THE LAW SOCIETY OF ZIMBABWE
versus
CHARLES CHINYAMA

LEGAL PRACTITIONERS DISCIPLINARY TRIBUNAL
CHATUKUTA J (CHAIRPERSON), MUSAKWA J (DEPUTY CHAIRPERSON)
S. MOYO AND D. KANOKANGA (MEMBERS)
HARARE, 23 November 2018, 28 & 29 March 2019 & 3 June 2021 & 9 July 2021

Disciplinary Hearing

F. Mahere, for applicant
Respondent in person

MUSAKWA J: The respondent was registered to practice law in this country on 5 March 1997. The applicant seeks the deletion of the respondent's name from the register of legal practitioners, notaries and conveyancers on account of several complaints of misconduct. The complaints are summed up as follows:

1. failing to remunerate a professional assistant without just cause;
2. acting in an improper and unseemly manner by having a questionable relationship with a client who was the estranged wife of the complainant in the course of divorce proceedings between the couple;
3. failing to account to client (two counts);
4. failing to properly perform a client's mandate and taking advantage of such client; and
5. failing to issue receipts and to account for funds held in trust, and placing himself in a position of conflict with client's interests;
6. failing to issue receipts and to account for funds held in trust and failing to account for debts recovered on client's behalf; and
7. raising a false bill for legal fees and forging an acknowledgment of debt by client in support of legal action against such client for recovery of fees.

The Facts

First Complaint

Prosper Sidhuli was employed by Chinyama and Partners as a professional assistant on 1st September 2014. The verbal agreement entailed a salary of US$700 per month. A written contract was never availed despite being promised. For the month of September 2014 he was paid US$600. No salaries were paid for October, November and December 2014 save for arrears for two months following complaints.

The respondent's defence is that there was a dispute with the complainant that could only be resolved by the Labour Court. However, he further submitted that they eventually settled.

Second Complaint

The complainant is Walter Madziro. The respondent represented Daisy Chavhundura, who was the complainant's wife in divorce proceedings between the couple. On 16th November 2015 around 22:30 hours the respondent was spotted by the complainant driving Daisy Chavhundura's motor vehicle, with Daisy Chavhundura in the passenger seat. Upon being confronted by the complainant the respondent sped off in his client's motor vehicle. The complainant pursued the respondent and this culminated in a collision between the vehicle driven by the complainant and that driven by the respondent.

The respondent denies any improper relationship with Daisy Chavhundura. According to him on 16th November 2015 Daisy Chavhundura was the last client to be attended to at 16:45 hours. As the respondent arranged for a taxi to take him and his young brother home, Daisy Chavhundura offered them a lift. This was around 17:45 hours. On account of Daisy Chavhundura being heavily pregnant she requested the respondent to drive to his residence in Borrowdale from where she would then drive herself to her home in Pomona.

When the respondent was about to reach the gate to his home he noticed a vehicle closely following behind. When he stopped the complainant confronted him seeking to know why he was driving Daisy's vehicle. The complainant and Daisy had since parted customarily and Daisy was no longer the complainant's wife. The respondent explained why he was driving the vehicle. The complainant is the one who deliberately rammed into Daisy's vehicle and he was detained at Borrowdale Police Station.

Third Complaint

The complainant is Julius Gorerokufa. The complainant who was based in the United States of America engaged the respondent to administer his late father's estate in 2015. On 9th November 2015 the complainant was requested to avail bank details into which proceeds would be transferred. With the promised transfer not materialising, the respondent became elusive when the complainant made follow-ups. Despite the complainant having paid the fees charged, on 9 and 12 May 2017 the respondent asked the complainant to avail proof of payment. Later the respondent sent the complainant a bill of $12 952 with an indication that more bills would follow.

When the applicant sought the respondent's response to the complaint, the respondent wrote that he could not give a substantive response as he needed to access the relevant receipt books. According to the respondent a request to the complainant to avail receipts to expedite the matter had not yielded results.

In the counter-statement the respondent denied ever being instructed to administer the estate. The executor was *Mr Mucheche of Matsikidze and Mucheche*. The respondent's mandate was to represent Julius Gorerokufa's interests in the estates of his late parents and in litigation against the executor and the Master (HC11302/11). He also instituted legal proceedings against another party in HC 9369/15. The bill of costs was then presented to Julius Gorerokufa. In the event that Julius Gorerokufa had issues with the fees, he was prepared to have the bill taxed.

Fourth Complaint

The complainant is Kenneth V. Grant-Cocker. He made his complaint on 19 November 2015. Having sought the respondent's services he was charged US$10 000 as fees. Since he did not have funds he mulled selling his Toyota Hilux 4x4 motor vehicle. The respondent expressed interest in purchasing the motor vehicle. The respondent agreed to purchase the complainant's motor vehicle for US$30 000 from which amount he would deduct his fees. The complainant was advanced US$1 000 to enable him to travel to South Africa whilst his immigration matter was being attended to by the respondent. The immigration case was never satisfactorily resolved. He was paid further advances totalling US$4 000 leaving a balance of US$16 000. The respondent never prosecuted the complainant's instruction for the annulment of his marriage and he had to engage another legal practitioner. The motor vehicle was eventually re-sold by the respondent but the respondent failed to settle the balance of the funds payable to him. The respondent did not account for the transaction and would not return or answer the complainant's telephone calls.

The respondent's defence is that the complainant was referred to him by *Masawi and Partners.* He declined to represent him without payment. Having turned him down the complainant returned on the following day and asked the respondent if he was interested in purchasing his estranged wife's motor vehicle for US$20 000. The respondent expressed interest following which an agreement of sale was then signed. The complainant was paid US$4 000 leaving a balance of US$16 000. The complainant was not the respondent's client.

The complainant was subsequently detained on an immigration related charge. The respondent secured his release on bail. The respondent attended to the annulment of the complainant's marriage. Thereafter the complainant took his files in 2015 and was deported in 2017 when he was no longer the respondent's client. The respondent could not have asked the complainant to avail his passport to enable an extension of stay because he was no longer his

client. Following his deportation the complainant engaged the respondent. An application for review of the Magistrates Court decision was filed with the High Court.

Fifth Complaint

The complainant is Findros Godzi. He engaged the respondent in November 2015 to represent him in a dispute with Telecel involving a motor vehicle. In February 2017 he learnt that a default judgment had been granted against him as the respondent had not filed heads of argument. The respondent asked to purchase the motor vehicle but the complainant declined. Although an application for rescission of default judgment was filed, the complainant was advised that this would not prevent execution of judgment.

The respondent's defence is that he agreed to represent the complainant on the promise of future payment of fees. When he eventually requested for his payment this was not forthcoming. This prompted him to renounce agency. Since there was no payment the respondent never violated any bookkeeping principles. At the time of default judgment the respondent had already notified the complainant of his intention to renounce agency. The respondent never developed interest in a motor vehicle that was the subject of litigation.

Sixth Complaint

The complainant Zhou Haixi engaged the services of the respondent and deposited US$70 000 into the trust account that was operated by the respondent. When the complainant wrote to the respondent on 29 July 2016 enquiring on the status of the funds, there was no response. The respondent was also instructed to recover debts in the sums of US$20 000 and US$4 000 on two separate occasions. Despite having recovered the debts the respondent failed to account for the amounts. Instead, the respondent then billed the complainant for US$132 790 which bill was contested by the complainant.

The respondent explained that a deposit of US$70 000 was made into the trust account by Wezhou (Pvt) Ltd. There was a legal dispute between Mr Cheng and his daughter, Emmie on one side and the complainant and another on the other side. In another separate matter of spoliation, the complainant engaged the respondent for a watching brief. The money deposited by the complainant also covered fees for two other criminal charges that were preferred against Emmie. Upon demand, US$40 000 in cash was paid back to the complainant as he claimed he had no bank account.

The respondent denied being instructed by the complainant to recover sums of US$20 000 and US$4 000 from debtors. He never did debt collection for the complainant. A meeting at the applicant's offices never materialised. If the fees charged were exorbitant, the remedy

was to have the bill taxed. The complainant only challenged the bill in 2017 after a fallout regarding a gold mine located in Chinhoyi. The complainant instituted litigation against the respondent but subsequently withdrew the matter.

Seventh Complaint

The complainant is Melgund Trading (Pvt) Ltd. Its complaint was lodged with the applicant on 17 October 2014. The complaint concerned the respondent's charge of US$75 000 for representing the complainant in interpleader proceedings. When the complainant disputed the fee, a disputed acknowledgment of debt was then used to sue the complainant for payment of the disputed fees.

The respondent's defence is that fees were arrived at with the complainant's representative Mr Mazani and a professional assistant, Raymond Tsvakwi. A written acknowledgment of debt was signed by Mr Mazani. The respondent obtained default judgment and executed on it. The sale of the attached property was through public auction. After the sale Mr Mazani demanded a share of the proceeds of the sale to which the respondent refused. The default judgment was subsequently rescinded on the basis that Melgund Trading (Pvt) Ltd had not been properly served with summons. The respondent disputed having forged the acknowledgment of debt giving rise to the suit. No criminal charges were ever preferred against him.

Preliminary Issues

At the hearing the respondent raised some preliminary points which the Tribunal dismissed. The first point was that he was never served with notice to appear before the Disciplinary Ethics Committee. He thus sought to argue that his right to administrative justice had been violated as he had not been properly brought before the Tribunal. He also argued that Council of the applicant (hereinafter called Council) was supposed to investigate the complaints first before approaching the Tribunal. The criticism by the respondent regarding inadequacy of investigations would obviously have a bearing on the Tribunal's findings in respect of some of the charges. Nonetheless there is correspondence proving that the applicant wrote to the respondent seeking his comments regarding the complaints it had received. In one instance the respondent did not reply, which on its own became a charge of misconduct when Council deliberated on the complaints on 28 May 2018.

The respondent also sought to argue that some of the "claims" had prescribed. Disciplinary cases are not governed by the Prescription Act [*Chapter 8:11*]. Such proceedings are *sui generis* and do not constitute a debt which may be affected by prescription. As was held

in *Solomon* v *Law Society of Cape Of Good Hope* 1934 A.D. 401, an application of this nature is neither civil nor criminal. This is because the applicant seeks nothing from the respondent.

The third issue was that the applicant should lead oral evidence. As such, the respondent argued that he should have been furnished with the summary of evidence of the witnesses the applicant intended to call. On this aspect, the applicant was adamant that it would not lead oral evidence. The applicant was content with leading evidence on the papers filed, notwithstanding some apparent shortcomings in some of its evidence. The Tribunal could not compel the applicant to lead evidence in a particular way.

The respondent also sought to produce a bundle of documents to which the applicant objected. As rightly argued by the applicant, the respondent ought to have filed the bundle together with the counter-statement.

Applicant's Submissions On The Merits

With respect to the first complaint, Mr *Mahere* submitted that the respondent withheld payment of US$1 400 to Mr Sidhuli until 11 October 2018. He conceded that where an employee leaves employment without notice, an employer may claim damages for breach of contract. However he queried why the complainant would have persisted with the claim for arrear salary if it was not genuine.

With reference to the withdrawal of complaint by Mr Sidhuli, Mr *Mahere* submitted that this development can only affect the penalty. It cannot absolve the respondent from wrongdoing. Whilst a complaint was made on 23 December 2014, payment of the outstanding salary was only made on 11 October 2018. The payment is an acknowledgment of wrongdoing. It defeats the argument the respondent had advanced on prescription.

Concerning the second charge relating to Walter Madziro, Mr *Mahere* submitted that the respondent's defence was a bare denial. The respondent did not respond to the applicant when the allegations were raised. The respondent did not avail a supporting statement from the woman at the centre of the complaint, considering that she had intimate knowledge of the facts and was an eye witness to the confrontation between the complainant and the respondent. Statements from Daisy Chavhundura and the respondent's brother, Tinashe Madamombe should have been availed in support of the respondent's defence to the complaint. This is why the applicant successfully objected to the belated attempt to produce a bundle of documents by the respondent at the hearing.

Mr *Mahere* however, conceded that there were inconsistencies in the manner in which the allegations were presented.

Concerning the third charge, Mr *Mahere* submitted that it is not in dispute that the complainant made several follow-ups with the respondent. There is also no dispute that the respondent held funds for the complainant in the trust account which the respondent failed to pay to the complainant upon demand. The respondent undertook on several occasions to pay the inheritance due to complainant and asked for his bank details. He queried why the respondent requested for the complainant's bank details if there was no money due to the complainant. The respondent invoked the issue of bills for legal fees to diffuse the complaint. Once a dispute arises regarding fees it is imperative to kick-start taxation of the fees in order to have that dispute resolved as soon as possible. When a legal practitioner is asked to explain himself, he must avail all relevant information. The respondent did not do so regarding his bills of costs. Regarding withdrawal of money for a purpose not authorised by the creditor he referred to the case of *Chizikani* v *Law Society* 1994 (1) ZLR 382 (S).

Concerning the complaint by Kenneth V. Grant-Cocker, Mr *Mahere* submitted that the respondent asked for his fees in advance of his work. Since the complainant did not have money for the fees charged, he offered to sell his motor vehicle. The respondent became interested in the purchase of the motor vehicle for himself. Part of the proceeds of the sale were not remitted to the complainant as they were abused by the respondent. If proceeds of the sale were paid to the complainant, why was no receipt issued? The complainant would not have filed a complaint if the mandate had been carried out in full. In a letter dated 22 June 2016 the respondent undertook to pay the complainant.

The second issue relates to failure to execute a mandate. Mr *Mahere* submitted that despite the respondent's assertions to the contrary, there is no evidence showing that he discharged his duties. What triggered the order that was granted in case number HC 4363/16 was a complaint that was filed on 19 November 2015. One of the duties of a legal practitioner is to regularly update a client on work done.

In respect of the complaint by Findros Godzi, Mr *Mahere* submitted that the respondent was put in funds and failed to carry out the mandate diligently. Hence the default judgment that was subsequently entered against the complainant. The duty to file a notice of renunciation of agency rested with the respondent. The respondent also failed to properly maintain books of account. In support thereof Mr *Mahere* cited the cases of *Mugabe & Anor v Law Society* 1994 (2) ZLR 356 (S) and *The Law Society of Zimbabwe v Mujeyi* HH 821-15.

On the matter of the complaint by Zhou Haixi, Mr *Mahere* submitted that the respondent was given money to be held in trust. When the complainant demanded the money,

it was not available. If trust money is not available on demand or within a reasonable period, then the person in whose custody such money was entrusted is guilty of abuse of trust funds. If the money was refunded as claimed by the respondent, there should be proof, which proof has not been availed. If US$30 000 was paid to Kambarami as claimed by the respondent, there is no proof of such payment. Again, this was disputed by the complainant.

In respect of the complaint by Melgund Trading (Pvt) Ltd Mr *Mahere* submitted that fraud was perpetrated after the complainant asked for its funds. This is because a fictitious bill was presented to the complainant. A disputed acknowledgment of debt was used to sue the complainant. A deed of settlement and order by consent were cooked up and used to obtain a default judgment. The complainant was clearly duped.

Respondent's Submissions

On Prosper Sidhuli, the respondent submitted that he decided to pay him for purposes of finality. He used to see the complainant on a regular basis. He had a legitimate claim of an employer if regard is had to the circumstances under which the complainant quit the law firm without notice. The applicant's contention that the respondent could have sued the complainant is an acknowledgment that he had a claim of right. The dispute was for the Labour Court as opposed to the applicant.

Concerning Walter Madziro, the respondent submitted that the facts that were deliberated by the applicant's Disciplinary and Ethics Committee are different from the facts in the summary of evidence. He further submitted that he was not professionally consulted by either of the parties as there was no divorce. The dispute between the two related to the distribution of matrimonial property. He never met the complainant. By virtue of the fact that the complainant's wife was expecting, the respondent was requested to drive her vehicle. No improper conduct can be inferred from driving a client's vehicle.

Concerning Julius Mandizvidza Gorerokufa, the respondent submitted that he was not the executor of the estate. Upon being engaged, the deposit made into the trust account did not constitute the entire fees. Apart from that, further instructions were also given. As such the fees he charged were for work done and this was accounted for. The complainant agreed that the fees be taxed. As a legal practitioner he is entitled to withhold money held in trust for work done.

On Findros Godzi, the respondent submitted that the circumstances are similar to those of Kenneth V. Grant-Cocker. The complainant was aware of the default judgment. The respondent had informed the complainant that he would no longer represent him. The

complainant later withdrew the complaint to the applicant. There is no proof that he received money from the complainant. The complainant should have collected his file when the respondent renounced agency, which he later did. If this had been done earlier, the respondent would have ceased to be his legal practitioner of record.

On Kenneth V. Grant-Cocker, he submitted that he did not take advantage of the complainant. He purchased the complainant's motor vehicle in his personal capacity and paid him. Prior to the purchase of the motor vehicle there was no professional relationship. The matrimonial matter was delayed because the complainant had no funds to pay for substituted service in the United Kingdom. The matter was completed in default of the plaintiff. The complainant continues to give him work.

Regarding Zhou Haixi the respondent submitted that he initially carried out a mandate in respect of the gold mining entity in Chinhoyi-Wezhou Eldorado mine, and was not paid any fees. In February 2015 there was an undertaking to pay the fees. When US$70 000 was paid the receipt clearly indicated the payment was in settlement of fees. The respondent took over other matters that were previously handled by Mr Tamuka Moyo after the latter renounced agency. According to the respondent, the complainant did not want to use his bank account. Thus the complainant asked for US$40 000 which he paid to the complainant in cash. The complainant also instructed him to pay one Kambarami US$30 000. The problem started in December 2015 when the complainant told the respondent to stop visiting the mine. He then billed the complainant and any issues about overreaching can be resolved through taxation. The written request for the US$70 000 was lost when the safe was broken into.

On Melgund Trading (Pvt) Ltd, the respondent submitted that he did not personally deal with the matter. He would see Mr Mazanai almost daily. A default judgment was granted on the basis of an acknowledgment of debt. He was always available for taxation. Further investigations should have been conducted by Council.

Findings

The complaint regarding Prosper Sidhuli presents no difficulties. The respondent failed to pay the complainant an agreed salary. His explanation to the applicant when enquiries were made was that the salaries were up to date. Surprisingly the respondent did not avail proof in the form of bank statement or salary schedule to demonstrate that nothing was due to the complainant. He further claimed that this was an issue for the Labour Court. The complaint was lodged on 23 December 2014. The respondent eventually paid US$1 400 on 11 October 2018. This is against the backdrop that Council of the applicant had resolved to refer the matter

to the Tribunal on 19 June 2018. It is inescapable that the payment made was to forestall or arrest the referral. If the respondent was adamant that this was a labour dispute for the Labour Court why did he relent? Such conduct is unprofessional, dishonourable and unworthy of a legal practitioner.

The complaint relating to Walter Madziro was not well investigated and presented. The minutes of Council of the applicant even erroneously noted that the complainant had engaged the respondent to represent him in a divorce matter. The complainant's wife is the one who was the respondent's client. Despite the complainant alleging that his vehicle and that of the respondent collided when the respondent was trying to escape, no further evidence was placed before the Tribunal. It was also stated that the respondent dropped his cell phone at the scene of accident and subsequently returned. At that stage the complainant had the phone and nothing further was led regarding the issue. The manner in which this complaint was handled leaves a lot to be desired. I can do no further than quote the remarks of CHATUKUTA J in *Law Society of Zimbabwe* v *Mwonzora* 2018 (1) ZLR 562 at 570 where she had this to say:

> "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 the register. In other words, the applicant needs to set the tone for efficiency and diligence. This has been lacking in the present case."

The criticism that we handed the applicant in the Mwonzora case equally applies in respect of the complaint by Walter Madziro and some of the other complaints. It seems the applicant was content with accepting the written complaint and never sought clarification of the aspects I have highlighted earlier on. That the respondent dropped his cell phone at the scene of confrontation is confirmation that he fled from the scene. This is also confirmed by his subsequent return to the scene after his wife started to make calls on that phone. Even the time of the incident (10:30 p.m.) is very suspicious. There was no explanation on what type of consultation entailed meeting a client at night. It would be understandable if the respondent was handling an urgent matter.

Although the respondent did not respond to the applicant when he was called upon to do so, no charge of violating By-law 65 was specifically preferred. The application to the Tribunal made no reference to such a charge, but it was referred to in the summary of evidence. The respondent made no comment on this issue. It should be taken that the respondent admitted that charge.

In respect of the complaint by Julius Gorerokufa the applicant erroneously alleged that the respondent was instructed to wind up the estate of the late Frank Mandzvidza Gorerokufa. The executor to the estate was Mr *Mucheche*.

A consideration of the matter however shows that there is enough evidence that the respondent violated s 23 (1)(d) of the Legal Practitioners Act [*Chapter 27:07*]. On 1 November 2015 he confirmed to the complainant that funds had been transferred to the trust account although they were not reflecting. On 9 November 2015 he confirmed that the funds were now reflecting in the account. However, he inexplicably failed to remit the funds to the complainant. This is despite the various exchanges the respondent had with the complainant in which he promised to remit the money. At some stage the respondent asked for the complainant's banking details and after he was furnished with the details he did not remit the money. Sometimes he gave a variety of excuses for not responding to the complainant, like attending a funeral or attending court. Instead he then billed the complainant $12 952 although the respondent had previously quoted the complainant $6 000. The respondent also failed to explain why he did not transfer shares that were due to the beneficiaries to the estate.

The complaint relating to Kenneth V. Grant-Cocker shows that the respondent, despite his denial did represent the complainant. Since the complainant had no money for fees and had a motor vehicle he was selling, the respondent developed an interest in the vehicle. The respondent admitted to purchasing the vehicle which in his defence he said belonged to the complainant's wife. The respondent thus charged fees in kind, which is unethical. The respondent withheld the balance of money arising from his purchase of the complainant after deducting his fees. This is a violation of s 23 (1)(d) of the Legal Practitioners Act. There is no evidence on how the complainant was billed.

As in the complaint relating to Walter Madziro, some aspects of Kenneth V. Grant-Cocker's complaint were not definitively resolved by the applicant. These relate to the respondent's mandate regarding the nullification of marriage and the immigration matter. Kenneth V. Grant-Cocker's marriage was nullified on 23 March 2017 as per court order in HC 4363/16. The applicant did not lead evidence on when court processes were filed by the respondent. In any event, Kenneth V. Grant-Cocker was the defendant in those proceedings. It is not like the respondent failed to defend him. The court order shows that it is the plaintiff who was in default. As regards the immigration case, not enough evidence was led by the applicant.

In the case of the complaint by Findros Godzi, the respondent never issued the complainant with receipts for money paid to him. This constitutes unethical conduct of failing

to account to a client. The respondent also failed to defend the complainant's case in court, resulting in a default judgment. The respondent's explanation to the applicant was that he had not been placed in funds. Nonetheless the respondent had a duty to uphold and advance the interests of his client. The excuse that he had not been placed in funds does not hold water. The respondent had not renounced agency, thus the complainant still remained his client. The withdrawal of complaint by the complainant on 21 September 2018 does not absolve the respondent from wrongdoing. This is because the unprofessional conduct had already been committed.

In respect of the complaint by Zhou Haixi the respondent received US$70 000 and did not issue a receipt. On 29 July 2016 he was asked about the status of the funds and did not respond to client. The respondent's claim that he withdrew US$40 000 which he gave to the complainant as cash is not backed by any documentary evidence to that effect. The same applies to his claim that he was instructed to pay a Mr Kambarami US$30 000.The respondent was also asked to collect US$20 000 and US$4 000 from debtors. Despite purportedly instructing someone to deposit the collected funds into the complainant's account, this never materialised. Instead of accounting to client, the respondent billed him US$132 790.

On the complaint by Melgund Trading (Pvt) Ltd, the respondent and the complainant did not agree on the fees. The dispute on the fees charged should have been referred for taxation. Thus Council did not reach a conclusion on whether there was overreaching by the respondent. Council left it for the courts to decide on the authenticity of the acknowledgement of debt that was ascribed to the complainant. Council also failed to get reasons for the setting aside of the consent order from the Magistrates Court. This is one example of the applicant failing to place a properly investigated complaint before the Tribunal. There is no reason why it could not secure the record of proceedings from the Magistrates Court.

Disposition

In light of the foregoing the complaints are disposed of as follows:

First Complaint

The respondent is guilty of unprofessional, dishonourable or unworthy conduct.

Second Complaint

The respondent is guilty of unprofessional, dishonourable or unworthy conduct.

Third Complaint

The respondent is found guilty of withholding trust money without lawful excuse.

Fourth Complaint

The respondent is found guilty of withholding trust money without lawful excuse.

Fifth Complaint

The respondent is guilty of unprofessional, dishonourable or unworthy conduct in that he failed to account to the complainant and also failed to defend the complainant's case thereby resulting in a default judgment being granted.

Sixth Complaint

The respondent is guilty of failing to account to client and withholding trust money without lawful cause.

Seventh Complaint

The respondent is absolved of misconduct.

Penalty

We directed the respondent and the applicant to file submissions in mitigation and aggravation by 7 and 9 June respectively. The respondent's submissions were only availed on 16 June 2021. This was hampered by the initial unavailability of the Tribunal's reasons.

The respondent made detailed submissions in which he individualised the penalties relating to particular charges. In particular he related to the table of fines proposed by Council on 8th March 2021 and submitted that the charges he was convicted of attract fines. The respondent submitted that he should be fined in respect of complaints by Walter Madziro, Julius Gorerokufa, Kenneth V. Grant-Cocker and Findros Godzi. More comments will be made in respect of the complaint relating to Walter Madziro. In respect of the complaint by Julius Gorerokufa it was submitted that the respondent and the complainant eventually reconciled and agreed that the disputed bill be referred for taxation. The respondent again referred to the rejected bundle in his bid to demonstrate that he accounted to the complainant. The respondent further claimed that after submissions had been made to the Tribunal (presumably before the findings) the applicant engaged auditors to investigate the Kenneth V. Grant-Cocker and Zhou Haixi matters and he was exonerated. He further submitted that the Disciplinary Ethics Committee found him guilty of these charges (unspecified) as well as the charge for which he was absolved by the Tribunal.

The respondent sought to rely on a bundle of documents which he filed on 27 March 2019. We rejected the admission of that bundle at the hearing on 28 March 2019 following an objection by the applicant. It was our view that the bundle should have been filed together with the counter-statement. The respondent cannot seek to produce the same bundle under the cover of mitigation.

It was further submitted that deregistration should only be ordered where the respondent's conduct amounts to gross negligence. In pleading for lesser punishment, the respondent contended that his conduct is of lesser moral turpitude than that of the respondent in *Law Society of Zimbabwe* v *Muchandibaya* HH 114-17.

The respondent also made reference to s 28 of the legal Practitioners Act which prescribes the powers of the Tribunal. Section 28(1) of the Act gives the Tribunal power to order any of the following:

(a) Deregistration;
(b) Suspension from practice;
(c) Imposition of conditions the Tribunal deems fit;
(d) Payment of a fine;
(e) Censure; or
(f) Caution and postponement of further action on condition of future good conduct.

In that regard the respondent urged the Tribunal to opt for other penalties other than that of deregistration. In doing so the respondent pointed to his blameless record for close to 25 years. Reference was also made to the respondent's personal circumstances: he is aged 55 years and takes care of more than 8 children of which 6 are still minors. It was also submitted that his quest for the post of Prosecutor General failed on account of the present charges whose prosecution was unreasonably delayed by the applicant. Thus the delay in the finalisation of the matters should be considered as mitigatory. Finally the respondent urged the Tribunal to strive for uniformity of sentencing.

On its part the applicant has sought that the respondent's name be deleted from the register of legal practitioners, notaries and conveyancers. The applicant referred the Tribunal to the decision in *The Law Society of Zimbabwe* v *Manokore* HH-167-21 which highlighted the objectives of disciplining an errant legal practitioner.

It is worth observing that the powers of the Tribunal in terms of s 28 of the Legal Practitioners Act are not restricted to specific acts of misconduct. It is accepted that the ultimate punishment of deregistration must be resorted to in the most serious acts of misconduct. It must also be borne in mind that disciplinary matters are unlike criminal matters. Therefore the generally recognised principles of sentencing may not strictly apply to disciplinary matters in as far as mitigatory factors are concerned

The applicant's attitude regarding the appropriate penalty must be given due weight. This is because the applicant is the Regulatory Authority in respect of the legal profession. In

this respect see *Transvaal Incorporated Law Society* v *K* 1950 (4) SA 449. In arriving at an appropriate penalty to impose against the respondent, it is instructive to refer to the case of *Chizikani* v *Law Society* 1994 (1) ZLR 382 (S) in which at 391 GUBBAY CJ had this to say:

> "In each case the facts usually determine the punishment. Part of the headnote in *Die Prokureursode van die OVS* v *Schoeman* 1977 (4) SA 588 (O) at 589F reads:
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> "The consequences of an order of striking off are serious and far-reaching. But the facts usually determine the punishment. And even the making up of a deficiency in trust moneys, deep remorse and ignorance concerning book-keeping and basic business principles are not in themselves sufficient to avoid a striking off order in all cases. Those are, however, all factors in mitigation of punishment which should be placed in the scales."
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> In *Visse's* case (*supra*) although restitution had been made, and others had contributed to the misappropriation, both respondents were struck off the roll.
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> HIEMSTRA J observed in Incorporated Law Society, *Transvaal* v *K & Anor* 1963 (4) SA 631 (T) at 632E that:
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> "Since the case of Incorporated Law Society, *Transvaal* v *Visse & Ors* 1958 (4) SA 115 (T) this Court has consistently followed the practice of removing attorneys from the roll who have misappropriated trust funds."
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> See also Incorporated Law Society, *Transvaal* v *Horwitz* 1964 (4) SA 294 (T) at 300H-301A.
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> In applications by the Law Society for disciplinary action to be taken against a member, the paramount considerations are maintaining the integrity, dignity and the respect the public must have for officers of the court, no less than the Law Society's desire to protect members of the public from unscrupulous persons operating behind the colour of their profession. The question is: is the appellant a fit and proper person to be a member of the honourable Society? Any colourable conduct sufficiently grave to attract popular dissatisfaction with the profession must be visited with sanctions befitting such conduct."

The objective of disciplining an errant legal practitioner was outlined in *The Law Society of Zimbabwe* v *Manokore (supra)* as:

a. upholding public confidence in the administration of justice;

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

c. punishing the errant legal practitioner for misconduct; and

d. setting standards to be observed by other legal practitioners and in the process deterring against similar conduct by other like-minded legal practitioners.

An excerpt from the case of *Law Society of Singapore* v *Kurubalan s/o Manickam Rengaraju* [2013] 4 SLR 91 serves to illustrate the point. In that case SUNDARESH MENON CJ had the following to say at para 48-49:

> "A court that exercises disciplinary jurisdiction is likely to view mitigating factors in a qualitatively different light than would a court in the exercise of its criminal jurisdiction: see *Law Society of Singapore* v *Tham Yu Xian Rick* [1999] 3 SLR(R) 68 at [22]: Because orders made by a disciplinary tribunal are not primarily punitive, considerations which would ordinarily weigh in mitigation of punishment have less effect on the exercise of the disciplinary jurisdiction than on sentences imposed in criminal cases: *Bolton* v *Law Society* [[1994] 2 All ER 486] at 492. To state the matter another way, whatever might have been the appropriate sentence in the criminal proceedings, the objective there was rather different from that in show cause proceedings, which are civil and not punitive in nature.
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> 49 The point simply is that even if a mitigating circumstance might be found that could weaken the case for *punishment* in a criminal case, this circumstance may often not avail an Advocate and Solicitor in disciplinary proceedings because an equally, if not more, important consideration is the protection of public confidence in the administration of justice. This interest can legitimately trump the individual offender's interest in having his punishment finely calibrated according to his precise degree of culpability. Where aggravating factors are concerned, there is usually less need to draw this distinction since a factor that aggravates the offender's particular culpability would generally tend also to aggravate the adverse impact on confidence in the administration of justice, although there may be exceptions to this"

The above excerpt dovetails with the dicta of this Tribunal in *The Law Society of Zimbabwe* v *Manokore* (*supra)*. The emphasis in the present proceedings is to preserve the integrity of the legal profession and to uphold public confidence in the profession and the administration of justice. As such, the respondent's personal circumstances like having a blameless record for close to thirty years as well as looking after the welfare of over 8 children has to be weighed against the aggravating factors.

In our view there are several aggravating factors in the complaints. The improper association with a client is one such factor. On the subject of improper romantic liaisons between a legal practitioner and client, nothing is specifically provided for in the Code of conduct or the Act. There is also a dearth of case law on the subject within our jurisdiction. I find it worthwhile to refer to an article: Attorney-Client Sexual Relations published in The Journal of the Legal Profession. In his introduction Abed Awad states the following:

> "When one is presented with an opportunity for a consensual sexual encounter, it is possible that the person may proceed and succumb to temptation. Such a situation could, and often does, develop during an attorney's representation of a client. In an attorney-client relationship, the attorney holds the position of power and dominance. When one is involved in a legal matter, the attorney is viewed with utmost reverence, a sort of a saviour. This perception explains the dominance an attorney has in an attorney-client relationship. The attorney-client relationship from the outset, therefore, is inherently unequal. Such an unequal relationship, where the client in most cases is emotionally and financially vulnerable, is a recipe for abuse by attorneys. Could there be consent in such a relationship? In most cases, especially emotionally charged cases, probably not. Commenting on attorney-client sexual relations, one court succinctly stated: "we have nevertheless been consistent in noting that the professional relationship renders it impossible for the vulnerable layperson to be considered 'consenting.'" It may be impossible for the lay person to be considered consenting. Certain non-lay persons may be considered consenting, for example, a high-powered corporate executive engaging in sex with her attorney. If, however, the executive is involved in a matrimonial or criminal matter, consent becomes questionable. It is possible for a client to truly consent to a sexual relation-ship with an attorney, but it is rare. Clearly, the defense of consent is problematic due to the character of the majority of attorney-client relationships. Given the nature of the attorney-client relationship, is the commencement of a sexual relationship between an attorney and client during legal representation unethical? The majority of jurisdictions and commentators would answer the question in the affirmative."

The article by Abed Awad analyses ten jurisdictions in the United States of America in which attorney-client sexual relations are expressly prohibited. In the same article the author discusses other jurisdictions in the United States of America in which although attorney-client sexual relations are not expressly prohibited, such conduct has been dealt with as conflict of interest. It may also be noted that rule 1.8 (j) of the American Bar Association's Model Rules of Professional Conduct provides that:

> "A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced."

I will refer to two cases from the Wisconsin Supreme Court which deal with legal practitioner-client romantic liaisons. In the matter of *Larry R. Ridgeway* 158 Wis. 2d 452 (1990) an attorney had a sexual relationship with a client he was representing in his capacity as a public defender. He had also encouraged the client to violate one of her terms of probation, which was not to consume alcohol. It was found that the attorney's representation was materially limited on account of the conflict his interests manifested. The client was vulnerable as she faced the prospect of a three year jail sentence if her probation was revoked. The attorney's practising licence was suspended for six months.

In the matter of *Joseph H. Hallows* 136 Wis. 2d 72 (1987), an attorney was found guilty of several cases of unprofessional conduct. In one of the charges the attorney represented a

woman with whom he was having an intimate relationship. He did not disclose to the client the potential conflict between his professional and personal interests. In another charge the attorney made unsolicited sexual advances to a client he was representing in a divorce matter and subsequently engaged in sexual intercourse with the client on the occasions they met in his office to discuss the divorce matter. He also did not disclose the potential conflict between his professional and personal interests. It was found that the attorney's conduct warranted the revocation of his practising licence in Wisconsin.

Thus, it is the consequences of the relationship that are aggravating. As stated by E. A. Lewis in his book Legal Ethics, the golden rule in respect of misconduct is:

"A legal practitioner must avoid all conduct which, if known, could damage his reputation as an honourable lawyer and honourable citizen."

The duty to do the best in service of a client is an integral duty of a legal practitioner. Such duty is likely to be compromised where a legal practitioner develops an interest in the client. This violates the fiduciary duty the legal practitioner owes to the client. As was stated by Abed Awad in the article on Attorney-Client Sexual Relations:

> "The fiduciary duty that an attorney owes his or her client has its origin in common law. This notion was best articulated in 1850 by the Supreme Court:
> There are few of the business relations of life involving a higher trust and confidence than that of attorney and client, or, generally speaking, one more honourably and faithfully discharged; few more anxiously guarded by the law, or governed by sterner principles of morality and justice; and it is the duty of the court to administer them in a corresponding spirit, and to be watchful and industrious, to see that confidence thus reposed shall not be used to the determent or prejudice of the rights of the party bestowing it.
>
> The lawyer has a "duty to exercise and maintain the utmost good faith, honesty, integrity, fairness and fidelity." The principles underlying a fiduciary duty are recognized in both the Model Rules and the Model Code. A fiduciary duty is "a duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person." According to Professor Gillers, there are three reasons that strongly suggest a lawyer has a fiduciary obligation toward his client when the professional relationship commences: (1) "the client will likely have begun to depend on the attorney's integrity, fairness, and judgment;" (2) "the attorney may have acquired information about the client that gives the attorney an unfair advantage in negotiations between them" and (3) "the client will generally not be in a position where he or she is free to change attorneys, but will rather be economically or psychologically dependent on the attorney's continued representation." Unquestionably, a lawyer owes his client a fiduciary duty. When an attorney commences a sexual relationship with a client he is more likely to place his personal interest in the sexual relationship above the client's interest in his case, thus, breaching His sacred fiduciary duty to his client.
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> In order for attorneys to fulfil their fiduciary duty to their clients, "lawyers are expected to provide emotionally detached, objective analysis of legal problems and issues for clients." The ABA, commentators and courts alike, have recognized that a sexual relationship between a lawyer and client "may involve unfair exploitation of the lawyer's fiduciary position and/or significantly impair a lawyer's ability to adequately represent the client competently." Objective

> and detached analysis of the client's case becomes difficult when the attorney is involved sexually with the client."

The respondent should have set barriers against which he should not have crossed in relation to his professional interaction with the complainant's estranged wife. Both the applicant and the respondent were invited to file supplementary submissions regarding the appropriate penalty for this charge. This is in light of the fact that this is a novel charge within this jurisdiction. The applicant chose not to file any supplementary submissions. Surprisingly, on 25th June 2021 counsel for the applicant addressed a letter to respondent's counsel in which it was erroneously stated that the complaint by Walter Madziro was dropped during the course of the hearing. This was in reply to clarification that had been sought from the applicant on 24th June 2021 by respondent's counsel. The respondent has latched onto this erroneous feedback from applicant's counsel to argue that he was irregularly convicted of that charge. Having come to the erroneous conclusion that the respondent was found guilty on the basis of a common mistake, the respondent has submitted that the Tribunal should correct its judgment.

The record is clear that both the applicant's counsel and the respondent addressed the Tribunal on the merits of the charge emanating from the complaint by Walter Madziro. There was never any intimation to drop that charge by Mr *Mahere*. In fact, the respondent had initially sought to lead oral evidence on that charge but he eventually relented and confined himself to oral submissions. Therefore there is nothing to correct in the judgment.

The charge relating to Findros Godzi also reflects badly on the respondent's conduct. Having failed to account to client the respondent failed to defend his case thereby resulting in the client incurring a default judgment against him. This case is an example of the respondent not devoting himself to the best interests of his client which go to the root of the profession.

In respect of Julius Gorerokufa's case, the respondent vacillated on paying what was due to client despite having been furnished with banking details. There were instances when the respondent would not pick the client's calls or return such calls. In other instances the respondent would give excuses for being engaged in other issues. Ultimately, the respondent billed the client more than the fees he had quoted him. Such devious conduct is unacceptable for a senior legal practitioner. Allowing the respondent to continue practising would expose the public to such devious conduct.

In the case of Zhou Haixi the respondent failed to account for the complainant's funds when he was requested to do so. Considering that these were trust funds which should have been available on demand the failure to account amounts to abuse in the circumstances. Abuse

of trust funds invariably attracts deregistration unless there are exceptional circumstances of which we find none in the present case. See the case of *Chizikani* v *Law Society (supra)*.

In the case of Kenneth V. Grant-Cocker, the respondent developed interest in the client's motor vehicle which was being offered for sale. This is a species of conflict of interest. The respondent charged his fees from the proceeds of the sale of the motor vehicle and did not account for the balance. There was also tardiness in the manner in which the client's mandate was prosecuted.

The multiplicity of complaints for which the respondent has been found guilty of misconduct is alarming. The respondent's errant conduct does not bode well for the legal profession. All acts of misconduct were committed within a period of two years between 2014 and 2016. The respondent did not show any contrition. He never admitted any of the charges. Against the weight of evidence against him, he persisted in denying each charge. The lengthy period the respondent has spent practising law is overshadowed by the cumulative acts of his transgressions. In this respect see *Tayengwa Dugmore Muskwe* v *Law Society of Zimbabwe* SC 72/20. Having practised law for such a lengthy period, the respondent should have been exemplary in his conduct, taking into account that he was the principal of the law firm.

In our view, the respondent is not a fit and proper person to continue to practice law. Accordingly, it is ordered that:

1. The respondent's name be deleted from the register of legal practitioners, notaries and conveyancers.
2. Respondent shall pay the expenses incurred by the applicant in connection with the proceedings.

Gill, Godlonton & Gerrans, applicant's legal practitioners
Masawi & Partners, respondent's legal practitioners