THE LAW SOCIETY OF ZIMBABWE
versus
BELVIN BOPOTO

LEGAL PRACTITIONERS DISCIPLINARY TRIBUNAL

HARARE, 28 SEPTEMBER, 3 OCTOBER 2018 & 30 October 2019
Before: CHATUKUTA J (Chairperson), MUSAKWA J (Deputy Chairperson)
MR D KANOKANGA & MS S. MOYO (members)

S Gahadzikwa , for the applicant
W Chinamhora, for the respondent

CHATUKUTA J: This is an application for the deregistration of the respondent as a legal practitioner, notary public and conveyancer. It is alleged that the respondent, whilst practising under Maeresera and Partners conducted himself in contravention of the Legal Practitioners Act [*Chapter 27:07*] (the Act) by:

(1) announcing that he was acting for clients when he did not have instructions;
(2) him having been placed in funds, failing to carry out client's mandate as per client's instructions;
(3) failing to refund money paid by a client when the client had withdrawn instructions;
(4) failing to issue receipts for money received;
(5) abusing trust funds;
(6) failing to account to clients;
(7) failing to refund fees paid by client when no work had been done;
(8) being dishonest when he lied that he had issued court process for clients when he had not done so despite having been paid fees to have the process issued; and
(9) failing to respond to communication from the applicant's secretary

Before proceeding to the facts giving rise to the charges, it is necessary to comment on the way the charges have been presented in the application. There is no citation of the relevant provisions that the respondent is said to have breached. The acts of unprofessional conduct are

found under the Act (section 23), the Law Society of Zimbabwe by-Law 1982, (SI 314 of 1982) Law Society of Zimbabwe (Code of Ethics) By-Laws, 2017 (S I 37 2018). These have not been alluded to in the application.

The issue was raised with the applicant. Mr *Gahadzikwa*'s response was that it is not necessary for the applicant to refer to a by-law when preferring a charge. It is adequate to state the essential elements thereof. The import of Mr *Gahadzikwa*'s response is that it is the obligation of the Tribunal to plough through the regulations and Act to ascertain the appropriate provision. This cannot be the responsibility of the Tribunal. The Tribunal has time and again raised this concern with the applicant. In *the Law Society* v *Mwonzora* HH 306-18 (LPDT 05/13), the Tribunal had the occasion to spell out the level of proficiency expected of the applicant. The applicant, being the regulating authority for the legal profession, is expected to exhibit a high degree of diligence. At P 11 of the judgment we observed that:

> "The level of proficiency that the applicant expects of legal practitioners must be reflected in the pleadings that it places before the Tribunal particularly where it seeks the ultimate penalty of deleting (the name of) a legal practitioner from its register. In other words the applicant needs to set the tone for efficiency and diligence."

In *Ford* v *Law Society of Rhodesia* 1977 (4) S.A (RAD) 178, Macdonald C.J remarked that a complaint against a legal practitioner must be "with clarity, certainty and reasonable particularity". (See also *The Law Society* v *Sibanda* HC-H-90). If no such provision exists, it would be necessary to state the basis for alleging that the conduct amounts to unprofessional conduct. It is not for the Tribunal to rummage through the various pieces of legislation for the relevant provisions creating the offence. For example, the first count lacks the drafting elegance expected of the applicant. The gravamen of that charge is that the respondent being an officer of the court misrepresented facts to the court. The high degree of diligence expected of the applicant is thus lacking.

However, the respondent cannot be said to have been prejudiced by the applicant's failure to cite the relevant provisions that he is alleged to have breached. He responded to the allegations leveled against him without objection. It shows that the presentation of the complaints was with "clarity, certainty and reasonable particularity" and met the standard set out in *Ford* case.

We now turn to the merits of the application. The first complainant, Herbert Chikiwa, filed a complaint on 24 September 2015 alleging that he was arraigned and placed on remand on 21

December 2013. Sometime in April 2014 he appeared at Harare Magistrates Court for further remand. The respondent was also in court on the day in question. The respondent addressed the court indicating that he was representing the complainant. Following this representation, the complainant appears to have been remanded to a further date. The respondent did not have, at that stage, instructions to represent the complainant. He only got instructions when he visited the complainant at remand prison after the further remand. The respondent went to remand prison and interviewed the complainant with the intention to make an application for bail on behalf of the complainant. He was given instructions to proceed to make the application. The complainant's wife later paid him fees in the sum of US$400. He did not issue the complainant's wife with a receipt for the money. He further did not apply for the bail. The complainant finally got bail on 25 August 2015 but with the assistance of another lawyer.

The complainant, through his brother-in-law, one Mr Mapungwana, demanded a refund of the US$400 paid by the complainant's wife. Mr Mapungwana was given by the respondent US$50. The respondent acknowledged in writing owing the complainant and undertook in the acknowledgement to refund the balance of US$350. The respondent failed to refund the balance. At the time of the events, the respondent was employed by Nyamushaya and Associates. These facts are alleged to be the basis for counts (1), (2) and (4).

In his defence, the respondent admitted receiving US$400 from the complainant's wife. The money was handed over to Nyamushaya and Associates and a receipt was issued to the complainant's wife. He had been assigned to attend to the matter by his then principal, Mr Nyamushaya. He prepared the necessary bail application and attended to routine remands. Mr Nyamushaya ordered him to demand another $600 in addition to the US$500 for the preparation of the application and set down for hearing. The complainant's wife refused to pay as she indicated that she had been made to understand that the $400 she had paid was for the entire process.

The respondent admitted refunding the complainant's relatives a sum of US$50 but alleged that it was under duress as the complainant's relatives had threatened to assault him. He did not pay the balance of US$350 because he was not personally liable to refund the money since the money had been paid to the firm and not to him personally.

Regarding the first charge, we have already observed that the wording of the charge renders it meaningless. However, it is clear from the facts placed before the Tribunal that the respondent is alleged to have misrepresented to the court that he had instructions to represent the complainant

when he did not have such instructions. The applicant's Council and the Tribunal are not limited to the acts of misconduct set out in s 23 (1) of the Act only. Section 23 (2) of the Act permits the applicant's Council or the Tribunal to determine if any other act or commission constitutes unprofessional, dishonourable or unworthy conduct.

There are a number of inconsistences in the respondent's submissions regarding what happened to the US$400. The respondent states that Mr Nyamushaya told him that the amount was not adequate to process the bail application hence the demand for an additional US$600. The impression created is that the amount was strictly for the bail application. In paragraph 7 of his counter-statement, the respondent stated that the amount was part of the fees for the visit to prison and court attendances for routine remands. However, he was instructed to file a bail application and not attend routine remands. Mr *Chinamhora* conceded in oral submissions that the amount was strictly for the bail application which was never lodged with the court. The respondent failed to issue an invoice and statement to the complainant. In other words he did not account to client.

A legal practitioner is an officer of court and owes a duty to the court to be honest. The duty of a legal practitioner to the court is set out in B Crozier's **Legal Ethics: A Handbook for Zimbabwean Lawyers**, 1st Ed, 2009. The author remarked at pp 14-15 that:

> "Legal practitioners are officers of the court and, as such, have duties towards the courts in which they appear. They are not "mere agents for their clients", but have duties towards the judiciary to ensure the efficient and fair administration of justice.
>
> According to Rule 6 of the IBA International Code of Ethics:
>
> "6. Lawyers shall always maintain due respect towards the court. Lawyers shall without fear defend the interests of their clients and without regard to any unpleasant consequences to themselves or to any other person. **Lawyers shall never knowingly give to the court incorrect information or advice which is to their knowledge contrary to the law.**
>
> And the Canadian Bar Association's Code of Conduct states, as an example of prohibited conduct, that a lawyer must not:
>
> "(e) knowingly attempt to deceive or participate in the deception of a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon false or deceptive affidavit,

> suppressing what ought to be disclosed or otherwise in any fraud, crime or illegal conduct;"

He further observes at p 16 that:

> "a legal practitioner must never knowingly mislead the court, directly or by omission, but must always act fairly and in good faith"

The respondent did not respond to the allegations that he did not have instructions to represent the complainant at the hearing in April 2014. His response dated 4 January 2016 to the complaint and his counter-statement relate to the payment of the deposit by the complainant's wife. There is no explanation tendered as to what transpired in court on the day in question. This in our view is a concession to the allegation that he misrepresented to the court that he had instructions to represent the complainant. His conduct was deceitful and thus amounts to an act of misconduct.

Regarding the second charge whether or not he carried out instructions having been placed in funds, the respondent's response of 4 January 2016 and the counter statement contain concessions. He accepts that he was placed in funds in the sum of US$400. He states that he drafted an application which was not lodged with the High Court because his superior, Mr Nyamushaya had "ordered him" to demand an additional US$600. The respondent stated in paragraph 7 of the counter statement that he attended two routine remands at the Harare Magistrates Court. He does not explain why he was attending remand hearings. The attendance was contrary to client's instructions that he apply for bail. Client's instructions were for him to file an application for bail and not attend remand hearings. The respondent clearly failed to comply with client's instruction despite having been placed in funds. The applicant in our view was able to prove the second charge.

The next charge is that the respondent failed to refund fees paid by client when work had not been undertaken for which he had been paid. Again the respondent proffered a veiled concession that he did not refund fees when he was supposed to have done so. He accepts refunding the complainant a sum of US$50. As at the date of hearing he had not refunded the balance of US$350. He does not dispute that he made an undertaking to refund the balance which he did not honour. His explanation that he paid the US$50 and made the undertaking under duress is devoid of merit. The respondent is a legal practitioner who ought to know that the alleged conduct of the complainant's relatives amounts to extortion and is an offence. He did not report to police when he was being extorted. The respondent could possibly have laid a complaint against the relative

for contravening s 134 of the Code (Extortion). Failing to do so weighs against him being a lawyer who knows or ought to know the law and his rights.

In any event, having acknowledged owing the complainant, his failure to own up to the acknowledgment is unprofessional conduct. In the absence of a report to the police, an honourable and professional legal practitioner honours his undertaking. In **Legal Ethics: A Handbook for Zimbabwean Lawyers** (*supra*) B.D Crozier observes at p 36 that:

> "A practitioner must always honour his or her word. A practitioner who fails to honour a professional undertaking is prima facie guilty of misconduct…. Hence, before giving such an undertaking a practitioner must consider very carefully whether he or she will be able to honour it."

It is apparent from the respondent's response that he did not want to honour his undertaking. He only wanted reprieve from the alleged "barbaric conduct" of the complainant's relatives who wanted to assault him. He does not explain why the relative would have been barbaric to a legal practitioner who had attempted to assist their relative. It is our view that the applicant proved that the respondent failed to refund fees paid to the client when no work had been done.

The second complainant, Getrude Mufuranwa, made a complaint by way of a letter dated 23 May 2016. She alleged that her husband was imprisoned for defaulting performance of community service. She approached the respondent on 30 April 2016 and instructed to file an appeal on behalf of her husband. The respondent demanded fees in the sum of US$400. He initially demanded payment in full. However, after negotiations the respondent agreed to a deposit of US$150. The complainant paid the respondent the US$150 at Harare Central Prison with the balance to be paid later. Her husband's colleague advised her that he had already engaged another lawyer and she immediately advised the respondent that his services were no longer required whereupon she demanded a refund of the amount paid. The respondent refunded her $50 and the balance of US$100 remained unpaid as at the date of the complaint.

The applicant advised the respondent of the complaint by letter dated 20 June 2016 and invited him to respond to the complaint. The letter was received on 29 June 2016 by one Priviledge Muchazore. The respondent did not respond to the communication. These facts give rise to charges (3), (5), (7) and (9).

The respondent submitted that he retained the $100 as fees for visiting and attending to the complainant's husband at Harare Prison. He stated that a receipt was issued to the complainant's

wife and an acknowledgment was prepared when the wife indicated that she had misplaced her receipt and her husband wanted proof of the payment. He denied ever receiving the communication from the applicant.

The first two charges relating to the second complaint are that the respondent failed to refund money after withdrawal of instructions and failed to refund fees paid to the client when no work had been done. The charges are similar, and as such will be dealt with as one. The respondent did not dispute that he was paid US$150 by the complainant's wife. He further does not dispute that instructions were withdrawn, neither did he dispute refunding only US$50. A balance of US$100 remained outstanding. His explanation that the US$100 went to fees for attending to the complainant at Harare Remand Prison was unsubstantiated. It is noted that the onus to prove its case rests with the applicant. However, a bare statement as advanced by the respondent without the requisite proof of the fee note sent to the complainant, is wholly inadequate. The only conclusion that can be derived from the bare statement is that the respondent was not entitled to retain the money and therefore owes the complainant. Since instructions were withdrawn before he had started working on the matter, he was obliged to refund the outstanding amount. Failure to do so, in our view, amounts to unprofessional conduct

Turning to the question whether or not the respondent failed to respond to communication from the applicant's secretary, the applicant conceded that there was no adequate proof that the communication was served on one Priviledge Muchazore. The respondent denied that such a person was employed by Maeresera & Partners Legal Practitioners. It was incumbent on the applicant to have investigated if such a person was employed by the firm. After the respondent denied the existence of Priviledge Machazore, it would only have taken a phone call to confirm her existence. If she exists, the applicant ought to have filed the necessary affidavits to prove that she received service of the communication. Given the concession by the applicant, the respondent is found not guilty of failing to respond to communication from the applicant. We shall allude later in the judgment to the responsibility of the applicant to conduct adequate investigations.

The third complainant is Tashinga Musiyazviripo. She lodged her complaint by letter dated 15 July 2016. She alleged one Talkmore Pilime engaged the respondent on her behalf in a rent dispute with her tenant. The respondent charged fees in the sum of US$770.00 to issue summons. Pilime paid the fees but the respondent did not carry out client's mandate. Pilime made follow ups with the respondent. The respondent advised him that summons had been issued and served by the

Messenger of Court. The matter was at pre-trial conference stage. Despite request, the respondent failed to avail case number; copies of the court processes issued; receipt issued by the Messenger of Court; and proof of service. It was further alleged that he did not respond to communication from the applicant. These facts give rise to counts (2), (5), (6), (8) and (9).

Mr *Gahadzikwa* conceded that the applicant did not have the evidence to sustain the allegation that the respondent did not respond to applicant's communication. The concession in our view was proper. The applicant's communication does not form part of the application. It is therefore difficult for the Tribunal to conclude, firstly, that there was such communication and secondly that the respondent did not respond to the communication.

The respondent admitted that an amount was deposited into the Maeresera & Partners Trust Account. He however stated that only US$500 and not US770 was deposited. His instructions were to lodge an application for rent attachment which he duly did under MC 24574/16. The respondent attached an order issued by the Magistrates Court on 3 June 2016. He therefore disputed that he did not carry out work as mandated. He further submitted that he did not receive any communication from the applicant regarding the complaint.

The applicant insinuated in its oral submissions that the court order was a forgery.

It is trite that the burden of proof is upon him who affirms not on him who denies-"*Affirmat non neganti incumbit probatio*---". The applicant must therefore place before the Tribunal the requisite proof on a balance of probability of the respondent's guilt. It is necessary, as will appear later, to summarise the procedure leading to the placement of a matter before the Tribunal. The procedures are set out in By-laws 60-67 of the Law Society of Zimbabwe, 1982 (SI 314 of 1982):

(a) A complainant is usually lodged with the Secretary of the Law Society (By-law 61 (1) (a)). In some instances the applicant *meru motu* raises a complaint if allegations of misconduct by a legal practitioner come to its attention by other means other than a formal complaint;
(b) In either case, the Secretary invites a response from the respondent (By-law);
(c) If further action is warranted, the Secretary refers the complaint and the response by the legal practitioner to the disciplinary committee for consideration;
(d) The disciplinary committee is entitled to direct that further investigations be conducted. (By-law 62) It may require either the complainant or the respondent to file any affidavits and documents necessary to prove the complaint or refutal.

(e) On the completion of its investigations, the committee refers the matter to the Council. The Council may also direct that further investigations be conducted. After deliberations, Council may refer the matter to the Tribunal. (By-law 63 and s 26 (1) of the Act).

When an application is placed before the Tribunal and the Tribunal decides to hear the matter, the respondent is given an opportunity to file a counter-statement. The applicant is also given the opportunity to file a reply to the counter statement (see s 6 of the Regulations).

It is therefore clear from the procedures that the applicant had an opportunity at every turn to conduct investigations, upon receipt of complaint, through the disciplinary committee and after the counter-statement. As alluded to earlier, the long known maximum that "he who alleges must prove" equally apply to disciplinary proceedings. The applicant must place adequate evidence before the Tribunal in support of its allegations of misconduct. This requires conducting investigations as provided for in the Regulations. A complainant must be investigated. The word "investigate" means-

> "to carry out a systematic or formal inquiry to discover and examine the facts of (an incident, allegation, etc) so as to establish the truth." (Oxford Dictionary).

Conducting investigations therefore requires that the applicant do more than just receive a complaint and then seek a comment from the respondent. It requires probing and follow ups on the allegations. The importance of conducting investigations in disciplinary matters was discussed in *Gabathuse* v *Quarries of Botswana* 2012 2 BLR 644 IC. BARUTI J observed at p 653 that:

> "The combined legal significance of these two principles is that for an employee's dismissal to be called as legally valid and fair, the employee must have reached it through a process which was procedurally and substantially fair. Besides the case of *Phirinyane* v *Spie Batignollas (supra)*
>
> DINGAKE J also laid down a step by step procedure that an employer must follow if its decision is to be procedurally and substantially fair. The honourable judge did so in the case of *Makaya* v *Payless Supermarket (Pty) Ltd* [2007] IBLR 521 IC at p 507 C. The combined effort of the *Phiriyane* case and the *Makaya* case are such that they lay out a step by step disciplinary procedure which if the employers followed, would greatly reduce the risks of illegal and unfair hearings.
>
> **There is however one aspect of the disciplinary process which these two cases do not cover, but which is crucially important. This is the requirement that the employer must conduct a reasonably fair and transparent investigation into allegations of misconduct before embarking upon a disciplinary process. By so doing the employer would be able to gather facts which will allow him to assess objectively as to gathering process as every step before charges are laid, the risk of spurious changes would be greatly reduced. It is therefore crucial that employer's attention must be adverted to**

> **this step. Furthermore, in the event the employer decides to commence the disciplinary process, the facts so gathered at a preliminary investigation would be the facts it would place before the employee, as part of the hearing process.**" (Own emphasis)

The disciplining of a legal practitioner has adverse consequences on a legal practitioner whether or not the applicant ultimately succeeds. If the applicant does not succeed, the integrity and reputation of the legal practitioner is tainted thereby causing him/her irreparable harm. If it succeeds, it results in the punishment of the legal practitioner. In either case, the allegations against the respondent must therefore be well investigated to avoid spurious complaints.

The third complaint was received by the applicant on 18 July 2016. This application was only filed on 8 June 2017. The respondent filed his counter-statement on 21 August 2017 in which he averred that at paragraphs 25 to 27, that he obtained an order for the complainant and therefore complied with client's instructions. He attached the order to the counter statement. The applicant did not reply to the counter-statement and proceeded to file its heads of argument on 21 June 2018. It is incumbent upon the applicant to cause proper investigations where the response by the legal practitioner raises issues that require such investigations. There is no indication if any investigations were conducted to establish the authenticity of the order. The order bears a case reference, the name of the magistrate who dealt with the matter and an official stamp of the court. The presumption unless the contrary is established is that the order is genuine. The applicant had the opportunity to investigate the authenticity of the order upon receipt of the counter statement. It had over a year to do so. It did not.

The reason given by Mr *Gahadzikwa* for questioning the authenticity of the court order is that it was not accompanied with the application lodged by the respondent giving rise to the order. The applicant did not produce any communication that it requested the respondent to produce application and he failed to comply with the request. In any event such a request would amount to shifting the burden onto the respondent to prove the genuineness of the order, which burden rests on the applicant. The nature of the instructions by client could also be verified with the requisite investigations. Therefore, it is our view that the applicant failed to prove the count that respondent failed to execute instructions by the complainant. However, that does not exonerate the respondent from failure to account to client.

In all the complaints, the applicant failed to account for the money due to all the complainants upon demand. This clearly shows that the respondent abused trust money. Had the funds been available, there would not have been any reason for failing to pay out to the complainants.

The Tribunal accordingly finds the respondent guilty of unprofessional, dishonourable and/or unworthy conduct.

MUSAKWA J AGREES:.....

Mapaya & Partners, respondent's legal practitioners