THE LAW SOCIETY OF ZIMBABWE
versus
TICHAONA GOVERE

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

T. T. G. Musarurwa, for the applicant
Respondent in person

CHATUKUTA J: The respondent was registered as a legal practitioner, conveyancer and notary public on 12 December 2007. The applicant seeks in this application to have his name deleted from the Register of legal practitioners, notary public and conveyancers on allegations that he acted unprofessionally, and dishonourably of a legal practitioner. The applicant alleges that the respondent, conducted himself in contravention of s 23 (2) (b) of the Legal Practitioners Act [*Chapter 27:07*] (the Act) by instructing the Messenger of Court to attach, pursuant to a court order, property pertaining to a debt that had already been paid.

The allegations arise from a complaint lodged with the applicant on 20 February 2013 by Mr. Gumbo of Atherstone & Cook on behalf of the complainant, Mr. Tafadzwa Chinamo. The respondent represented Communication & Allied Industries Pension Fund (the Fund) in an action against Mr Chinamo. The Fund was claiming an amount of US$27 000.00 from Mr. Chinamo in arrear rentals. The parties appeared in court on 25 October 2012. It was argued before the court that Mr. Chinamo had paid an amount of US$5 000.00 as part of the arrear rentals. It is alleged that the respondent conceded the point. The court issued an order in the sum of US$27 000.00. A discussion was held between Mr. Gumbo and the respondent where it was agreed that the court order ought to have reflected an amount of US$22 000.00 taking into account the US$5 000.00 paid by Mr Chinamo. A payment in the sum of US$16 000.00 was made by Mr. Chinamo into Messrs Govere Law Chambers' trust account leaving a balance of US$6 000.00. On 3 December 2012, US$6 569.82 was paid into Messrs Govere Law Chambers' account. The respondent was

furnished with the proof of payment of both amounts. Mr. Gumbo was under the impression that Mr. Chinamo's debt had been extinguished with the payment of the two amounts as per the purported agreement between Mr. Gumbo and the respondent. However, the respondent proceeded to instruct the Messenger of Court to attach goods to satisfy the court order. Mr. Chinamo paid to the Messenger of Court US$5 812.00 to forestall seizure of his property.

At the hearing of the application, the respondent raised three preliminary points. The first point is that the matter was prematurely before the Tribunal in that the applicant's Council did not comply with the provisions of s 26 of the Act as read with s 63 of the By Laws, 1982. It was submitted that the minutes of the purported deliberations by Council were identical to the minutes of the applicant's Disciplinary Ethics Committee (the DEC). It was contended that this was evidence that Council did not deliberate on the recommendations of the DEC but simply regurgitated the recommendations of the DEC.

The second point *in limine* is that the matter was prematurely before the Tribunal for the reason that the DEC and Council had not conducted full investigations into the matter. It was submitted that both the DEC and Council did not consider all relevant information referred to by Mr. Gumbo in the letter of complaint and more particularly the record of proceedings before the Magistrates Court in case No. 16302/12. It was further submitted that had the DEC and Council considered case No. 16302/12, they would have established that the respondent did not concede in the Magistrates Court that the amount of US$5 000.00 should have been deducted from the amount claimed by the Fund.

The last point is that the charges preferred by the applicant were fatally defective for want of particularity, specificity, clarity and certainty. It was argued that the Tribunal predicated its case on s 23 (2) (b) of the Act as it had found that the respondent did not commit any acts of misconduct envisaged in s 23 (1) of the Act. It was submitted that the applicant further alleged in its heads of argument that the respondent contravened By-Law 70F of the By-Laws. It was argued that the allegations referred to in the heads of argument were divorced from the allegations in the application and summary of evidence. It was contended that the respondent was entitled to know the exact charges that he was facing. It was submitted that it was therefore improper for the applicant to address in the heads of argument on charges that were different from those preferred in the application.

Per *contra*, Mr. Musarurwa, for the applicant, was at great pains to explain the identical findings of the DEC and Council. He submitted that the fact that the findings were identical did not mean that Council had not deliberated on the recommendations of the DEC. With regards the second preliminary point, he argued that the record of proceedings is the respondent's defence. The respondent was therefore entitled to place before the Tribunal the record of proceedings if he believed that the record was exculpatory. It was submitted that it was not for Council to do so. It was contended that the charges preferred against the respondent fell squarely under s 23 (2) of the Act.

It is our view that all three points raised by the respondent *in limine* are merited.

A perusal of the minutes of the meeting of the DEC held on 16 October 2018 in Bulawayo and those of the meeting of Council held on 26 November 2018 are identical except for those who were in attendance at the meetings, the replacement of "The DEC" with "Council" and the numbering of the paragraphs. What is striking is that the minutes of the DEC meeting end with paragraph 3. The minutes of the meeting of Council start with paragraph 4 as if they are a continuation of the minutes of the DEC. Also striking is the fact that the subparagraphs of paragraphs 4 and 5 of the Council minutes appear as follow up paragraphs to 2 and 3 respectively of the DEC minutes. Paragraph 2 of the DEC minutes end with subparagraph (b) and the corresponding paragraph 4 of Council minutes start with subparagraph (c) instead of (a). Paragraph 3 of the DEC minutes end with subparagraph (f) and the corresponding paragraph 4 of Council minutes start with subparagraph (g) instead of subparagraph (a). The findings of both the DEC and Council are identical, word for word.

As rightly submitted by the respondent, this was a clear case of cut and paste. In such a case, Council cannot, by any stretch of imagination be said to have considered the recommendations of the DEC. The Tribunal has in numerous cases emphasised that it is enjoined to rely on the recommendations of the applicant in its consideration of applications for the disciplining of legal practitioners. It has been highlighted that the applicant, as the regulator of the legal profession must comply with the same law it expects legal practitioners to adhere to. (See the *Law Society of Zimbabwe* v *Douglas Mwonzora* 2018 (1) ZLR 562, *Law Society of Zimbabwe* v *Edwin Hamunakwadi* HH 83-21 and *Law Society of Zimbabwe* v *Charles Chinyama* HH 362/21)

It is therefore unfortunate that the Tribunal must yet again restate that the applicant must comply with the By Laws. It is unacceptable that the applicant should find itself in such a position.

Having found that the evidence before the Tribunal does not disclose that the Council deliberated on the recommendations of the DEC, it is our finding that matter against the respondent was prematurely referred to the tribunal.

The second preliminary point, raised the same issue as the first, that the Tribunal prematurely referred the matter to the Tribunal. In the case of *Law Society of Zimbabwe* v *Edwin Hamunakwadi* (*supra*) the Tribunal made the following remarks on the need for Council to conduct proper investigations before satisfying itself that a complaint warrants referral of a legal practitioner to the Tribunal. It was remarked that:

> "Thus both the By- laws and the Act require the Council to seriously consider the allegations calling for more information or directing that there be further investigations if necessary. This process can only follow after the council has considered the matter before it to see if there are any deficiencies in terms of the available information. If satisfied to also reflect that satisfaction with the disciplinary committee's consideration of the matter and the findings thereof. These processes are meant to safeguard both the complainant and the respondent by ensuring that a decision to refer the matter to tribunal is justified or that there is no case."

The Tribunal again refers to its remarks in *Law Society of Zimbabwe* v *Bopoto* HH 62-20 that:

> "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:
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> > "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)*
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> > 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.
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> > **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 complaint raised in Mr. Gumbo's letter of complaint hinges on what transpired in the Magistrate's Court. Mr. Gumbo contends that the respondent conceded before the court a quo that the amount of US$5 000.00 ought to have been deducted from the US$27 000.00 claimed by the Fund. Mr. Gumbo's complaint was that the respondent acted contrary to that concession before the court and the subsequent concession by the respondent that the court order was erroneous and the amount payable would exclude the US$5 000.00. Since the genesis of the complaint was what transpired during court proceedings, it would have been imperative for the applicant to have secured the record of the court proceedings. It is amiss for the applicant to argue that it is the respondent who required the record to exculpate himself and therefore should have placed same before Council. Once the respondent replied to the complaint and raised a defence, Council ought to have had regard of the Magistrates Court record before referring the matter to the Tribunal. It thus prematurely referred to the Tribunal a matter which had not been properly investigated.

With respect to the clarity of the charge against the respondent, the applicant charged the respondent with a contravention of s 23 (2) (b) of the Act as appears in paragraph 3 of the Application. Section 23 (2) reads:

> " Subsection (1) shall not in any way—
> (*a*) preclude the Society from prescribing in by-laws further acts which shall constitute unprofessional, dishonourable or unworthy conduct on the part of a registered legal practitioner, notary public or conveyancer; or
> (*b*) limit the discretion of the Council of the Society, the Disciplinary Tribunal or a court in determining whether or not any act or omission, which is not specified in subsection (1) or in by-laws, constitutes unprofessional, dishonourable or unworthy conduct on the part of a registered legal practitioner, notary public or conveyancer."

Section 23 (2) (b) does not create an offence. It allows Council or the Tribunal to consider acts or omissions which are not classified as acts of misconduct in 23 (1) or in by-laws as such.

The applicant did not submit whether the respondent's conduct was not specified in s 23 (1) or any by-law. Surprising, the applicant submits in paragraph 17 of its heads of argument that the respondent contravened By-Law 70F of the Law Society By-Laws, 1982. By-Law 70F proscribes the failure to pay promptly money in a trust account that becomes due and payable. It further submits in paragraph 27 of the heads that the respondent contravened s 23 (1) (d) of the Act. Section 23 (1) (d) proscribes the withholding of payment of trust money without lawful excuse. Once the conduct of the respondent fell under either By-Law 70F or s 23 (1) (d), the applicant could not invite the Tribunal to exercise its powers in terms of s 23 (2) (b) of the Act. Further, the applicant could not proceed to address the Tribunal in the heads on charges it had not preferred against the respondent. The charges against the respondent appear in paragraph 3.6 of the Application which reads:

> "3.6 By using a court order and ordering the Messenger of Court to attach assets pertaining to a debt that had actually been paid in full whilst knowing so, the Respondent committed an act of misconduct in that the Respondent failed to act with integrity, failed to treat professional colleagues with respect and fairness and engaged in conduct that diminished public confidence in the legal profession and the administration of justice, thereby bringing the legal profession into disrepute."

Two acts of misconduct are raised in paragraph 3.6 the first being that the respondent instructed the Messenger of Court to execute an order that had been fully discharged. The second conduct complained of is that the respondent did not treat a professional colleague with respect and fairness (whatever that was intended to mean). The act of mutates in paragraph 10 of the Summary of Evidence which reads:

> "10 The respondent's belated unilateral apportionment towards "costs" of the amount of $5 000.00 which was paid for arrear rentals, is unacceptable unprofessional conduct which should be censured. he receipted the payment as rental arrears and the defendant intended it as such, he could not thereafter deem the amount to be his costs without any taxation or the agreement of the defendant. it is even more reprehensible that he went on to attach the defendant's property in respect alleged non-payment of the very amount which he had snatched."

The act of misconduct is now the unilateral apportionment of arrear rentals towards costs.

It is not clear what the acts of misconduct complained of were given the multiple acts referred to in the application and heads of argument. Under the circumstances, the respondent would have been at a loss as to which charge to respond to.

The preliminary points raised by the respondent have merit. Council prematurely referred the matter to the Tribunal. The charges against the respondent are not clear, specific and certain. The preliminary points must be upheld.

As for the respondent/s prayer for costs, costs will follow the result.

It is accordingly ordered as follows:

The matter be and is struck off the roll with costs.