THE LAW SOCIETY OF ZIMBABWE
versus
JOSEPH MAWENI

LEGAL PRACTITIONERS DISCIPLINARY TRIBUNAL
HARARE, 4 December 2018, 18 & 25 January 2019 and 30 October 2019
Before: CHATUKUTA J (Chairperson), MUSAKWA J (Deputy Chairperson)
MR D KANOKANGA & MS S. MOYO (members)

B Pesanai, for the applicant
J Mutonono, for the respondent

CHATUKUTA J: The respondent was brought before the Tribunal under case No LPDT 6/17 on allegations that he failed to respond to communication from the applicant, abused trust funds and that he used unorthodox means to effect transfer of property into his client's name thus defeating the course of justice. The applicant seeks the deletion of the respondent from its register of legal practitioners.

The facts of the matter as contained in the summary of evidence are as follows: The respondent practised under Mutendi & Shumba Legal Practitioners, Masvingo. He was engaged by Beauty Tafirei to represent her and her husband in a sale of their house. The proceeds of the sale totalling US$26 000 were deposited into the respondent's trust account sometime in early 2015. Beauty Tafirei was entitled to a 50% share of the proceeds totalling US$13 000. The respondent transferred only US$9 500 in two instalments. He later acknowledged the debt in June 2015. Despite demand, the respondent failed to pay the outstanding balance. This amounted to abuse of trust funds. The applicant invited the respondent to respond to the complaint. The respondent did not respond to the letter and to a subsequent reminder from the applicant giving rise to the second charge.

The third charge arises from a complaint by Mr Shadreck Chando. The complaint was that the complainant was involved in a housing dispute with the respondent's client. The respondent was now practising under Chikanda & Maputsenyika Law Firm also of Masvingo. The respondent's client had applied for an interdict against cession of the property to the complainant. The application was dismissed. The respondent's client appealed against the decision of the court. The appeal was subsequently dismissed. However, before the dismissal

of the appeal, the respondent facilitated a sale and cession of the property under dispute from his client to the name of his client's wife well aware that the appeal was still pending.

The application was initially opposed.

At the commencement of the hearing of the matter, the applicant abandoned the allegation that the respondent neglected to respond to communication. During the course of the hearing, the respondent conceded to the other two counts. Following the concessions, the Tribunal concluded that his conduct was unprofessional and put the legal profession into disrepute.

Turning to sentence, the respondent expressed his contrition and undertook not to put the name of the profession into disrepute again. He was registered as a legal practitioner, notary public and conveyancer in 2000. He started practising in 2002 and left the profession for an undisclosed reason to return to the profession in 2011. He submitted that at the time of commission of the offences he was fairly inexperienced and attributed his misconduct to the inexperience. Deleting his name from the applicant's register would visit him with untold suffering. He had paid Beauty Tafirei the full outstanding amount. Mr Chando did not ultimately lose his property. Therefore no prejudice was occasioned to the complainants. He therefore prayed for a wholly suspended sentence coupled by an order to pay a fine and costs.

The applicant persisted with its prayer for the deregistration of the respondent on the basis that the respondent's misconduct was serious and warranted the ultimate punishment.

The respondent's plea is clearly a plea for mercy. The question whether or not the Tribunal should be influenced by such a plea was discussed in *Mafara* v *The Law Society of Zimbabwe* 1987 (2) ZLR 293 (SC). McNally JA remarked at 300 A- F that:

"As was said by BOTHA JP in Law Society v Du Toit 1938 OPD 103 at 104:

> "We are not concerned here to-day with any theory of punishment. The proceedings are instituted by the Law Society for the definite purpose of maintaining the integrity, dignity and respect the public must have for officers of this Court. The proceedings are of a purely disciplinary nature; they are not intended to act as a punishment of the respondent. He has received his sentence for the offence he committed and it is no longer a matter that will influence us in dealing with this case. It is for the Courts in cases of this nature to be careful to distinguish between justice and mercy. An attorney fulfils a very important function in the word of the Court. The public are entitled to demand that a Court should see to it that officers of the Court do their work in a manner above suspicion. If we were to overlook misconduct on the part of officers of the Court, if we were to allow our desire to be merciful to overrule our sense of duty to the public and our sense of the importance of attaching to the integrity of the profession, we should soon get into a position where the profession would be prejudiced and brought into discredit."" (Also cited with approval in *Aitken* v *Law Society of Zimbabwe* 1995 (2) ZLR 383 (SC) at 388 A-E

The primary concern for the Tribunal is therefore the protection of the integrity of the profession. Abuse of trust funds and defeating the course of justice have been considered some of the most serious acts of misconduct a legal practitioner can commit and invariably attract the deregistration of a legal practitioner. (see *Chizikani* v *Law Society of Zimbabwe* 1994 (1) ZLR 382 (SC), *Mafara* v *The Law Society of Zimbabwe* (*supra*), *Mitchell* v *Estate Agents Council* 1996 (1) ZLR 222 (SC).)

In *Mitchell* v *Estate Agents Council* MCNALLY JA observed at 226 C-D that:

> "Central to the whole concept of professionalism in the handling of clients' money is the trust account. Whether one is speaking of lawyers, accountants or estate agents, the principle is the same. Clients must know, with absolute conviction, that their money is safe. The machinery which has developed to ensure that safety is the trust account system."

Once that machinery is destroyed, clients' money is not safe and confidence in the profession is eroded. Regarding the defeat of the course of justice, McNally JA remarked in *Mafara* (*supra*) at 300 G-301 A that:

> " The case of *Incorporated Law Society* v *Behrman* 1957 (3) SA 221 (T) was a case involving an attorney who sought to defeat the course of justice. The court noted that he offended "against the very thing that he was sworn to uphold". It held, per RAMSBOTTOM J, that "this Court would not be doing its duty if, in the present case, it did not grant the application of the Law Society and strike the respondent off the Roll".

We hold the same sentiments. The respondent's conduct in both counts would in fact be a basis for criminal prosecution. His plea for mercy under such circumstances is undeserved. Heeding the plea would be interpreted as acting in complicity with the respondent and would bring not only the legal profession but also the Tribunal into disrepute.

It is accordingly ordered that:

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

Musakwa J *agrees:*……

Mutendi, Mudisi & Shumba, applicant's legal practitioners