

REPORTABLE (67)

**TAYENGWA DUGMORE MUSKWE
v
LAW SOCIETY OF ZIMBABWE**

**SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, MAKONI JA & BERE JA
HARARE, NOVEMBER 11 & 12, 2019 & JUNE 11, 2020**

L Uriri, for the appellant

N R Mutasa, for the respondent

GWAUNZA DCJ

[1] This is an appeal against the decision of the Legal Practitioners’ Disciplinary Tribunal handed down on 6 March 2019, ordering that the appellant’s name be deleted from the register of Legal Practitioners, Notaries’ Public and Conveyancers. On the day following the hearing in this matter, the court issued an order dismissing the appeal with costs, and indicated that the reasons for the order would follow in due course. These are the reasons.

FACTUAL BACKGROUND

[2] The respondent is a statutory body established in terms of the Legal Practitioners Act (*Chapter 27:07*) (the ‘Act’) It is a regulator of the legal profession in Zimbabwe. The appellant is a legal practitioner duly registered with the respondent. In 2013 the Commercial Bank of Zimbabwe Limited (‘CBZ Bank’) sold a certain piece of land

called stand number 543 of the remainder of subdivision D of the Grange Township to Mr and Mrs Jambo (hereinafter referred to as ‘the purchasers’) for US\$68 411 inclusive of value added tax (VAT). CBZ Bank appointed Messrs Muskwe and Associates (‘Messrs Muskwe’) as its conveyancers in the Grange Project under which stand number 543 fell. The appellant is the principal of Messrs Muskwe.

- [3] The purchasers secured mortgage finance from the Central Africa Building Society (‘CABS Bank’) in the sum of US\$54911. On 19 December 2013, through the purchasers’ legal practitioners Messrs Wintertons, the appellant received a letter of undertaking from CABS Bank for the payment of the sum of US\$54 911. This amount fell short of the required total by US\$9 546, which was to be paid by the purchasers. On 12 February 2014, the purchasers paid US\$8753 to CBZ bank instead of the full balance of US\$9546. CBZ Bank sent the US\$8 753 back to the purchasers, indicating it would only accept the full purchase price. After the refund, the purchasers did not transmit the money to the appellant. The latter proceeded to effect transfer and registration of the property into the names of the purchasers on 3 April 2014 under Deed of Transfer 194/2014. This was before he had received the full purchase price from CABS Bank and the purchasers. The appellant acted on the basis of the undertaking by CABS Bank to pay US\$54 911 even though it fell short of the purchase price by US\$9 546. On 23 April 2014 CABS Bank honoured its guarantee and paid the sum of US\$54 911 into the appellant’s trust account. The appellant, however, did not promptly remit the amount to CBZ Bank.

- [4] As at 9 December 2014, the purchasers had not paid the full amount required of them. The full purchase price of US \$68 411 was eventually paid into the appellant’s trust
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account. However, it had taken the appellant two years to secure the balance from the purchasers and pay it to CBZ Bank. This process was, however, not without its own rough patches. It appears that prior to 27 January 2016 the appellant and CBZ Bank discussed the payment of the amount held in the appellant's trust account. The appellant requested a grace period of up to 31 March 2016 to effect the required payment. CBZ turned the request down. On 27 January 2016 CBZ Bank gave the appellant 7 days' notice to effect full payment, failing which it would register a complaint against him, with the respondent. On 15 February 2016 the bank through its legal practitioners wrote to the appellant indicating that consequent upon his failure to comply with the directives and the demands of the letter of 27 January 2016, it was going to register a complaint with the respondent as well as institute legal proceedings against him. Subsequently the bank filed a complaint with the respondent on 8 March 2016.

- [5] Before this date, the appellant made part payment of US\$ 20 000 on 5 February 2016 leaving a balance of US\$ 48 411. The balance was paid in instalments of US\$ 47 000 on 29 March 2016 and US\$1 411 on 22 April 2016, both after the complaint had been registered with the respondent. The latter then filed an application with the Legal Practitioners Disciplinary Tribunal (the Tribunal'), seeking the deletion of the appellant's name from the register of legal practitioners in terms of s 28 (1)(i) of the Act. This would, effectively, mean that the appellant would be deregistered as a legal practitioner. The respondent averred that the appellant by his conduct in the course of his practice as a legal practitioner, was guilty of unprofessional, dishonourable and unworthy conduct contrary to what was expected of him in terms of the relevant provisions of the Act and related Statutory Instruments. In particular, the respondent charged that the appellant: -
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- “a) failed to pay promptly to his client, funds that had been deposited in his trust account amounting to \$68 411, when the money became due and payable;
- b) withheld payment of the funds without lawful excuse; and
- c) failed to produce, despite demand, proof that he at all material times held the said funds in his trust account.”

[6] The appellant filed a counter statement disputing the allegations against him. However, at the hearing of the matter before the Tribunal, he pleaded guilty to all the charges against him and was duly found guilty. He thereafter proceeded to address the Tribunal in mitigation but to no avail. The Tribunal imposed the penalty of deregistration.

Aggrieved at this penalty, the appellant noted this appeal on the following grounds, that I have taken the liberty to summarise: -

1. The Disciplinary Tribunal erred and misdirected itself in taking into account, and premising its findings on irrelevant, extraneous and manufactured facts;
2. The Disciplinary Tribunal erred and misdirected itself in the outright dismissal of the Appellant’s mitigation, and in finding that migratory (*sic*) circumstances were only relevant for the purpose of making an application for readmission to the Registrar of Legal Practitioners, Notaries Public and Conveyancers.
3. The Disciplinary Tribunal erred and misdirected itself by insisting on the ultimate penalty in the face of weighty mitigating factors pleaded by him, including his long blame-free legal career, full restitution made and demonstrated contrition;
4. The Disciplinary Tribunal erred and misdirected itself in failing to consider the concessions made by the Respondent’s Legal Practitioner, that the facts ‘squarely’ before it did not warrant the ultimate penalty.
5. The Disciplinary Tribunal misdirected itself by misreading the facts contained in the Appellant’s opposing papers which clearly indicated that the full purchase was done (*sic*) sometime in 2015.

These grounds of appeal in my view raise one issue for determination, which is, whether or not the Disciplinary Tribunal erred in imposing the ultimate penalty of striking out the appellant’s name from the register of Legal Practitioners, Notaries Public and Conveyancers.

- [7] The appellant avers that the Disciplinary Tribunal relied on irrelevant, extraneous and manufactured facts. It is contended through his first ground of appeal that the judgment of the Tribunal demonstrates that it related to another person, not the appellant. The appellant in his heads of argument however did not motivate this ground of appeal nor did he make any further reference to it.

Accordingly, the first ground of appeal stands abandoned and will not be considered in this judgment.

WHETHER OR NOT THE DISCIPLINARY TRIBUNAL ERRED IN IMPOSING THE ULTIMATE PENALTY OF STRIKING OUT THE APPELLANT FROM THE REGISTER OF LEGAL PRACTITIONERS.

- [8] The appellant avers that the penalty imposed against him by the Tribunal for the offences that he faced, was excessive in the circumstances. He charges that the Tribunal in arriving at its penalty, failed to properly weigh the mitigating circumstances of the case against the aggravating factors thereof. In his view, the court over-emphasised the latter. The respondent, to the contrary, maintains the position that the Tribunal in imposing the penalty in question, exercised its discretion in a judicious manner and properly ordered that the appellant's name be struck out from the Register of Legal Practitioners, Notaries Public and Conveyancers. Given that the appellant pleaded guilty to all the charges laid against him, the respondent correctly submits that the issue to be determined is whether the Tribunal was correct in finding that the appellant was not a fit and proper person to continue practising as a legal practitioner, and therefore imposing the penalty that it did.
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[9] The appellant effectively pleaded guilty to having misappropriated trust funds. It bears mention that the amount involved, despite having ultimately been transmitted to the client, was not insignificant. A look at the relevant cases and other authorities clearly suggests that courts of law take a very serious view of the abuse of trust funds by a legal practitioner. Further, that lawyers, as a class, generally hold themselves up to very high standards of honesty, integrity and professionalism in the discharge of their legal duties. In the case of *Incorporated Law Society Transvaal v Behrman*, 1977(1) SA 904(T) at 905 H the court unequivocally stated that a practitioner who contravened the provisions relating to his trust account was guilty of unprofessional conduct and liable to be struck off the roll or suspended from practice. The court in *Law Society, Transvaal v Matthews* 1989 (4) SA 389 (T) at 394 expressed the same sentiments as follows:

“I deal now with the duty of an attorney in regard to trust money. ... 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.**” (*my emphasis*)

[10] Concerning the high standards that lawyers themselves have set up for themselves, this Court in *Chizikani v Law Society of Zimbabwe* 1994 (1) ZLR 382 (SC) had this to say:

“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 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 this 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 (T) at 394 B-396H.)**” (*my emphasis*)

It is therefore against the principles set out in the authorities cited above, that the appellant's submissions in impugning the 'ultimate' penalty that the Tribunal imposed on him, will be considered.

[11] It is evident from a reading of the judgment of the Tribunal that it considered both the mitigating and aggravating circumstances of the case, and related to pertinent authorities, before imposing the penalty in question. The Tribunal stated as follows: -

“Turning to the sentence, in arriving at the 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 that time of commission of the offence. He has been in practice for 33 years (29 years at the time of the commission of the offense). 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, Northern Provinces [2006] SCA 59 (RSA) where it was decided that the case 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*).”

[12] In weighing the aggravating against the mitigating circumstances argued for the parties, the Tribunal found (correctly in my view), the following to be particularly damning of the appellant: -

- “i) that the appellant’s submissions in relation to his mature age, the long and unblemished career spanning 30 years in the practice of law and professionalism during that period ‘cut both ways if not sharper, in aggravation.’
- ii) that with such credentials and being the principal of his law firm, the appellant should have been more exemplary in his conduct;
- iii) that his transgressions were ‘compounded’ by the fact that he proceeded to effect transfer of the property to the purchasers without securing the entire purchase price, a circumstance that jeopardised the interests of the seller, since the balance of US\$54, 911 was paid into his trust account well after the transfer;
- iv) that the appellant thereafter failed, and with no reason given, to remit this and the other amount paid by the purchasers to CBZ Bank, only doing so after some two years, and even then, after demand, and in instalments;
- v) that as of 28 August, 2015, after the full purchase price was paid by CABS Bank and the purchasers, the respondent’s account reflected a balance of only US\$35 332,21, against the total required amount of US\$68 411, which showed that he no longer had the amount in his account when payment was required;
- vi) that in this respect no explanation was advanced by the respondent as to what had happened to the client’s funds;
- vii) that the respondent, despite pleading guilty before the Tribunal, had up to that point exhibited lack of contrition through his persistence in defending ‘the indefensible until the very last minute’ and;
- vii) that the amount of trust funds abused by the appellant was in no way insignificant.”

[13] It is my view that there is little if anything to fault in the Tribunal’s analysis of the evidence before it, nor in the manner that it weighed the mitigating factors pleaded by the appellant, against the aggravating circumstances of the case, *vis a vis* the appellant’s conduct as a whole. I further find the reasoning of the Tribunal as outlined above to be unassailable. The reasoning is in *tandem* with the *plethora* of authorities in our jurisdiction and beyond (*supra*), that make it very clear that a lawyer who abuses a client’s trust finds risks the ultimate penalty of being de-registered as a legal practitioner.

[14] Having found that the respondent's submissions in mitigation 'overlooked the shadow' cast by his conduct on the good name and integrity of the rest of the legal profession, the Tribunal then considered the consequences of the penalty that it went on to impose on the appellant. It, in this respect, cited the following text from the headnote in *Die Prokureursode van die O.V.S v Schoeman* 1997 (4) SA 588 (O) at 589F: -

"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 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." (*my emphasis*)

[15] In applying the above to the circumstances of the case before it, the court found that the absence of an explanation by the respondent as to what happened to his client's money, coupled with his lack of remorse, exhibited a high degree of dishonesty. It also found that his plea of guilty to all the charges levelled against him was a clear admission that he had misappropriated the client's funds. This conduct, the Tribunal opined, demonstrated that the appellant was not a fit and proper person to continue in the practice of law.

[16] Before finally imposing the penalty, the tribunal was fully cognisant of the fact that it was not to be lightly imposed. It was guided in this respect by the following remarks by HOLMES J (as he then was) in *Incorporated Law Society, Natal v Naunde* 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 deficiency, and this factor overrides the

element of restitution even if made. In the result, we are of the opinion that our duty, painfully though it may be, is plain and we grant the order sought by the Law Society for 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."

As already noted the Tribunal *in casu* also found that the 'deficiency' was not inconsiderable. In the result, the Tribunal's view was that the conduct 'attracted' nothing short of the ultimate penalty, which it went on to impose. It also ordered the appellant to pay the respondent's expenses in connection with the proceedings.

[I7] I find that there is merit in the respondent's submission that the Tribunal judiciously exercised its discretion, after a proper consideration of the facts of the case and relevant authorities, in imposing the penalty that it did, on the appellant. The court in *Law Society of the Cape of Good Hope v C 1986 (1) SA 616 (A)* at 637B – C reasoned that the exercise of the court's discretion in matters of this nature involves the weighing up of the conduct complained of against the conduct expected of an attorney and, consequently making a value judgment. There is nothing in my view to suggest that the value judgment that the Tribunal made, against the facts and circumstances of the case before it, was flawed in any way. It should be noted, in addition, that the discretion enjoyed by a court of first instance in relation to a penalty that it imposes in cases involving the misappropriation of trust funds by a legal practitioner, is not one that an appeal court may lightly interfere with (see *Mutandi* case, *supra*). The appeal court may only do so where it finds that the court of first instance arrived at its conclusion capriciously, exercised its discretion injudiciously or relied upon a wrong principle of law. See *Barros & Anor v Chimponda* 1999 (1) ZLR 58 (S) at 62G – 63A where it was stated as follows:

“... If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account some relevant consideration, then its determination should be reviewed and the appellate court may exercise its discretion in substitution, provided always (that it) has the materials for so doing.”

[18] Taking the foregoing into account, I am satisfied that in arriving at the penalty that it imposed the Tribunal adopted the right approach as set out above. This was after it had properly weighed the aggravating against the mitigating circumstances of the case. The court *a quo*'s ultimate finding that the mitigation pleaded was outweighed by the aggravating circumstances of the case is in my view not to be faulted.

DISPOSITION

[19] In light of the foregoing, the court found that no basis had been established for interfering with the discretion exercised by the Tribunal in imposing the ultimate penalty of striking the appellant's name off the register of Legal Practitioners, Conveyancers and Notaries Public. The appeal was accordingly devoid of merit, hence the order made by the court, dismissing the appeal with costs.

MAKONI JA: I agree

BERE JA: I agree

Chikwangwani Tapi Attorneys, appellant's legal practitioners
