

THE LAW SOCIETY OF ZIMBABWE
versus
JAMES MAGODORA

HARARE, 8 December 2021 & 22 June 2022
Before: CHATUKUTA J (Chairperson), MUSAKWA J (Deputy Chairperson)
MR D KANOKANGA & MRS S. MOYO (members)

LEGAL PRACTITIONERS DISCIPLINARY TRIBUNAL

N Chikowore, for the applicant
Respondent in person

CHATUKUTA J: The respondent faced one charge of contravening section 23 (1) (d) of the Legal Practitioners Act [*Chapter 27:07*]. The applicant alleged that the respondent withheld payments of trust funds without lawful cause. He also faced two other counts of contravening By Laws 70 E (2) and 70F, and 65 (a) of the Law Society By-Laws, 1982 (SI 314 of 1982) (the By-Laws) respectively. The applicant alleged that the respondent failed to promptly pay monies received in his trust account when it became due in contravention of By-Law 70 E (2) and 70 (F) of the By Laws. It was further alleged that he unreasonably neglected to respond to correspondence from the applicant in contravention of By Law 65 (a).

The background to the charges is as follows: Regarding the first charge, the respondent facilitated negotiations for the sale of an immovable property owned by his client. The complainant who was the purchaser paid a sum of US\$16 484.00 into the respondent's trust account in anticipation of the parties concluding an agreement of sale. The parties failed to agree on some of the terms. Resultantly, no agreement was signed by the complainant and the respondent's client. On 11 November 2016, the complainant, with the assistance of Bhunu and Associates Legal Practitioners, requested from the respondent a refund of the amount of US\$16 484.00 paid into the respondent's trust account. The respondent failed to remit the amount to the complainant. The latter lodged a complaint with the applicant by email of 24 November 2016. On 15 December 2016

the applicant invited the respondent to reply to the complaint. The respondent failed to respond to the request.

The respondent only remitted the amount of US\$16 484.00 to the complainant on 25 October 2018. His explanation for the delay of two years was that he had given the money to his client who wanted to pay school fees for his children. The client delayed to return the money in time for him to reimburse the complainant.

The second charge arose from a complaint to the applicant lodged by clients who had engaged the respondent in a labour dispute with their employer. The employer paid an amount of USD 11 682.85 into the respondent's trust account. The respondent remitted a sum of US\$4 050.00 to the employees leaving a balance of US\$7 632.00.

On 16 May 2018, the applicant requested the respondent to reply to the complaint. The respondent failed to respond to the request. He also failed to respond to follow up letters from the applicant. The non-response to the communication from the applicant was basis for the third charge.

On 8 December 2021, the Tribunal found the respondent guilty of unprofessional, dishonorable or unworthy conduct. Both the applicant and the respondent have filed written submissions in aggravation and mitigation respectively.

The law is settled that, generally, a legal practitioner's name should be deleted from the Register of Legal Practitioners if he is found to have mishandled trust funds. The legal practitioner's name can be saved from deletion from the register only in exceptional circumstances. (see *Chizikani v Law Society of Zimbabwe* 1994 (1) ZLR 382 (SC).) In arriving at its decision, the Tribunal is guided by the following objectives:

- a) upholding public confidence in the administration of justice;
- b) safeguarding the collective interest in upholding the standard of the legal profession.
The Tribunal is guided by the opinion of the applicant which is the regulator of the profession. See *Law Society of Zimbabwe v Sheelagh Cathrine Stewart* HH 39-89.
- c) punishment of the errant legal practitioner for the misconduct
- d) setting standards to be observed by other legal practitioners and in the process deterrence against similar offences by like-minded legal practitioners

In *Muskwe v Law Society of Zimbabwe* GWAUNZA DCJ SC 72-20 remarked at paragraph 9 that:

- “9. 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*)”

The applicant has sought deregistration of the respondent. The issue for determination is therefore whether exceptional circumstances exist compelling the Tribunal not to deregister the respondent.

Counsel for the respondent submitted as follows: He is 55 years old. He is a family man with four children and is the sole breadwinner. Three of his children are at university. He was registered as a legal practitioner in 1994.

He compensated the first complainant in full. He in addition offered the complainant a plot being sub-division 3 of Roslin Farm. The complainant has since taken occupation of the plot, constructed a dwelling and is into animal husbandry and agriculture. In support of these developments, the respondent attached two receipts from Zibagwe Rural District Council of payments made towards development levy for 2013 to 2020 and other fees. Also attached is a copy of a sale agreement dated 18 July 2020 between the respondent (being the purchaser) and one Benjamin Mahlatini (being the seller) for the purchase of Plot 3 of Roslin Farm. The respondent submitted that he had suffered “double jeopardy” in that he compensated the complainant in full and in addition purchased a plot for the complainant.

He refunded the second complainant leading to the complainant withdrawing his complaint to the applicant.

He apologized for the failure to respond to the communication from the applicant and submitted that he was traumatized by the entire process. He was further traumatized when the applicant withheld the practicing certificate for year 2019. He was issued with a practicing certificate by the applicant for the year ending December 2022. This was indicative of compliance with the registration requirements set by the applicant.

The applicant submitted that there were no exceptional circumstances justifying deviation from the general principle. It was submitted as follows: The trust funds in respect of the first complaint were substantial. In spite of demand for the release of the funds having been made in 2016, compensation was only made in October 2018.

The respondent set up the law firm, Magodora & Partners, in January 2002. The firm has been in existence for twenty years with the respondent being the principal of the firm. The respondent's conduct was not exemplary for such a senior practitioner and principal of a law firm.

With respect to the respondent's submissions in mitigation, the applicant submitted that the documents attached to the submissions did not disclose in what way they related to the complainants. It was submitted that the receipts did not have the first complainant's name. It was further submitted that the complainant was not a party to the agreement of sale of sub-division 3 of Roslin Farm.

We are of the view that the applicant did not advance any exceptional circumstances warranting deviation from the established principle that misappropriation of trust funds renders a legal practitioner unfit to practice law. We take note of the mitigating factors submitted regarding the respondent's personal circumstances. We are however of the view that the circumstances are nothing out of the ordinary.

The fact that the respondent has not had a brush with the applicant during the twenty years of practice would ordinarily have been mitigating. However, the acts of misconduct that placed him before the Tribunal are serious and go to the core of the legal profession. As rightly submitted by the applicant, the seniority of the respondent in his firm and in the profession weighs against the mitigating factors. The respondent's otherwise unblemished career pales into insignificance against the seriousness of the charges.

The seriousness of the acts of misconduct is further compounded in the first charge by the delay in remitting trust funds to the complainant. The complainant was put out of funds as she had to seek legal assistance from yet another firm to recover what was owed to her by the respondent. In spite of the intervention of another legal firm, the respondent still failed to remit the money to the complainant. The intervention of the applicant did not have immediate positive impact. From 15 December 2016 up to 25 October 2018, the respondent was unyielding and not paying any heed to the regulator's intervention. This in our view was a show of disdain of the regulator of the profession and should not be tolerated.

The disdain of the regulator is again reflected in his failure to respond to communication from the applicant in relation to the second act of misconduct.

The respondent did not suggest any penalty that should be imposed on him. He simply submitted that the penalty suggested by the applicant "is unduly harsh and disproportionate to the gravity of the offences." Neither the imposition of a fine nor the suspension of the respondent would in our view be appropriate in view of our finding that there are no exceptional circumstances that preclude the Tribunal from causing the deletion of the respondent's name from the register of legal practitioners,

In the result, 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.