

THE LAW SOCIETY OF ZIMBABWE
versus
MOSES KAMDEFWERE

LEGAL PRACTITIONERS DISCIPLINARY TRIBUNAL
HARARE, 1 December 2020, 19 May 2021 & 2 June 2021
Before: CHATUKUTA J (Chairperson),
MUSAKWA J (Deputy Chairperson)
MR D KANOKANGA & MRS S. MOYO (members)

S Gahadzikwa, for the Applicant
L Uriri with J Chirabgwe, for the respondent

CHATUKUTA J: The applicant seeks the deletion of the respondent's name from the register of legal practitioners. The respondent is a legal practitioner registered with the applicant. At the material time he was and is still the senior partner in Muringi Kamdefwere Legal Practitioners (the respondent's law firm). He is alleged to have contravened s 23 (1) (d) and s 23(1)(c) of the Legal Practitioners Act [*Chapter 27:07*] as read with By-Law 70E and 70F of the Law Society of Zimbabwe By-laws, 1982 (SI 314/1982) (By-Laws) in the following respects:

- a) he failed to pay promptly to client money deposited in his trust account amounting to US\$49 690.39 when the money was due and payable;
- b) he withheld payment of the money without lawful excuse;
- c) he failed to produce proof that he at all times held the said money in his trust account;
and
- d) he failed to supervise a professional assistant in the employ of his firm.

The background to the application which is largely common cause is as follows: The applicant received a complaint on 26 October 2017 from Golden Million Engineering (Private) Limited, represented by one Admire Saweto. The complainant instructed the respondent's law firm to recover from Metallon Gold Mine an amount of US\$362 660.73. A Mr Nyasha Mapanzure who was working in the respondent's law firm represented the complainant. The full amount was recovered after litigation. The amount was deposited into the trust bank

account of the respondent's law firm. An amount of US\$301 343.73 was remitted in cash to the complainant in three instalments over a period of eighteen days. The first payment of US\$150 000 was made on 9 May 2015. The second payment of US\$100 000 was made on 16 May 2015. The third payment of US\$51 343.73 was made on 27 May 2015. An amount of US\$11 626.61 was appropriated to bank charges and legal fees.

There are points of departure between the applicant and the respondent. The first point relates to the balance of US\$49 690.73. The applicant contends that the amount remained outstanding at the date of hearing of the application. After the complaint was brought to the attention of the respondent, a meeting was convened by Mr Mandinde the applicant's official, and was attended by Mr Saweto and the respondent. The respondent undertook at the meeting to come up with a payment plan. He did not honour the undertaking. The respondent contends that the full amount was remitted to the complainant less bank charges and legal fees.

The second point of departure relates to the question who is responsible for the failure to remit the balance to the complainant. The applicant contends that the respondent was responsible for the non-remittal of the balance by virtue of being a senior partner at the law firm. The respondent contends that the non-remittal was the sole responsibility of Mr Nyasha Mapanzure who was a consultant at the law firm. The latter handled the case between the complainant and Metallon Gold Mine. The respondent's law firm only facilitated payment to an arrangement the firm was not directly involved in.

Preliminary Point: Splitting of charges

The respondent raises a preliminary issue in his counter-statement, that there was an improper splitting of charges. It was submitted that all the charges against the respondent emanate from one single transaction undertaken by one Nyasha Mapanzure. Responsibility would not attach to the respondent because Mapanzure was a consultant in the law firm and not employed by the law firm as a professional assistant.

The respondent was clearly seeking to apply criminal law in the present application. It is trite that disciplinary proceedings are *sui generis*. As a result of this peculiarity, the proceedings are neither criminal nor civil. The procedures in criminal proceedings therefore do not apply.

Whilst the charges emanate from the same facts, the Act and the By-laws create different and distinct obligations for the respondent with regards to those facts. The respondent cannot avoid his responsibility to proffer a lawful excuse for failing to promptly pay funds due to a client because he has been charged with failing to promptly pay the funds, neither can he

escape the responsibility to show that he held the funds in his trust account at all times. The respondent's preliminary point therefore is unmeritorious.

Merits

Turning to the merits, the Tribunal need not be detained by the last charge. The respondent pleaded guilty in paragraph 7.1 of his counter-statement and regrets the lack of supervision.

Three main issues stand for determination. The determination of these issues will resolve the question whether the applicant has proved the remaining charges. The first issue is whether or not Nyasha Mapanzure was a consultant or a professional assistant at the law firm. The second issue is whether a balance of US\$49 690.39 remained outstanding. The last issue is whether the law firm and consequently the respondent are responsible for remitting the money to the complainant.

Whether Nyasha Mapanzure was a consultant or a professional assistant at the law firm

The respondent gave oral evidence under oath. He initially testified that he was not responsible for Mapanzure's conduct because the latter was a consultant and not a professional assistant. However, he would at times also refer to Mapanzure as a professional assistant. This prompted Mr *Uriri* to ask him to explain the exact nature of his engagement. The respondent replied as follows:

“Mapanzure was a professional assistant but he was my classmate, he is not a young man, he is not a PA like any normal PA whom you would chase around. He was my classmate, if this had not happened we were supposed to have gone into a partnership but unfortunately this happened and I was saved from that. Basically in this matter Mapanzure dealt with the complainant and his files, he would actually take some other instruction from complainant and engage other lawyers in town like Mr Madotsa, Mr *Bherebhende* on behalf of complainant acting himself as the complainant for Golden Million that is why he had the express authority to receive monies in cash which he did. This is the misunderstanding which I resolved with the complainant until he withdrew the matter.”

In yet another answer to a question from Mr *Uriri* whether Mapanzure required supervision, the respondent replied as follows:

“No when we engaged Mr Mapanzure he was actually coming from Bherebhende Law Chambers. I received no communication from the applicant that he was supposed to be under any special particular supervision, I had simply consented that we could employ him as any ordinary professional assistant.”

The respondent admitted in his evidence-in-chief and under cross examination that Mapanzure was a professional assistant at his law firm. This puts the matter to rest. The use of the term “consultant” was therefore used in order to avoid the consequences of accepting that Mapanzure was a professional assistant.

Whether a balance of US\$49 690.39 remained outstanding

The applicant submitted that the respondent produced documents reflecting three acknowledgments by the complainant of payments by the respondent's law firm. The total amount acknowledged by the complainant is US\$301 343.73. An amount of US\$11 626.61 was appropriated to bank charges and legal fees. The outstanding balance is US\$49 690.39. The respondent failed to produce any acknowledgment of receipt of that amount. He acknowledged owing the amount and offered to come up with a plan. The offer was an admission of his indebtedness to the complainant.

The respondent testified that all the money was paid to Mapanzure who in turn remitted the money to the complainant through Mr Saweto. Mr Saweto acknowledged receipt of the money. The respondent relied on the three acknowledgments of receipt signed by Mr Saweto and a letter dated 9 May 2017 written by Mapanzure in which he stated that Mr Saweto had acknowledged receipt of the full amount.

Mr Mapanzure stated in his letter that Mr Saweto signed "various acknowledgments of receipt of the full amount". The respondent however availed to the applicant only three acknowledgements from Mr Saweto. It is not disputed that the money was paid from the debtor into the respondent's law firm's account. It was further conceded that the release of the money would be authorised by the principal of the firm and the respondent was the principal of the firm. Such authorisation would have been part of the accounting documents the respondent or law firm ought to have kept as part of the records. The respondent cannot therefore rely on an acknowledgement by Mapanzure who would otherwise have also been a respondent before this Tribunal. The respondent should have produced empirical proof of the other various acknowledgements of receipt duly signed by the complainant's representative which should have been in his possession.

The respondent overlooked the email sent to him by Mapanzure on 2 May 2017. The email confirms that a sum of US\$301 343.73 was remitted to the complainant and received by Mr Saweto. The email reads:

"Thank you for letting me know what the situation is like concerning Golden million cases. As you are aware that I was the lawyer dealing with Golden million cases and in particular Metallion gold case in which Judgement of \$301 343.73 2015 which was paid in full. At all material times I signed for the monies received with Mr Saweto. It came as a Surprise to hear that there is money owing whereas it is the other way round. I believe Mr Saweto wanted to take advantage of my absence. I did consultancy work at your law firm and made sure that all monies were paid. I cannot recall all figures by head but if you can send me the Documents relating to metallion payments." (*sic*)

It is undisputed that a sum of US\$362 660.73 was deposited into the respondent's trust account. The amount included interest totalling US\$53 317. According to the above email, it is now common cause that an amount of US\$301 343.73 was received by Mr Saweto. An amount of US\$11 626.61 was appropriated to bank charges and legal fees. Simple calculations show that the balance of US\$49 690.39 remains outstanding. There is no proof of the payment of that amount.

The respondent does not dispute undertaking to come up with a payment plan. He testified that he offered to come up with the plan because he was the principal of his law firm. Mr *Uriri* submitted during his closing remarks that the respondent found himself in an invidious position as a principal of the firm. He did not want the complaint to haunt him, hence he agreed to come up with a payment plan. He further submitted that the offer to come up with a payment plan was made without prejudice. The respondent referred to a letter dated 7 April 2017 which he wrote to the complainant marked "Without prejudice".

The letter does not refer to a payment plan. The question of a payment plan arose after the complaint was registered with the applicant and at a meeting convened by the applicant's Mr Mandinde. There was no proof placed before the Tribunal that the discussions during that meeting were without prejudice.

Mr *Uriri* further submitted as follows:

"The idea (was) to try and resolve the matter. In fact, when we look at it from a practical perspective here is a principal in a law firm, he is faced with this powder keg which is about to explode, he has got to deal with it as best as person at the top must do. He is the person at the top he must take responsibility, he must say that this has happened, this is regrettable, we will resolve the matter. In so doing he does not say I personally took money I stole the money or this happened he is basically trying to deal with matter as pragmatically as any principal who will be in the circumstances. He was just being a pragmatic, a pragmatic principal and he cannot be penalised for being pragmatic."

The offer to come up with a payment plan is supportive of the applicant's contention that there was an outstanding amount. The respondent has been in practice for over twenty years now and he has been the principal of his law firm. The Tribunal does not believe that he was not aware that he would be liable to pay an amount that was due and payable. If he was not aware, that is an indictment on him as to his appreciation of the law and how to take care of clients' funds given his experience.

The respondent seeks to rely on an affidavit of withdrawal deposed to by Admire Saweto on 16 July 2020 in which the latter stated that he had satisfactorily resolved the issue with the respondent and was now withdrawing the complaint. The affidavit is unhelpful to the

respondent's case. It comes three years after the complaint, two years after the filing of the application and five months before the hearing of the application. The affidavit does not state in what way the issue giving rise to the complaint was resolved, whether or not the respondent paid the outstanding amount or agreed to make a payment plan. It is not stated whether the complainant abandoned its claim for the outstanding balance and when the complaint was resolved. The respondent did not take the applicant and the Tribunal into his confidence either as to how the issue was resolved. It is however confirmed in the affidavit that there was indeed a dispute regarding the outstanding balance. It can be safely assumed that had the respondent paid the balance, the deponent would have stated so. In any event, the applicant is *dominus litus*. The withdrawal of a complaint by a complainant, and more particularly in circumstances as the present one where there is evidence of impropriety, does not extinguish the offending acts.

Whether the law firm and consequently the respondent was responsible

The respondent persisted with his contention that he was not personally responsible for the outstanding amount. Having admitted that it was his responsibility as the principal of his law firm, to come up with a payment plan, he cannot retract the admission. He seems to have been under the misapprehension that liability would only attach if he had handled the matter directly/personally. He overlooked the provisions of By-Law 70E. The By-law provides that every firm shall, within a reasonable time after the performance or earlier termination of its mandate, account to client in a written statement setting out the details of the money received by the firm and its disbursement. The word "firm" is defined in By-Law 70A as follows:

"firm" means-

- (a) a legal practitioner in private practice on his own account; or
- (b) a partnership of legal practitioners in private practice;

but does not include a legal practitioner who is not obliged to open a trust account in terms of section 13 of the Act;"

The responsibility to ensure that trust funds are kept intact and remitted to rightful owners therefore rests with both the principal or senior partner of a law firm and any other legal practitioner in the firm falling under s 13 of the Act. The respondent was the senior partner at his Law firm. He had the ultimate responsibility to ensure that all employees under him adhered to the provisions of the Act and the By-laws. He cannot abdicate his responsibility and place it on Mapanzure. He could not accept fees for services rendered on its behalf by Mapanzure and refuse to take responsibility for Mapanzure's failures.

Disposition

The respondent's defence to the charges was clearly contrived. The respondent was the senior partner and sole signatory to the account. It was therefore his sole responsibility to ensure that trust monies were remitted to the intended beneficiary. The outstanding balance remained unpaid five years after the full amount was paid into the firm's trust account. This was contrary to By-law 70E which requires that an amount due to a client must be paid within a reasonable time. A delay of five years is inordinate and cannot be said to be reasonable time. The late payment is further contrary to By-Law 70F which requires a law firm to remit the money promptly to a person entitled to it.

It is therefore our finding that the applicant proved that the respondent's conduct was unprofessional, dishonourable, unworthy and unbefitting of a legal practitioner. The respondent is accordingly found guilty of all counts.

SENTENCE

On 19 May 2021 we directed that the respondent file submissions on sentence on or before 26 May 2021. The applicant was directed to file its submissions on or before 28 May 2021. The applicant duly complied with the direction of the Tribunal. On the other hand the respondent failed to file his submissions. The Tribunal shall proceed to consider the appropriate sentence without the benefit of the respondent's submissions.

It is trite that in arriving at an appropriate sentence, the Tribunal must consider, *inter alia*, the following sentencing objectives:

- (a) upholding public confidence in the administration of justice;
- (b) safeguarding the collective interest in upholding the standards of the legal profession;
- (c) punishment of the errant legal practitioner for the misconduct; and
- (d) setting standards to be observed by other practitioners and in the process deterrence against similar offences by like-minded legal practitioners (See *Law Society of Singapore v Chiong Chin May Selena* [2005] 4 SLR ® 320 at 26).

In considering the above objectives, the Tribunal is guided by the opinion of the applicant. (See *Law Society of Zimbabwe v Sheelagh Cathrine Stewart* HC-H- 39 – 89). The applicant submitted that the respondent's conduct called for his de-registration. The respondent was a senior partner at Muringi Kamdefwere Legal Practitioners. He had the responsibility to ensure that trust funds were secure and available to the complainant when they became payable and at the most on demand. Not only did he fail to secure the funds, he failed to explain what

happened to the funds. He failed to explain how and when the funds were paid to the complainant, if at all. He admitted failing to supervise a professional assistant.

As alluded to earlier, the only conclusion that arises from the delay in paying the complainant is that the respondent misappropriated trust funds. Had the funds been available on demand, it would not have been necessary for the respondent to offer a payment plan. It is trite that a legal practitioner who misappropriates a client's funds is not a fit and proper person to remain on the roll of legal practitioners. (See *Chizikani v Law Society of Zimbabwe* 1994 (1) 382 (SC), *Muskwe v Law Society of Zimbabwe* SC 7/19 and *Law Society, Transvaal v Matthews* 1989 (4) SA 389 (T).)

The respondent's blameworthiness is therefore high. He misappropriated trust funds. Secondly, a delay of five years in paying the complainant, which is evidently inordinate, is serious. This is compounded by his failure to honour an offer made to a client to come up with a payment plan. The offer was made before the applicant who is the respondent's regulator. The respondent's conduct is inexcusable. The respondent surprisingly exhibited a lack of comprehension of the responsibilities of a principal of a legal firm towards a client with regards to trust accounts. He has been in practice for 15 years. That is a considerable period. Whether the respondent feigned ignorance or was genuinely not aware of his responsibility, either way, it renders him unsuitable to remain on the register.

As rightly submitted by the applicant, the respondent showed lack of remorse. Instead of accepting liability for the misappropriation of trust funds, he persisted to the end with his blame game, shifting the blame on a professional assistant. This is a professional assistant he admitted to have failed to supervise.

The respondent has, by his conduct tarnished the reputation of the legal profession. The lodging of a complaint is indicative of the complainant's disgruntlement and lack of trust of the respondent. It is a show of the dent inflicted by the respondent's conduct on the respect for the profession by a member of the public. The respondent is thus not a fit and proper person to continue practicing law. The integrity of the profession and the protection of the public can only be realized with the de-registration of the respondent.

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.