged upon us the need, when imposing punishment, to take into reckoning the circumstances attaching to the offender as an individual; the fact that the deficiency has been made good; the extent of the deficiency; deep remorse; the fact that no person or estate has suffered loss; and an undertaking on the part of the offender to conduct himself in future in accordance with the rules. All this overlooks the shadow which such behaviour casts on the good name of the rest and the need to protect the unsuspecting public from the clutches of an unscrupulous legal practitioner.

In each case the facts usually determine the punishment. Part of the headnote in *Die Prokureursode van die O.V.S* v *Schoeman* 1977 (4) SA 588 (O) at 589F reads:

> "The consequences of an order of striking off are serious and far-reaching. But the facts usually determine the punishment. And even the making up of a deficiency in trust moneys, deep remorse and ignorance concerning book-keeping and basic business principles are not in themselves sufficient to avoid a striking off order in all cases. Those are, however, all factors in mitigation of punishment which should be placed in the scales."

In *Visse's* case *supra* although restitution had been made, and others had contributed to the misappropriation, both respondents were struck off the roll.

HIEMSTRA J observed in *Incorporated Law Society, Transvaal* v *K & Anor* 1963 (4) SA 631 (T) at 632E that:

> "Since the case of *Incorporated Law Society, Transvaal* v *Visse & Ors* 1958 (4) SA 115 (T) this Court has consistently followed the practice of removing attorneys from the roll who have misappropriated trust funds."

See also *Incorporated Law Society, Transvaal* v *Horwitz* 1964 (4) SA 294 (T) at 300H-301A.

In applications by the Law Society for disciplinary action to be taken against a member, the paramount considerations are maintaining the integrity, dignity and the respect the public must have for officers of the court, no less than the Law Society's desire to protect members of the public from unscrupulous persons operating behind the colour of their profession. The question is: is the appellant a fit and proper person to be a member of the honourable Society? Any colourable conduct sufficiently grave to attract popular dissatisfaction with the profession must be visited with sanctions befitting such conduct. Thus in *Reyneke* v *Wetszenootskap Van Die Kaap Die Goeie Hoop* 1994 (1) SA 359 (A) at 361I the headnote reads:

> "That, although the charges against the appellant and the findings of the Court a quo did not relate directly to his professional practice as such in that he had not acted to the detriment of his client nor stolen money from his practice, and although these factors elicited a measure of sympathy for the appellant, the fact remained that he was guilty of two serious transgressions which reflected upon his honesty and integrity and which detracted from his fitness to practise as an attorney." (emphasis supplied).

This is ominously confirmatory of the principle that a legal practitioner who is guilty of misappropriation of trust funds disentitles himself from having his name retained on the register of practitioners.

We are in no doubt that a legal practitioner who misappropriates his client's funds is not a fit and proper person to be placed in the position of trust and confidentiality to which his enrolment as a member of the Law Society elevates him. If there are any mitigatory circumstances, they will be placed in the scales and reflected in favour of the appellant, if and when he should apply for reinstatement of his name on the roll.

A few unworthy practitioners should no longer be allowed to hurt the good name of the rest. The Law Society is justified in expunging the name of any member who, in the name of the profession, preys upon the credulity of members of the public to their detriment."

As evidenced from the above remarks, the approach by the courts and Tribunal both in Zimbabwe and in South Africa is the same where a legal practitioner misappropriates client's funds as in the present matter. A truant legal practitioner is deregistered except in very exceptional circumstances. The rationale for deregistration is apparent. The conduct of such a legal practitioner brings into disrepute the integrity and reputation of the entire legal profession. It exposes unwitting members of the public to such unscrupulous legal practitioners to their detriment financially and in most cases emotionally and psychologically as well. To allow the legal practitioner to continue practising would be tantamount to assisting and abetting the legal practitioner.

The *Chizikani* case is similar to the present case. In that case, Mr *Chizikani* had misappropriated $8 000 paid into his trust account by the complainant who was a purchaser of an immovable property. There were delays in the transfer of the property into the complainant's name leading to a complaint being lodged with the applicant. Upon being found guilty, Mr *Chizikani* pleaded almost the same mitigating factors as those pleaded by the respondent in this case; that the deficiency had been made good, there was deep remorse and an undertaking by the offender not to reoffend. These factors did not find favour with the Tribunal in the *Chizikani* case and in the Supreme Court as we do not find favour with the same mitigating factors advanced by the respondent before us.

In fact, it is our view that the submissions advanced by the respondent regarding the period of practice and his professionalism during that period cuts both ways if not sharper in aggravation. The respondent having been a legal practitioner for 29 years at the period of commission of the offence and being the principal of the law firm ought to have been even more exemplary.

His transgressions were compounded by the fact that he proceeded to effect a transfer without securing the entire purchase price. As indicated earlier, it is common cause that transfer was effected into the names of the purchasers on the strength of the guarantee by CABS of the payment of the sum of US$54 911 yet the purchase price was US$68 411 (inclusive of value added tax). Transfer was effected when the full purchase price had not been paid or secured. The balance was paid well after transfer and without securing the interests of the seller. Having transferred the property, there was no basis for not transferring

the US$54 911 to CBZ. It took the respondent two years to pay the US$54 911. The balance of the purchase price was paid into the trust account by the purchasers some two years after transfer of the property and was again not paid to CBZ until demand was made in 2016. According to the statements annexed to the respondent's counter-statement, as at 28 August 2015, the respondent had a balance of $35 332-21. This was clearly not sufficient to pay CBZ its US$68 411. No explanation was advanced by the respondent in the response to the complaint, in the counter-statement or in mitigation as to what had happened to client's money. In fact when demand was made, the respondent had to pay by instalments. The respondent did not advance any explanation why he could not pay the complainant at least the US$54 911 held in his trust account..

The cases referred to by the respondent in support for his proposition for a suspended sentence are clearly distinguishable from the present case. In *KwaZulu-Natal Law Society* v *Moodley & Anor* the charges preferred against the legal practitioner did not relate to abuse of the trust fund. *Moodly* had been found guilty of overreaching in the fees that he charged and mismanaging the winding up of a deceased's estate.

In *Summerley* v *Law Society, Northern Provinces* the lower court had found that the legal practitioner had not been dishonest but had "displayed a complete lack of insight into an attorney's obligations with regards to his trust account".

At paragraph 24 Brand JA remarked:

> "[24] That the appellant's transgressions were serious, particularly when viewed in their totality, cannot be gainsaid. The question whether they were serious enough to warrant the extreme penalty of striking-off, ultimately depends on a value judgement. On the application of that value judgment, I am persuaded that in all the circumstances the penalty of striking-off is too severe. What weighs heavily in the appellant's favour is the consideration that I have already referred to, namely that he was not guilty of dishonesty. The society's contention was that, though a finding of dishonesty may not be warranted, the appellant's misconduct displayed a complete lack of insight into an attorney's obligations with regards to his trust account. I agree. What I do not agree with, however, is the inference sought to be drawn by the society that this lack of insight must be attributed to a reckless disregard for its rules aimed at the protection of the trust funds. On the appellant's version, which cannot be rejected, his lack of insight resulted from a dearth of knowledge and experience. Though these answers will rarely be acceptable from an attorney such as the appellant, who must be approaching middle age and who has been practicing for more than ten years, his situation appears to be quite exceptional. He had no experience of note before he left the attorney's profession for about 18 years and he has hardly had any exposure to trust transactions since his return. Because he always practiced on his own, he never benefitted from the guidance of more experienced colleagues and, because he was always struggling to survive, he was unable to employ knowledgeable assistance."

The same cannot be said of the respondent. He is beyond middle age and has long experience. He in fact blew his own trumpet on his efficiency and clean record in his response to the complaint and in mitigation. He referred to other matters under the Grange Project and submitted documents including deposit slips (bearing account numbers) of transactions by other private individuals to prove that he had handled the transactions for CBZ with proficiency. In fact he was quite poetic in expressing his capability by quoting in his response to the complaint Charles Dickens' **The Life and Adventures of Martin Chuzzlewit**:

"One foul wind no more makes a winter than one swallow makes a summer."

He then proceeds to observe further that:

> "We do not believe that this one problematic transaction should sully and overshadow all the work we did in the Grange Project.
>
> In any event, all is well that ends well and confirm that this matter was settled on 29 March 2016."

Unfortunately for the respondent it has not all ended well for him. The complainant persisted with its complaint. The respondent persisted defending the indefensible until the last minute showing lack of contrition. The attitude of the respondent and his persistence exhibited lack of contrition. Every legal practitioner charged with unprofessional conduct has a constitutional right to defend himself. However, there are limits to which he or she can exercise that right without inviting the Tribunal to draw adverse conclusions. As alluded to above, the conduct of the respondent clearly showed that he failed to pay client and did not have the money in his account when he was requested to make payment. This is one such case where defending the indefensible more particularly by a senior legal practitioner attracts adverse findings.

The lack of an explanation as to what happened to the complainant's money coupled with the lack of remorse in our view exhibits a high degree of dishonesty. In essence the respondent admitted to failing to promptly pay client money deposited in his trust account, withholding trust moneys due to client without lawful cause and failing to prove that he at all material times held the said money in his trust account. The admission is a clear of

misappropriation of client's funds. Such conduct, as in the *Chizikani* case attracts nothing else other that the ultimate penalty, "the death sentence".

It is accordingly ordered that:

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

Costa & Madzonga, applicant's legal practitioners
Muskwe & Associates, respondent's legal practitioners