THE LAW SOCIETY OF ZIMBABWE
versus
DOUGLAS MWONZORA

LEGAL PRACTITIONERS DISCIPLINARY TRIBUNAL
HARARE, 28 October 2016, 2 December 2016, 6 June 2018
Before: CHATUKUTA (Chairperson), MUSAKWA J (Deputy Chairperson)
MR KANOKANGA & MS S. MOYO (members)

Z. Chadambuka, for the applicant
T. Maanda, for the respondent

CHATUKUTA J: The respondent is a registered legal practitioner carrying on the business and practice of a legal practitioner under the name Mwonzora and Associates having been admitted and registered as a Legal Practitioner, Conveyancer and Notary Public on the 18th of September 1992. The applicant filed the present application seeking that the respondent's name be deleted from the register of legal practitioners on the ground that he conducted himself in contravention of the Legal Practitioners Act [*Chapter 27;07*]. It alluded to the following four acts of conduct committed by the respondent that it considered to be unprofessional thereby bringing the profession into dispute, namely that the respondent:

1. fraudulently filed court process resulting in prejudice to the complainant;
2. represented opposing parties in a single case interchangeably and therefore was conflicted;
3. failed to remit trust funds upon demand; and
4. failed to represent a client effectively despite having accepted the client's instructions and payment.

The following facts giving rise to the charges are set out in the applicant's "Summary of Evidence":

Regarding count 1, the applicant received a complaint from one Mr Makonye dated 18 June 2009 that the respondent had filed a fraudulent notice of appeal on 5 May 2007 on behalf of a client. Mr Makonye had obtained an order for the ejectment of the respondent's clients. The notice of appeal filed by the respondent was intended to forestall the ejectment of the respondent's clients. The notice bore a Master of the High Court stamp which was altered by

hand with the deletion of the word "Masters" and substituted thereof with the word "High" so that it read "High of High Court" instead of simply "High Court of Zimbabwe". The notice was filed on a Saturday, which is not an ordinary day for filing of appeals. The respondent acted in connivance with one Slanti, an assistant Registrar at the High Court, who facilitated the procurement of the date stamp and the alterations. The respondent's conduct was deceitful in that an official court stamp was unprocedurally altered seeking to create the impression that the notice of appeal had been properly issued by the Registrar of the High Court. On Monday 7 May 2007, Slanti, again acting in cahoots with the respondent, wrote a letter rejecting the notice of appeal because it had been unprocedurally filed on a Saturday. The applicant further alleged that the respondent refused or neglected to respond to the issues raised in the complaint by Mr Makonye.

On Count 2, it was alleged that the complainant, Mr Dandadzi, had a dispute with one Mr Stephen Matongo emanating from an agreement of sale in terms of which the complainant sold to Matongo an immovable property, being stand 157 Meyrick Park Township of stand 109 Meyrick Park Harare. The complainant engaged the services of the respondent. The parties reached a settlement at a Pre-trial Conference in the High Court. The respondent failed to enforce the settlement. At this stage it is necessary to quote verbatim instead of para-phrasing the evidence presented by the applicant as the evidence is the subject of preliminary points raised by the respondent:

> "1. ……
> Respondent failed to enforce a settlement which had been reached between the parties at a pre-trial conference presided over by Justice Gowora. Respondent in his response to the Secretary negotiated with the purchaser's lawyers on behalf of client as he left complainant to negotiate on her (*sic*) own leading to her prejudice, despite having been put in funds to do the job.(*sic*)
> 2. Respondent drafted, contrary to the complainant's instruction, an agreement of sale which did not protect complainant's rights in full. The complainant was asked by the Respondent and paid the Respondent's fees in full for briefing Advocate Zhou but on the court date neither Advocate Zhou nor the respondent appeared in court. Instead the Respondent assigned the matter to his Professional Assistant Mr Terera who in the complainant's opinion did a shoddy job in court.
> 3. Respondent was put in funds, in the sum of Z$60 million by the purchaser as top up to the initial selling price paid for the immovable (property). The money was supposed to have been paid by 18 April 2007. See letters attached as Annexure "D" from Respondent and Purchaser's lawyers who confirmed the amount and the agreed date of payment. In his response to the Secretary's inquiry Respondent professed ignorance of the date of payment of the top up, that he was not involved in the process of negotiating the top up and that he was

not aware of the date of payment of the top up as the 18th of April 2007. The letter written by the Respondent confirm (*sic*) that he was part of the process of negotiation through (*sic)* but neglected to eventually enforce client's rights despite having received instructions. The purchaser paid the top up a month later despite instructions by the complainant to return the purchase price to Mr Matongo's lawyers Manase and Manase. Respondent refused or neglected to return the trust money in time until the money was eroded by inflation.

4. The respondent left the complainant without proper representation in his case despite having been paid in advance to represent her (*sic*). It is clear that complainant did not owe the Respondent any fees as the Respondent did release complainant's file without requesting for outstanding fees. Through Respondent's non-execution of client's instructions complainant lost both the house and the purchase price. Respondent's negligence and incompetence in executing client's instructions is unprofessional and brings the profession into disrepute."

At the commencement of the hearing, the respondent raised four preliminary issues (and not necessarily in the order that the issues were raised). The first issue was that the applicant did not have a basis for proceeding against him in the first count where the Registrar of the High Court had written to it indicating that there was no fraudulent conduct. Further, it was submitted that filing an appeal on a Saturday did not amount to fraudulent conduct particularly where the respondent genuinely believed that he was permitted under r 4C of the High Court Rules to file the application on any day including a Saturday. Assuming that the respondent's understanding of r 4C was wrong, it would be improper for the applicant to proceed against him for misinterpreting the law.

The second issue was that the Summary of Evidence did not support the allegations in paragraph 4.2 of the Application, that is, that the respondent represented two opposing parties to a dispute and was therefore conflicted. The allegations did not therefore disclose an offence.

The third issue was that the respondent had been prosecuted in a criminal court and acquitted of contravening section 113 (2) (d) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] the allegations having been that he had stolen money due to Everson Shepard Dandadzi (the complainant in respect of paragraphs 4.2-4.3). Mr *Maanda* submitted that the allegations before the Tribunal are the same as those presented before the Regional Magistrate Court. Further, the proof required before the Tribunal in a matter involving theft is the same as in a criminal matter that is proof beyond reasonable doubt. The respondent referred to *Law Society of Zimbabwe* v *Mugabe & Anor* 1994 (2) ZLR 356 where it was held that proof beyond reasonable doubt is required in an a charge of theft of funds. He therefore raised the defence of *autrefois acquit*.

The fourth and final issue is that the applicant did not comply with the provisions of the By Laws in presenting the application before the Tribunal. It was contended that the complaint by Mr Dandadzi was prematurely before the Tribunal in that reference of the complaint to the Tribunal had not been sanctioned by the applicant's Council as is required under section 62 of the By Laws of the Law Society. The applicant has failed, despite numerous requests to provide proof of the authorization up to date. Instead it produced minutes of the Council Meeting held on 9 July 2010 as proof thereof which do not in any way refer to the complaint by Dandadzi. It only refers to the first count of the altered notice of appeal.

Regarding the question whether or not the respondent filed fraudulent court process or was conflicted, Mr *Chadambuka*'s conceded that there was no basis for proceeding against the respondent in respect of the first count in view of the response from the Assistant Registrar that the respondent did not have a hand in the alteration of the date stamp and also in view of the letter from Slanti that she/he had erroneously accepted a notice of appeal on a Saturday. What is of concern to the Tribunal is that the applicant approached the Tribunal in the present matter on 13 March 2013. The letter from the Assistant Registrar was already out. How the applicant sought to prove its case that the respondent had a hand in the alteration of the stamp is anyone's guess.

Mr *Chadambuka* further conceded that the Summary of Evidence did not in any way allude to the fact that the respondent was conflicted. He further conceded that the allegations in paragraphs 1 of the Summary of Evidence that the respondent "negotiated with the purchaser's lawyers on behalf of client as he left complainant to negotiate on (his) own leading to her prejudice despite having been placed in funds to do the job" were contradictory if not meaningless. The respondent could not have negotiated for client and at the same time be said to have left the same client to negotiate on his own. He further conceded that the respondent did not draft any sale agreement which did not protect the complainant's interest. It appears the respondent only came into the picture when a dispute over the implementation of the agreement had arisen

Regarding the *autrefois acquit* defence, he submitted that the charge against the respondent before the Tribunal is different from the criminal charge before the Regional Magistrate Court. The respondent is charged before the Tribunal for his failure to remit trust funds on demand. The charge in the Regional Magistrates court was theft. The applicant submitted in response that whilst the current proceedings are premised on the same facts as in the criminal charge and that the burden of proof is the same, the charges are different,

disciplinary proceedings being *sui generis*. He said *autrefois acquit* is a criminal law defence which is not available to the respondent in a disciplinary matter.

Having made these various concessions, only two issues remained for determination. The first is whether or not the defence of a*utrefois acquit* can be raised by the respondent as regards Count 2. The second issue is whether or not the matter was prematurely brought before the Tribunal. However, despite the concessions, which, in my view were correct, it is necessary that I later comment on the respondent's conduct regarding all the issues raised.

Both parties were agreed that the issues raised by the respondent were akin to an exception to a charge in a criminal matter and that the Tribunal could in the present application apply the principles applicable in exceptions. I find no basis for not doing so. I am mindful of the fact that the current proceedings are not criminal or prosecutorial in nature. As stated in *Law Society of Zimbabwe* v *Sheelagh Cathrine Stewart* HC-H- 39 – 89, they are *sui generis*. It was observed by EBRAHIM J at p 6 that:

> "In an application, such as this, the court is not dealing with a normal civil or criminal case where the parameters of the sentence are defined by the amount of the claim or by judicial precedent. The Law Society petitions the Tribunal to discipline the delinquent practitioner in a manner it sees fit, if the Tribunal finds that the practitioner has been guilty of unprofessional, dishonourable or unworthy conduct. Such proceedings (before a court) have been described as being *sui generis* (see WESSELS, C.J. in *Solomon* v *Law Society of the Cape of Good Hope*, 1934 AD 401 At 40."

In *Siwanda Kennedy Mbuso Sibanda* v *The Law Society of Zimbabwe* S.C. 162-91 argument was advanced on behalf of the appellant that such proceedings were akin to criminal proceedings. In rejecting that proposition MCNALLY JA at p.3 of the cyclostyled judgment had this to say-

> "Certainly the Criminal Procedure and Evidence Act is not applicable, even by analogy, to the proceedings. They are governed by the provisions of the Legal Practitioners Act and Regulations (S.I. 580 of 1981) as amended by S.I. 695 of 1981). Section 11 (4) of the Regulations provides that the chairman of the Tribunal shall regulate the procedure at an inquiry."

However, having said that, there is nothing that precludes the Tribunal from borrowing procedures from the Criminal Procedure and Evidence Act and applying them to the present disciplinary proceedings, not wholesale but with the necessary adaptations as long as the procedures are consistent with the dictates of rules of natural justice. In so doing, the Tribunal should therefore not be misconstrued as elevating the matter to a criminal prosecution or that the Criminal Procedure and Evidence Act is applicable to these disciplinary proceedings. This

approach is, in my view, consistent with s 11 (4) of the Disciplinary Tribunal Regulations SI 580/81 which empowers the Chairperson of the Tribunal to regulate the procedures at the inquiry.

In terms of Section 146(1) of the Criminal Procedure and Evidence Act [Chapter 9:07], an indictment should set out the offence with which the accused is charged in such manner and with such particulars as to inform the accused sufficiently of the nature of the charge he is facing. Where the charge does not comply with these requirements an accused person can file an exception on the basis that the pleadings are vague and embarrassing. The defect must appear on the face of the pleadings. In deciding on the exception the court will take the facts alleged as correct and will limit itself to the facts in the pleadings. (See *S* v *Siphambili* 1995 (2) ZLR 337.)

The charge raised by the applicant does not disclose that the respondent is conflicted. The assertions in the Summary of Evidence do not disclose that the respondent represented two opposing parties. The Tribunal fails to appreciate where the applicant got that information from. As stated in *Ford* v *Law Society of Rhodesia* 1997 (4) SA 178 (RAD) and cited with approval in *The Law Society of Zimbabwe* v *Siwanda Kennedy Mbuso Sibanda* p13 a respondent has to be apprised of the complaint with clarity, certainty and reasonable particularity. It was observed at p188 E-G that:

> "Natural justice requires that when a complaint of misconduct is leveled against a practitioner, it should be set out in terms which leave him in no doubt at all as to its precise nature: see Incorporated Law Society v A. B. van Os, 1906 T. S. 733 at 738; Incorporated Law Society v Orange Free State v H., 1953 (2) S.A 263 (O). Where a practitioner's integrity and future are at stake, the need for clarity, certainty, and reasonable particularity in complaints brought against him can hardly be over-stressed."

In *Siwanda Kennedy Mbuso Sibanda* v *The Law Society of Zimbabwe*, upholding the decision of the Tribunal MCNALLY JA commented on the adequacy of the Summary of Evidence and more particularly that there were documents attached to the application in support of the Summary of Evidence. That is not the position in the present matter.

Turning to the question whether or not the matter is prematurely before the Tribunal, the law pertaining to bringing a matter before the Disciplinary Tribunal is provided for in the Legal Practitioners Act and the Law Society By-Laws 1982 herein after referred to as the By Laws. Section 26 of the Act provides for the manner in which Council of the Society refers matters to the disciplinary tribunal. Part V111 of the By Laws deals with the manner in which the matter is also supposed to be brought before the tribunal. By-Law 62 provides as follows:

"(1) Upon receipt of any matter referred to it by the secretary in terms of by-law 61, the disciplinary Committee shall cause such further investigation to be made in the matter as it deems fit and by notice written and dispatched by the secretary, on its instructions, to the complainant, legal practitioner or legal assistant as the case may be:

(a) require the person addressed-
(i) to make or provide affidavits by a specified date supporting the facts and circumstances alleged by him;
(ii) to produce, by a specific date, any book, deed, document, paper or other writing in his possession or under his control which in any way relates to or concerns the matter in question;
(b) invite the legal practitioner or legal assistant concerned to make written representations, by a specified date, on the substance of the complaint and such other matters as it may direct.

2) Upon proof of the dispatch of any notice referred to in sub-by-law 1, and after the expiry of any date specified therein, and on completion of its investigations, the disciplinary committee shall proceed to consider whether a *prima facie* case of unprofessional conduct is disclosed, and shall thereafter refer the matter to the council, with its findings and recommendations."

By-Law 63 provides that:

"(1) When any matter is referred to it by the disciplinary committee in terms of by-law 62 the council shall consider the matter and the disciplinary committee's findings and recommendations, and shall proceed hereinafter in this bylaw set out.

(2) If the council considers that further investigation is necessary before the decision is taken, it shall refer the matter back to the disciplinary committee for further action in terms of by-law 62, with such directions as it thinks fit.

(3) …….

(4) If the council considers that a *prima facie* case of unprofessional conduct is disclosed, and has satisfied itself that a legal practitioner or legal assistant concerned has been afforded a reasonable opportunity to reply to the substance of the complaint, it may-

(a) refer the matter to the disciplinary tribunal for inquiry; or

(b) decide to adjudicate itself upon the matter, where for any other reason it considers that the matter should not be the subject of inquiry by the disciplinary tribunal, and shall thereupon take such action including admonishing the legal practitioner or legal assistant as it thinks fit."

It follows from the above provisions that Council can refer a matter to the Tribunal only after it has concluded its investigations and deliberations. In other words, the applicant must follow the prescribed procedure to place the respondent before the Tribunal. However, the Council can bypass the procedures set out in Part VIII. In terms of By-Law 67:

"The council shall have the right to apply to the disciplinary tribunal for an order against a legal practitioner or a legal assistant in terms of subsection (1) or (2) of the Act without following

> the procedure provided for in this Part, and without any notice to the legal practitioner or legal assistant, other than such notice as may be required in terms of the Legal Practitioners Disciplinary Tribunal Regulations, 1981 if:
> (a) the member has been convicted of an offence of the kind referred to in subsection (3) of section 28 of the Act; or
> (b) the council is of the opinion that delay in the making of the application might be prejudicial to the public or any member thereof, or to the administration of justice, or to the reputation of profession."

In essence, the complaint must be such that Council considers it to warrant immediate attention for Council to proceed under By-Law 67.

It is common cause that the respondent wrote to the applicant on 29 April 2013, 3 July 2013, 11 October 2013 and 3 July 2014 respectively requesting proof of Council's deliberations on count 2. The response by the applicant is dated 8 July 2016 to which is attached minutes of the Council's meeting of 9 July 2010. These minutes only pertained to count 1 and nothing on count 2. As at the date of hearing of the matter the applicant had not availed the respondent with the requested information. The only conclusion to be drawn from this failure is that Council did not comply with the procedures set out in Part VIII of the By-Laws. Had the minutes been available there is nothing that would have precluded the production thereof and no reasonable explanation was advanced for the failure.

As provided for under By-Law 67, Council can short circuit proceedings in cases of emergency and only if it is in the public interests to do so. The complaint in count 1 was for events that occurred in 2007. The complainant only filed his complaint with the applicant in 2009. Council deliberated on the complaint in July 2010 and only brought this matter before the Tribunal in 2013. It certainly cannot be said to having been proceeding in terms of By-Law 67. Regarding both counts, the respondent was not convicted of any offence as provided under section 28(3) of the Act warranting Council to proceed in terms of that by-law. There was no basis for Council to circumvent Part VIII of the By-Laws.

These proceedings were therefore prematurely brought before the Tribunal.

The last issue for determination relates to the defence of *autrefois* acquit with respect to count 2. The defence of *autrefois acquit* is aptly provided for in section 180 of the criminal procedure and evidence Act. The requirements for this defence to succeed are that an accused should have been tried substantially on the same charge, by a court of competent jurisdiction and on the merits.(See *R* v *Watson* 1970(1) SA 320.) Whilst the burden of proof in disciplinary matters involving grave charges is beyond reasonable doubt that does not mean that the *autrefois acquit* defence is available to a practitioner charged under the Legal Practitioner Act.

The respondent sought to rely on the headnote of *Mugabe and Anor* v *Law Society of Zimbabwe* (*supra*) at 356 E-F which reads

> "The burden of proof at disciplinary proceedings before the legal practitioners disciplinary Tribunal varies with the gravity of the offence charged. Where the offence has strong criminal connotations such as misappropriation of trust money, the burden is on the Law Society to prove its case beyond a reasonable doubt. The fact that the legal practitioner concerned has already been convicted of a criminal offence would be regarded in the Tribunal as *prima facie* proof that he had in fact committed the offence."

This is consistent with section 28(3) of the Act which provides that:

> "(3) Where a registered legal practitioner has been convicted within or outside Zimbabwe of an offence by a court of law and the Council of the Society or the Disciplinary Tribunal is of opinion that such offence constitutes unprofessional, dishonourable or unworthy conduct on the part of the legal practitioner, whether as a legal practitioner, notary public or conveyancer, the Council of the Society or the Disciplinary Tribunal, as the case may be, may, if it thinks fit, on proof before it of such conviction and without hearing further evidence, deal with the convicted person in accordance with this Act:
>
> Provided that the convicted person shall be afforded an opportunity of tendering, in writing or in person or by his legal representative, as he may elect, an explanation to the Council of the Society or the Disciplinary Tribunal, as the case may be, in extenuation of his conduct."

Mugabe and Anor v *Law Society of Zimbabwe* cannot be said to be authority for the proposition that if charged of a criminal offence one cannot then be charged of a criminal offence. The proposition emerging from the case is that because of the gravity of the charge against the legal practitioner and the seriousness of the offence, the proof required in the disciplinary hearing is proof beyond a reasonable doubt. In other words, even where the legal practitioner is acquitted in a criminal court on facts relied on in a disciplinary hearing, the Tribunal is not precluded from hearing the disciplinary matter as long as the applicant is required to prove its case beyond reasonable doubt. Where a respondent before it has been acquitted of a criminal offence, the Tribunal will require the applicant to prove its case beyond reasonable doubt. Section 28(3) therefore allows for a respondent who may have been convicted of an offence to be referred to the Tribunal. This is recognition of the fact that proceedings in a criminal court and before the Tribunal are different processes for different purposes with different requirements despite arising from the same facts. Criminal proceedings are generally initiated by the police for breach of criminal law regarded as a wrong against society as a whole. Disciplinary proceedings are on the other hand initiated by the applicant with the aim of regulating the relationship between a legal practitioner and the applicant and maintain discipline in the legal profession. Had the proceedings been the same, a legal

practitioner convicted before a criminal court would escape proceedings before the Tribunal on the basis that he/she would suffer double jeopardy. That is not the position. The defence raised by the respondent is therefore not applicable in the present disciplinary proceedings.

Having determined the two issues remaining after the applicant's concessions, it would be remiss for me not to comment on the state of the application as a whole. The Law Society is a body that regulates the conduct of the legal practitioners. Its main responsibility is to safeguard public interest and the interests of the profession. The Tribunal places great reliance on its opinion.

In the case of *Law Society of Zimbabwe* v *Sheelagh Catherine Stewart* HCH 39-89 this was said about the responsibilities of the Law Society:

> "The Law Society is an exclusive professional organization and where such a Society is of the opinion that the particular offender is no longer suitable as a member thereof and should be prevented from practising the profession concerned, serious consideration should be given to that opinion. (per M T Steyn, J. in *Law Society of the O.F.S.* v *Schoeman*, 1977 (4) SA 588 at 603 A (in translation).

In this regard, DE VILLERS, J. said in *Transvaal Incorporated Law Society* v *K.*, 1950 (4) SA 449 at 454-455:

> "The Law Society are custodians of the honour of their profession and their vigilance in bringing misconduct on the part of practitioners to Court is a matter that the Court appreciates. Their opinion is entitled to be given due weight. When they form a view as to what the punishment should be and ask for a particular form of sanction, the Court is loathe not to fall in with the suggestion unless there is a reason to mete out a lesser punishment."

The rationale for placing reliance of the opinion of the Law society is also found in *Chizikani* v *The Law Society of Zimbabwe* 1994 (1) 382 at 390 C-E where GUBBAY CJ (as he then was) remarked 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 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 *Matthew* 1989 (4) SA 389 (t) at 394 B-396 H."

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 a legal practitioner from its register. In other words the applicant, need to set the tone for efficiency and diligence. This has been lacking in the present case. The applicant brought a matter prematurely before the Tribunal, yet it expects as it should legal practitioners to adhere to legal requirements as in count 1. The errors in the pleadings which were conceded to by Mr *Chadambuka* are not excusable. A male complainant was referred to as a female. Allegations on the face of the application were not substantiated by the Summary of Evidence and more so where the applicant had indicated that it was not intending to call witnesses.

In conclusion, the points *in limine* raised by the respondent are sustained. With the concessions made by Mr *Chadambuka* that there is no basis for proceeding against the respondent on the first count, the charge on that count in our view falls away. Regarding count 2, the matter is prematurely before the tribunal.

Both parties were partially successful and therefore each party shall be its own costs.

It is accordingly ordered that:

1. The allegations under count 2, namely that the respondent failed to remit trust funds upon demand, be and are hereby remitted to applicant's Council for deliberations.
2. Each party shall bear its own costs.