REPORTABLE (30)

LAWMAN CHIMURIWO
v
THE LAW SOCIETY OF ZIMBABWE

SUPREME COURT OF ZIMBABWE
BHUNU JA, CHIWESHE JA & CHITAKUNYE JA
HARARE: 1 FEBRUARY 2022 & 31 MARCH 2023

L. Uriri, for the appellant.

G. Madzoka, for the respondent.

CHIWESHE JA: This is an appeal against the whole judgment of the Legal Practitioners Tribunal "the Tribunal" sitting at Harare, dated 30 June 2021 convicting the appellant of contravening s 23(1) (d) and s 23 (1) (c) of the Legal Practitioners Act [*Chapter 27:07*] as read with By Laws 70 E and 70 F of the Law Society of Zimbabwe and sentencing him to the removal of his names from the Register of Legal Practitioners, Notaries Public and Conveyancers.

Aggrieved by both the conviction and sentence, the appellant has noted the present appeal for relief.

THE FACTS

The appellant is a legal practitioner practising under the firm Chimuriwo Attorneys at Law. He was arraigned before the Tribunal to answer charges of unprofessional, dishonorable and unworthy conduct laid against him by the respondent. The charges arose following certain complaints made to the respondent by Mr and Mrs K. Mafukidze. The respondent sought an order for the deletion of the appellant's name from the register of legal practitioners, notaries and conveyancers. It was alleged that the appellant had contravened s 23 (1) (d) and s 23 (1) (c) of the Legal Practitioners Act [*Chapter 27:07*], "the Act", as read with By Law, 70 E and 70 F of the Law Society of Zimbabwe By – Laws, 1982 (S.I 314/1982) in that he had!

"(1) withheld the payment of trust money to client without lawful cause.
(2) failed to promptly pay the trust money due to the sellers upon demand or within reasonable time.
(3) failed to properly keep books of accounts and did not issue a receipt for the amount of US$ 250 000 that was received in the trust account; and
(4) irregularly paid out more money to a client than was in the client's trust account."

The following facts were largely common cause. The Mafukidzes were the registered owners of a certain immovable property known as Stand 820 Mount Pleasant Township of Subdivision A of lot 58 of Mount Pleasant (the property). CBZ Bank had a running Mortgage balance on the property. The Mafukidzes failed to service the mortgage debt. They agreed with CBZ that the property be sold and the proceeds of the sale be directed to the bank to pay off the debt. The Mafukidzes then entered into an agreement of sale with one Anton Machakaire (the buyer) on 17 July 2017. The property was purchased for US$ 250 000. The purchase price was to be paid into the trust account of appellant's law firm. The Mafukidzes appointed the appellant to attend to transfer. It was a term of the agreement of sale that the purchase price would upon

transfer be released either to the Mafukidze's or to the bank to liquidate the debt owed by the Mafukidze's.

The buyer was financed by FBC Bank to the full amount of the purchase price. On 16 October 2017 transfer of title from the Mafukidzes to Anton Machakaire was accordingly effected under Deed of Transfer 4082/2017. FBC Bank paid the full purchase price to the trust account of Messrs Lawman Chimuriwo Attorneys at Law on 24 October 2017. The appellant did not advise his clients, the Mafukidzes, of this development. He also failed to advise CBZ which had released Deed of Transfer number 40689/2012 and given consent to the cancellation of its mortgage bond on the strength of the appellant's undertaking that an amount of US$ 241 000 would be paid to CBZ upon registration of the property in favour of the buyer.

In January 2018 the appellant, in response to a follow up by CBZ, deceitfully wrote to the bank giving the impression that transfer of the property was yet to be effected. Around that time CBZ was advised by the Mafukidzes that transfer had been effected at the Deeds Office and that the buyer was already in occupation of the property. CBZ then wrote to the appellant demanding payment of the balance of the mortgage bond in the sum of US$ 241 000 plus interest at the rate of 20 percent calculated from the date of transfer. On 9 February 2018 the appellant paid CBZ the sum of US$ 145 000 and undertook to pay the balance of US$ 96 000 by 31 March 2018.

On 19 April 2018, Messrs Mupanga Bhatasara, representing the CBZ, wrote a letter of complaint to the respondent alleging that the appellant had misappropriated trust funds. On

4 June 2018, Messrs Kantor and Immerman, representing the Mafukidzes, addressed a similar letter to the respondent. CBZ Bank issued summons on 19 April 2018 under case number HC 3520/18 claiming the sum of US$ 119 339 being the outstanding balance and interest accrued between 16 October 2017 and 17 April 2018. On 22 May 2018 the Mafukidzes also issued summons against the appellant under case number HC 4753/18 for the payment of US$96 000 plus interest and costs.

The appellant entered into a deed of settlement with CBZ for payment of the full amount claimed. The matter between the Mafukidzes and the appellant was withdrawn on 19 September 2018 with an order for costs against the appellant on a legal practitioner and client scale *de bonis propris*.

In his defence before the Tribunal the appellant denied misappropriating trust funds and stated that the withholding of payment was not willful. He had overpaid a Mr Timothy Manyuchi, a client of his, as a result of an accounting error. He had engaged this client on 26 January 2018 in connection with the overpayment. Mr Manyuchi promised to repay the funds but failed to do so. The appellant successfully sued Mr Manyuchi under HC 3743/18. He further explained that he failed to pay the Mafukidze's in October 2017 because they owed him US$3 380 in fees and thus, he was entitled to exercise a lien over their funds. He denied misleading the CBZ in his letter of 23 January 2018. The letter, according to the appellant, was meant to advise the CBZ that the only outstanding issue was the conflict over City of Harare bills which the sellers were aware of.

The Tribunal rejected the appellant's explanation. It was the Tribunal's finding that the appellant had failed to remit the funds to the complainants within a reasonable time and without lawful excuse. Further the Tribunal found that the appellant had failed to maintain proper books of accounts and had made an illegal payment to his other client Mr Manyuchi. Accordingly, the Tribunal held that the respondent had proved all the charges brought against the appellant and that therefore the appellant's conduct was unprofessional, dishonourable and unworthy. By way of punishment the Tribunal ordered that the appellant's name be deleted from the Register of Legal Practitioners, Notaries Public and Conveyancers. It also ordered the appellant to pay all the expenses incurred by the respondent in connection with the proceedings before it.

The appellant has noted the present appeal against both conviction and sentence.

GROUNDS OF APPEAL AGAINST CONVICTION

"1. The Tribunal erred in not following its decision in *The Law Society of Zimbabwe v Douglas Mwonzora* HH 306/18 by assuming jurisdiction in circumstances wherein the respondent had not compiled with By-Law 67 of the Law Society of Zimbabwe (By Laws) 1982 in that having justified the urgency for short circuiting proceedings on (sic) the public interest resulting from the alleged "prima facie case of misappropriation of funds which may require the referral to the Legal Practitioners Disciplinary Tribunal for an inquiry without investigation in terms of By-Law 67", the respondent vacated its basis for the alleged emergency in proceeding without an investigation and on any urgent basis when it did not, before the Tribunal, charge the appellant with misappropriation of funds and did not in any event treat the matter as urgent in bringing the same before the tribunal.
2. The Tribunal erred in not holding, as it must have, that the appellant's erroneous overpayment to another client, which overpayment was common cause between the parties, made it objectively impossible for the appellant to make payment of the said trust funds to the Mafukidzes and CBZ Bank on demand and as such constituted a lawful excuse.
3. The Tribunal erred and misdirected itself in holding that "the error is the basis for the other charge against the respondent (appellant *in casu*) that he failed to keep proper books of accounts. It is therefore not "a reason or excuse that is in accordance with the

law" and, in so doing, disregarded the settled legal position that objective impossibility to undertake a legal obligation is a complete defence.

4. The Tribunal further erred and grossly misdirected itself in finding the appellant guilty of misappropriation of trust funds when the charges against the appellant brought by the respondent before the Tribunal that it was dealing with were the withholding of trust funds without lawful cause and failure to remit trust funds upon demand or within a reasonable time.
5. The Tribunal erred and grossly misdirected itself in holding that the admitted and common cause accounting error was a failure to keep proper books of account within the contemplation of the Legal Practitioners' Act and By-Laws thereunder and also making an illegal payment.
6. The Tribunal erred, in the absence of proof of the requisite *mens rea* beyond a reasonable doubt that the admitted common cause accounting error amounted to an illegal payment.
7. The Tribunal erred and grossly misdirected itself in any event in subjecting the appellant to double jeopardy in that the admitted and common cause accounting error was at the heart of both the first and second charge and in convicting the appellant on both charges, albeit as regards the first charge on a head under which the appellant had not been charged.
8. The Tribunal misdirected itself in holding in all the circumstances that the appellant's conduct was unprofessional, dishonourable and unworthy of a legal practitioner.

AS REGARDS SENTENCE

9. The Tribunal erred and misdirected itself in predicating its sentence of the disbarment of the appellant on principles relative to offences relating to the misappropriation and abuse of trust funds in circumstances wherein the appellant had not been charged with misappropriation of trust funds and could not have been properly convicted of misappropriation of trust funds.
10. The Tribunal erred in any event in not holding that the admitted and common cause accounting error amounted to an exceptional circumstance justifying a departure from the common law rule that where there is abuse of trust funds, a charge the appellant could not have been properly convicted of on the facts and charges against him, the opinion of the respondent as the regulatory authority ought generally to be followed.
11. The Tribunal erred and misdirected itself, in any event in relying on the common law principle that it follows the opinion of the regulatory authority without paying regard to the said principle's infringement of the Constitutional protection of the right to the protection of the law guaranteed in s 56 (1) of the Constitution and the Constitutional right to be heard by "an independent and impartial court, tribunal or other forum established by law" protected and guaranteed in s 69 (3) of the Constitution in that the principle followed by the Tribunal in sentencing the appellant detracts from the independence and impartiality of the court and its jurisdiction to access sentence."

RELIEF SOUGHT

The appellant seeks the following relief:

1. That the appeal be allowed with costs.

2. That the judgment of the Tribunal be set aside and substituted with the following:

"1. In the result the matter is remitted to the applicant's Counsel for it to comply with By-Law 67 of the Law Society of Zimbabwe (By-Laws), 1982.
Alternatively, the application be and is hereby dismissed with costs.
In the alternative to para 2 above, and only in the event that the appeal against conviction fails the appellant seeks the following relief:
2. In the result the sentence imposed on the appellant be and is hereby set aside.
3. The matter is remitted to the Legal Practitioners Tribunal for its assessment of an appropriate sentence in accordance with the reasons for this judgment."

THE ISSUES

The following issues arise from the grounds of appeal *vis a vis* conviction.

1. Whether, having taken the view that the matter was urgent, the respondent was entitled to charge the appellant with an offence other than misappropriation of trust funds.

2. Whether the appellant was properly convicted as charged for conduct which is unprofessional, dishonourable and unworthy of a legal practitioner.

3. Whether the Tribunal should have upheld the appellant's, defence of impossibility.

4. Whether there was a splitting of charges as the accounting error was at the heart of both the first and second charges thus subjecting the appellant to double jeopardy.

ANALYSIS RE CONVICTION

The following facts were common cause. The appellant was under instruction to pay either CBZ Bank or the Mafukidzes the amount paid by the buyer upon transfer of the property. The amount was paid to the appellant's trust account through FBC Bank on 24 October 2017. The

appellant did not forward this amount to CBZ or the Mafukidzes. *Prima facie* therefor the appellant failed to disburse the monies promptly or within a reasonable time as required by law. The appellant's defence was that he had erroneously overpaid another client in the sum of US$89 000 leaving his trust account bereft of funds to pay CBZ as expected. The appellant's defence cannot be *bona fide* given the facts of this matter. It was imperative for the appellant to show by means of the accounting system (in use at his firm) the date on which such overpayment occurred in relation to the date the FBC funds reached his trust account. He failed to do so, leaving him open to the reasonable suspicion that the overpayment (if any) occurred well after the time he was expected to pay the Mafukidzes or CBZ. In other words, he had unlawfully withheld payment not because he was unable to pay, as he suggests, but for reasons best known to himself. Further he did not advise CBZ or the Mafukidzes that payment had been made to his trust account consequent upon transfer, nor did he explain to these complainants that he had erroneously overpaid another client and was thus unable to transfer the moneys to either of them as the trust account had been erroneously dissipated. His failure to timeously so disclose his predicament in that regard leaves a lot to be desired.

The purchase price was deposited into the appellant's trust account on 24 October 2017. He failed to transfer the amount to CBZ for a period in excess of 3 months. Even as CBZ enquired of him by letter dated 18 January 2018 as to whether transfer had been effected he gave the impression that transfer had not been effected. He did not, as he now says, explain to CBZ that an error had occurred through overpayment to another client. The appellant only paid US$145 000 when confronted by the complainants who had now, through their own

efforts discovered that transfer had been effected and the purchase price deposited into the appellant's trust account.

The only reasonable conclusion arising from the evidence and circumstances of this case is that the appellant withheld the payment of trust funds without lawful excuse, or alternatively, failed to promptly pay the trust money due to the sellers upon demand or within a reasonable time. The Tribunal's reasoning and ultimate decision to convict the appellant on these charges cannot be faulted.

The Tribunal found, as a matter of fact, that the alleged erroneous overpayment, the basis of the appellant's defence to the changes, was a ruse meant to cover up the appellant's short comings. Again, this finding of fact cannot be faulted given that no evidence was led from the entries on the Lawpac Legal Accounting System (the accounting system in place at the appellant's law firm) that in fact such overpayment occurred, the amount so overpaid, the date and the account to which such overpayment was made. Moreover, there is a significant difference between the amount of the overpayment given by the appellant and that given by the payee, Mr Manyuchi. The appellant told the Tribunal that he overpaid by US$ 89 000 and yet the recipient, Mr Manyuchi, said he had been overpaid in the sum of US$ 134 300. In the circumstances, the Tribunal correctly rejected the appellant's defence in that regard. It also correctly dismissed the appellant's defence of lien because the amounts subject to lien were so insignificant compared to the overall amount owed.

The total legal fees allegedly owed by the Mafukidzes and CBZ did not exceed US$32 486. The appellant should have held that sum as a lien and transferred the balance out of US$ 250 000 to the complainants. He did not do so and consequently breached the trust reposed in him by the complainants.

Further, by not leading evidence as to the Lawpac Accounting System in place, more so with regards, the transaction under review and by making the alleged overpayment, the appellant has admitted that he not only made an error, but that such error was not picked up for months. When it was picked up, it did not show that the error involved higher sums than the US$89 000, namely a figure of US$134 000! Clearly, he could not have convinced any reasonable person that he had not failed to properly keep books of accounts. In any event, it is common cause that he did not issue a receipt for the sum of US$ 250 000 that was received in the trust account.

The evidence against the appellant on all the charges preferred against him is overwhelming. The appeal against conviction cannot succeed. The amount involved, US$ 250 000, is substantial. The appellant disregarded his duty as a legal practitioner and as the conveyancer instructed by the complainants to attend to transfer of the property and to remit the purchase price to the complainants. He failed to do so. He was sued in a court of law for the recovery of these trust funds. Such conduct is clearly unprofessional, dishonourable and unworthy of a legal practitioner.

WHETHER, HAVING TAKEN THE VIEW THAT THE MATTER WAS URGENT, THE RESPONDENT WAS ENTITLED TO CHARGE THE APPELLANT WITH AN OFFENSE OTHER THAN MISAPPROPRIATION OF TRUST FUNDS.

The appellant argues that the respondent vacated its basis for the alleged emergency in proceeding without investigation and on an urgent basis when it did not, before the Tribunal, charge the appellant with misappropriation of trust funds and did not in any event treat the matter as urgent in bringing the same before the Tribunal. The appellant relies for this proposition on the provisions of By Law 67 of the Law Society of Zimbabwe (By Laws) 1982 and the decision of the Tribunal in the case of the *Law Society of Zimbabwe v Douglas Mwonzora HH 306/18*.

By Law 67 reads as follows:

> "Council's right to apply for Disciplinary Tribunal inquiry without investigation.
> The Council shall have the right to apply to the Disciplinary Tribunal for an order against a legal practitioner or assistant in terms sub section (1) or (2) of s 28 of the Act without following the procedure provided for in this Part, and without any notice to the legal practitioner or assistant, other than such notice as may be required in terms of the Legal Practitioners (Disciplinary Tribunal) Regulation, 1981, if –
> (a) the member has been convicted of an offence of the kind referred to in subsection (3) of s 28 of the Act; or
> (b) the Council is of the opinion that delay in 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 the profession."

In the *Mwonzora* case *supra*, the Tribunal held as follows:

> "As provided for under By-Law 67, Council can short circuit proceedings in cases of emergency and only if it is in the public interest 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 have been proceeding in terms of By-Law 67. Regarding both counts, the respondent was not convicted of any offence as provided under s 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 present matter is distinguishable from the *Mwonzora* case *supra* in that the delay in bringing the application to the Tribunal in that case was 6 years whereas *in casu* the delay was a mere 5 months. Further, in the present matter, the complainants had filed applications in the High Court seeking to recover their moneys from the appellant. It would not have been prudent for the respondent to institute parallel proceedings before the Tribunal for matters pending at the High Court. CBZ Bank issued summons on 19 April 2018 under HC 3520/18 and the Mafukidzes issued summons on 27 May 2018 under HC 4753/18. Both cases were finalized in favour of both complainants on 14 September 2018 and 19 September 2018, respectively. The matter was brought before the Tribunal on 17 September 2018, immediately after the appellant and CBZ entered into a deed of settlement. In other words, the respondent acted with urgency from the date of complaint to the date of application to the Tribunal. Assertions to the contrary by the appellant are without basis. Equally unfounded is the submission by the appellant that no prejudice had been suffered by any of the persons mentioned in By-Law 67." We find that such submission is insensitive to the plight of the complainants who genuinely feared they stood to lose an amount as substantial as US$ 250 000. In the end the money was recovered on the back of two lawsuits instituted by the complainants. The inconvenience and anxiety suffered by the complainants through no fault of their own is obvious. The appellant's conduct was in the circumstances prejudicial to the complaints" interest. They suffered both actual and potential prejudice. Further, such perverse conduct certainly damaged the good reputation of the legal profession.

We agree with the respondent that it has the right in terms of By-Law 67 to commence proceedings before the Tribunal without following the investigative procedures outlined in the By-Laws where it is of the view that delay in the making of the application may be prejudicial to the public, the administration of justice and the reputation of the profession. That right, prescribed by law, cannot be taken away. It is absolute and unfettered. What may be debated is whether the requirements for the exercise of that right have been met, namely whether the delay in proceeding by way of investigation is "prejudicial to the public or any member thereof, the administration of justice or the reputation of the profession." As already alluded to it is our view that these requirements have been met. We hold therefore, that in the circumstances, the respondent was perfectly entitled to proceed without preliminary investigation, on the basis of urgency.

The appellant is of the view that the respondent could only proceed without investigation where the charge is misappropriation of trust funds. The appellant has not cited any authority in support of that contention. The provisions of by-Law 67 are clear and unambiguous. There are no limits as to what charges, bind the respondent when it exercises its right to proceed without investigation. All what is required is that the respondent proceeds in terms of s 28 of the Act and that it holds the opinion that proceeding by way of investigation may result in a delay that is prejudicial to the public, the administration of justice or the reputation of the profession. By-Law 67 does not by any stretch of the imagination provide that its provisions are only applicable in cases where the charge of misappropriation of trust funds is preferred.

In the circumstances we hold that the respondent's decision to refer the matter to the disciplinary tribunal without investigation was properly made in terms of the law.

WHETHER THERE WAS A SPLITTING OF CHARGES AS THE ACCOUNTING ERROR WAS AT THE HEART OF BOTH THE FIRST AND THE SECOND CHARGES.

There is no merit in this ground of appeal. Though the facts giving rise to the charges are similar, each charge is distinct from the others in that it relates to specific misconduct on the part of the appellant. The first charge is withholding trust money without lawful excuse. That is what the appellant did when he received and withheld the money from the complainants. He ought to have released same to the complainants. The second charge relates to a different set of facts, namely that when demand was made by the complainants for the appellant to pay them their money, the appellant failed to do so. Similarly, failure to keep proper books of accounts by failing to issue receipts for money received in the trust account is a standalone charge and so is the irregular payment of more money to a client than was in the trust account.

This ground of appeal must be dismissed.

AD SENTENCE

In assessing the appropriate sentence for a legal practitioner found to be guilty of any act of misconduct the Tribunal has to invoke a 3-stage inquiry as outlined in the South African case of *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA). First, the court must decide whether the alleged offending conduct has been established on a preponderance of probabilities.

The second inquiry is whether the person concerned, in the discretion of the court, is not a fit and proper person to continue to practice.

The third inquiry is whether in all the circumstances the person in question is to be removed from the roll of legal practitioners, conveyancers and notaries public or whether an order suspending him from practice for a specified period will suffice.

The appellant contends that the Tribunal misdirected itself when in considering whether or not the appellant failed to remit the funds to the complainant within a reasonable time and without lawful excuse, it held as follows at p 118 of the record:

> "The only conclusion that can be drawn from the delay is that the respondent had misappropriated trust funds."

It is common cause that the charges levelled against the appellant and upon which he was convicted did not include misappropriation of trust funds. We agree with the appellant that the Tribunal erred in pronouncing itself on a charge that was not before it. The question that arises is whether that finding on a charge more serious than that preferred against the appellant tainted the Tribunal's approach to the first stage of the inquiry envisaged in the *Jasat* case *supra*, namely whether the offence (and the question arises, which offence), has been established, on a preponderance of probabilities.

Put differently, but for that misdirection would the Tribunal have arrived at the sentence it imposed on the appellant? Is this misdirection so serious as to vitiate the sentence? We think not, given the circumstances of this case. Firstly, despite that misdirection, the Tribunal did not convict the appellant of misappropriation of funds. Secondly, although the offences of which he stood convicted could have under different circumstances, attracted a lower penalty, the appellant's conduct in general lacked probity. He lied to the complainants that he was yet to

transfer the property whereas in truth and in fact he had already transferred the property to the buyer. He withheld from the complainants the fact that the full purchase price had been deposited by FBC Bank into his trust account. When it became clear to the complainants that the purchase price had been paid, he said he was withholding the amount as a lien. The amount owed him by the complainants as fees hardly came up to US$33 000. He should have withheld the US$33 000 and not the whole sum amounting to US$241 000. The appellant had to be dragged to court by the complainants for him to come clean with the amount owed to them. The appellant held on to this amount for 3 months without lawful excuse. The Tribunal found that his explanation that he had overpaid another client was a ruse meant to deceive the Tribunal, the respondent and the complainants.

The Tribunal cannot be faulted in its assessment of the appropriate penalty. It weighed the mitigatory factors against the aggravating factors and came to the inevitable conclusion that the aggravating factors far outweighed the mitigatory factors. The Tribunal correctly noted that it stands guided by the opinion of the respondent as the regulator of the profession. The respondent's opinion was that the appellant be removed from the roll of legal practitioners, public notaries and conveyancers. It was further guided by the sentencing objectives listed in *Law Society of Zimbabwe v Manokore* HH 167/21. These objectives are:

(a) upholding public confidence in the administration of justice;

(b) safeguarding the collective interest in upholding the standard of the legal profession;

(c) punishment of the errant legal practitioner for the misconduct; and

(d) setting standards to be observed by other legal practitioners, and, in the process, deterrence against commission of similar offences by likeminded legal practitioners.

The Tribunal was also guided by authorities such as the cases of *Chizikani v Law Society of Zimbabwe* 1994 (1) ZLR 382 (SC), *Muskwe v Law Society of Zimbabwe* SC 72/20 and *Summerly v Law Society Northern Provinces* (2006) SCA 59 (RSA). Reliance was placed in particular on the remarks of Gwaunza DCJ in the *Muskwe* case *supra*, at para 9, to the following effect:

> "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 Tribunal further noted that it is required to be guided by the opinion of the respondent unless there are exceptional circumstances warranting a lesser penalty. Having been addressed in full by both counsel for the appellant and the respondent on this point, the Tribunal determined that there were no exceptional circumstances in the case before it warranting deviation from the opinion rendered by the respondent regarding the appropriate penalty to be imposed.

No plausible reason has been advanced by the appellant urging this Court to interfere with the sentencing discretion of the Tribunal. The appeal against sentence ought not to succeed.

DISPOSITION

We are satisfied that the evidence adduced by the respondent in support of the charges levelled against the appellant is overwhelming. The appellant's guilt on each of the charges was proved beyond reasonable doubt. The appellant's defence was proved to be false and misleading. The conviction must be upheld.

As regards sentence the Tribunal properly took into account the mitigatory and aggravatory factors. In particular it took into account the appellant's personal and business circumstances. It weighed these against the aggravating factors, in particular the harm done to the reputation of the profession and the need to protect the public against would be offenders.

In that exercise it was properly guided by the respondent's opinion as well as leading authorities on the subject. We are satisfied that the sentence imposed is within the range of sentences normally imposed in cases of this nature. That being the case, there is no basis for interfering with the sentence given by the Tribunal.

There is no reason why the appellant should not be liable for costs of the magnitude prayed for by the respondent and granted by the Tribunal. In addition, he should pay the costs of this appeal on the higher scale.

In the result we order as follows:

1. The appeal against conviction and sentence be and is hereby dismissed.
2. The appellant shall pay the costs of this appeal at the legal practitioner and client scale.

BHUNU JA: I agree

CHITAKUNYE JA: I agree

Lawman Law Chambers, appellant's legal practitioners

Law Society of Zimbabwe, respondent's legal practitioners