THE LAW SOCIETY OF ZIMBABWE
versus
MOSES SHINGIRIRO CHINYENZE

LEGAL PRACTITIONERS DISCIPLINARY TRIBUNAL
HARARE, 28 September, 5 October & 19 December 2018, 25 January 2019, 29 March & 3 April 2019
Before: CHATUKUTA J (Chairperson), MUSAKWA J (Deputy Chairperson)
MR KANOKANGA & MRS S. MOYO (members)

N.R Mutasa, for the applicant
B Msipa & Magwaliba, for the respondent

CHATUKUTA J: The adage by Abraham Lincoln "A lawyer who represents himself has a fool for a client" proved true in this case. It is certainly not safe for a lawyer to handle all legal matters on his or her own where he or she is a litigant. It is generally safe to engage another lawyer from the onset to attend to their personal legal matters to ensure emotional detachment. The Tribunal learnt so when it dismissed the respondent's application for a postponement. The Tribunal suffered the agony of dealing with the respondent's worries, fears and stresses in his ever winding written responses and oral submissions. Both respondent and the Tribunal would have been spared the ordeal had respondent engaged counsel from the onset. The Tribunal was however saved towards the end of the hearing with the appearance of Mr *Magwaliba* albeit belatedly. Let this be a warning to other respondents who find themselves in similar situations that they need not be "fools for a client".

The applicant seeks the deletion of the respondent's name from the Register of Legal Practitioners, Notaries Public and Conveyancers on the ground that he conducted himself in contravention of the Legal Practitioners Act [*Chapter 27:07*]. The respondent is a senior legal practitioner having been admitted and registered as a legal practitioner on 16 January 1985. He is the sole partner of M.S. Chinyenze and Associates.

The application arises from a complaint by one Mrs Noreen Chikaka of Regional Executors and Trust (Private) Limited. On 19 May 2014 she was appointed as Executrix of the estate of the late Christopher Taruvinga Chimbumu who died on 22 August 2013. Before his demise, the late Chimbumu had been married to Florence Chimbumu. The two divorced on 26 June 2006. The two agreed in a Consent Paper to donate to 5 children of the marriage an immovable property known as No. 2 Wessex Drive, Cotswold Hills, Mabelreign, Harare. Pursuant to the Consent Paper, the respondent was appointed by the Registrar of the High Court as conveyancer for purposes of transferring the property into the names of the children. The transfer was required to be completed on or before 31 October 2007. The property was however not transferred before the said date and neither had it been transferred before the late Chimbumu's demise.

The property was subsequently sold to one Joseph Ngondonga on 20 October 2014 by the complainant as the executrix with the consent of the Master and the beneficiaries. The complainant instructed the respondent to process transfer of the property from the deceased estate to the purchaser. All the necessary transfer fees were paid by the purchaser directly into the respondent's trust account. Despite receipt of the money, the respondent had not processed the transfer as at the date of the complaint. The complainant made numerous inquiries with the respondent for an update. None was forthcoming.

The above complaint is the basis of the charges by the applicant against the respondent that the respondent acted in an unprofessional manner in that he:

a) abused his client's trust monies;
b) failed to account to client;
c) failed to execute client's instructions; and
d) failed to update client on the progress of the matter.

Before commencement of hearing, Mr *Msipa* applied for a postponement submitting that he had just been instructed by the respondent to represent him. The respondent had belatedly engaged him because he had been made to believe that the applicant was not pursuing the matter. On 21 June 2016 the respondent had been prosecuted before the Harare Regional Court on allegations of contravening s 113 (2) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. The criminal charges emanated from the same circumstances, it being alleged that he unlawfully converted the money paid into the trust account by Joseph Ngondonga. His application

for discharge at the close of the State case was dismissed on 28 November 2017. He filed an application for the review of that decision. The application for review was granted on 16 February 2018 under case number HC 11327/17. The decision of the Regional Court was set aside and the respondent was discharged at the close of the State case. He brought the order to the attention of the applicant. Ms Chagadama, applicant's officer, advised him on 18 June 2018 that this matter had been referred back to the applicant's Council for a decision whether or not to proceed further with the matter before the Tribunal.

The application for a postponement was opposed on the basis that the respondent did not have a reasonable explanation for seeking the postponement.

The application was dismissed. A chronology of the events leading to the application explains the decision of the Tribunal. The present application was filed on 30 January 2018. The application for review of the Regional Court's decision was granted on 16 February 2018. On 18 June 2018, Mrs Chagadama is alleged to have advised the respondent that the matter had been referred back to Council. The respondent filed his counter-statement on 10 July 2018. The notice of set down of the matter for 28 September 2018 was issued by the Registrar on 18 July 2018. It was personally served on the respondent on 20 July 2018 by Mrs Florence Chagadama. The applicant filed its reply to the respondent's counter-statement on 6 August 2018. It filed its heads of argument on 14 September 2018 and served same on the respondent on 18 September 2018. On 27 September 2018 the respondent instructed Muzangaza Mandaza & Tomana to seek a postponement of the matter on his behalf. A letter was written by Muzangaza Mandaza & Tomana and addressed to the Registrar on that date intimating that the respondent was to apply for a postponement of the matter as the respondent had earlier instructed Advocate *Magwaliba* to represent him. They had been instructed by the respondent to instruct Mr *Magwaliba* to prepare and file heads on his behalf. The letter was issued by the Registrar of the High Court at 15:34.

It is clear from the above that after the alleged indication by Mrs Chagadama on 18 June 2018 that the matter had been referred to Council, the applicant was served on 20 July 2018, a month later, by the same Mrs Chagadama with a notice of set down of hearing for 28 September 2018. The respondent should have sought an explanation and in writing why he was being served with the notice of set down. His explanation that Mrs Chagadama had advised him that the matter had been referred back to Council cannot therefore be true more particularly when he was further

served with the applicant's heads of argument on 18 September 2018, 10 days before the hearing. There can never be any clearer indication that the applicant was persisting with the matter. The writing was on the wall for everyone to see and particularly for a senior legal practitioner like the respondent.

The respondent ought to have instructed counsel as early as 20 July 2018 and sought a postponement far much earlier than 27 September 2018 when he approached Muzangaza, Mandaza & Tomana. He did not do so.

The letter from Mr *Magwaliba* addressed to the respondent and dated 27 September 2018 which the respondent sought to rely on in saying that his counsel of choice was not available did not assist him either. It reads:

> "I acknowledge your intention to brief me to handle the above matter on your behalf. The hearing was scheduled for 28 September 2018. I am willing and able as counsel of your choice to represent you in the matter. However, I am committed on the particular day with a Supreme Court appearance in the matter of *Mupinga* v *H. O Ncube*."

The letter is silent on when the intention to brief Mr Magwaliba was made and how. If it was in writing, such communication should have been availed. If it was telephonically, the date of the conversation should have been alluded to. The only conclusion that can be drawn from the lack of the information is that Mr Magwaliba had been contacted on 27 September 2018. Had he been contacted earlier, his communication to the respondent would surely have been dated earlier, or he would have written directly to the Tribunal.

Consequently, the application for a postponement was dismissed. Mr *Msipa* requested to be and was excused. Thereafter the respondent represented himself.

The respondent raised points *in limine* objecting to the continuation of the proceedings. The first point was that the matter is *res judicata* following his discharge at the close of the State case under case Number HC 11327/17. He submitted that the burden of proof in the criminal matter is the same as in a disciplinary matter, that is beyond a reasonable doubt. Continuing with the present application would mean he would suffer double jeopardy. In essence he was seeking to raise the defence of *autrefois acquit*.

It appears that this is an issue that will continue bedeviling the Tribunal despite it having been resolved in *Mugabe* & Anor v *Law Society of Zimbabwe* 1994 (2) ZLR 356 (SC). Despite making reference to that case the respondent was clearly selective of only that which supports his

case and overlooked the final decision of the Supreme Court. The Tribunal had the occasion recently to deal with the same issue under *Law Society of Zimbabwe* v *Douglas Mwonzora* HH 306/18. We observed at pp 8 -10 that:

> "The last issue for determination relates to the defence of *autrefois acquit* with respect to count 2. The defence of *autrefois acquit* is aptly provided for in section 180 of the Criminal Procedure and Evidence Act. The requirements for this defence to succeed are that an accused should have been tried substantially on the same charge, by a court of competent jurisdiction and on the merits.(See *R* v *Watson* 1970(1) SA 320.) Whilst the burden of proof in disciplinary matters involving grave charges is beyond reasonable doubt that does not mean that the *autrefois acquit* defence is available to a practitioner charged under the Legal Practitioner Act. The respondent sought to rely on the headnote of *Mugabe and Anor* v *Law Society of Zimbabwe* (*supra*) at 356 E-F which reads
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> > "The burden of proof at disciplinary proceedings before the Legal Practitioners Disciplinary Tribunal varies with the gravity of the offence charged. Where the offence has strong criminal connotations such as misappropriation of trust money, the burden is on the Law Society to prove its case beyond a reasonable doubt. The fact that the legal practitioner concerned has already been convicted of a criminal offence would be regarded in the Tribunal as *prima facie* proof that he had in fact committed the offence."
> >
> > This is consistent with section 28(3) of the Act which provides that:
> >
> > > "(3) Where a registered legal practitioner has been convicted within or outside Zimbabwe of an offence by a court of law and the Council of the Society or the Disciplinary Tribunal is of the opinion that such offence constitutes unprofessional, dishonourable or unworthy conduct on the part of the legal practitioner, whether as a legal practitioner, notary public or conveyancer, the Council of the Society or the Disciplinary Tribunal, as the case may be, may, if it thinks fit, on proof before it of such conviction and without hearing further evidence, deal with the convicted person in accordance with this Act:
> > >
> > > Provided that the convicted person shall be afforded an opportunity of tendering, in writing or in person or by his legal representative, as he may elect, an explanation to the Council of the Society or the Disciplinary Tribunal, as the case may be, in extenuation of his conduct."
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> *Mugabe and Anor* v *Law Society of Zimbabwe* cannot be said to be authority for the proposition that if charged with a criminal offence one cannot then be charged of a professional misconduct arising from a criminal offence. The proposition emerging from the case is that because of the gravity of the charge against the legal practitioner and the seriousness of the offence, the proof required in the disciplinary hearing is proof beyond a reasonable doubt. In other words, even where the legal practitioner is acquitted in a

> criminal court on facts relied on in a disciplinary hearing, the Tribunal is not precluded from hearing the disciplinary matter as long as the applicant is required to prove its case beyond reasonable doubt. Where a respondent before it has been acquitted of a criminal offence, the Tribunal will require the applicant to prove its case beyond reasonable doubt. Section 28(3) therefore allows for a respondent who may have been convicted of an offence to be referred to the Tribunal. This is recognition of the fact that proceedings in a criminal court and before the Tribunal are different processes for different purposes with different requirements despite arising from the same facts. Criminal proceedings are generally initiated by the police for breach of criminal law regarded as a wrong against society as a whole. Disciplinary proceedings are on the other hand initiated by the applicant with the aim of regulating the relationship between a legal practitioner and the applicant and maintain discipline in the legal profession. Had the proceedings been the same, a legal practitioner convicted before a criminal court would escape proceedings before the Tribunal on the basis that he/she would suffer double jeopardy. That is not the position. The defence raised by the respondent is therefore not applicable in the present disciplinary proceedings."

The issue was also determined in *Sergeant Khauyeza* (F048677J) v *The Trial Officer & Anor* HH 311-18. In that case the court was seized with an application by a police officer seeking stay of his detention pursuant to disciplinary proceedings under the Police Act [*Chapter 11:10*]. The applicant's proposition was that having regard to s 193 of the Constitution, disciplinary proceedings are interchangeable with ordinary proceedings. Consequently once convicted before a criminal court, a police officer could not be subjected to disciplinary proceedings else the officer would suffer double jeopardy. Section 193 of the Constitution provides that:

> "**193 Criminal jurisdiction of courts**
> Only the following courts may exercise or be given jurisdiction in criminal cases—
> (*a*) the Constitutional Court, the Supreme Court, the High Court and magistrates courts;
> (*b*) a court or tribunal that deals with cases under a disciplinary law, to the extent that the jurisdiction is necessary for the enforcement of discipline in the disciplined force concerned."

The respondent had argued that s 278 of the Criminal Code provides for the distinction between disciplinary and criminal proceedings and therefore one does not therefore suffer double jeopardy. Section 278 provides:

> **"278 Relation of criminal to civil or disciplinary proceedings**
> (1) In this section-
> "disciplinary proceedings" means any proceedings for misconduct or breach of discipline against a public officer or member of a disciplined force or a statutory professional body, or against any other person for the discipline of whom provision is made by or under any enactment;

……
……
(2) A conviction or acquittal in respect of any crime shall not bar civil or disciplinary proceedings in relation to any conduct constituting the crime at the instance of any person who has suffered loss or injury in consequence of the conduct or at the instance of the relevant disciplinary authority, as the case may be.
(3) Civil or disciplinary proceedings in relation to any conduct that constitutes a crime may, without prejudice to the prosecution of any criminal proceedings in respect of the same conduct, be instituted at any time before or after the commencement of such criminal proceedings."

In discussing the relationship between s 193 of the Constitution and s 278 of the Criminal Code, CHAREWA J remarked at p 26 that:

"Mr Mugiya's proposition presupposes that in interpreting s 193 (b), disciplinary processes are interchangeable with ordinary criminal proceedings.

This cannot be correct. The processes have entirely different objectives and even outcomes. Disciplinary processes aim to maintain and enforce discipline in the Police force, while criminal proceedings aim to maintain law and order.

Further, while our jurisprudence has adopted a more flexible approach in that proof beyond a reasonable doubt may be required where the gravity of the disciplinary offence and strong criminal connotations exist (See *Mugabe &* Anor v *Law Society of Zimbabwe* 1994 (2) ZLR 356 (SC)), nevertheless, disciplinary processes, as a general rule, require proof on a balance of probabilities (See *Olivier* v *Kaapse Balieraad* 1972 (3) SA 485 (A). See also *Law Society of the Cape* v *Koch* 1985 (4) SA 379 (C). Even then, the courts have long recognized the difference between disciplinary and criminal processes to the extent that a conviction for a criminal offence is regarded as *prima facie* proof that a party had committed a disciplinary offence (See *Mugabe &* Anor v *Law Society of Zimbabwe*, *supra*). Certainly, it has not been the position in our case law or South African jurisprudence, that conviction on a criminal offence excuses one from disciplinary liability, or vice versa.

Ultimately, disciplinary processes do not generate criminal records while criminal proceedings do. It is my view that it is precisely for that reason that s 193 (b) of the Constitution carefully emphasizes that any criminal jurisdiction given to a criminal or tribunal dealing with cases under disciplinary law, does so only to the extent necessary for the enforcement of discipline.

Therefore, the applicant's seeming suggestion that there is congruence between the disciplinary and criminal processes, which rules out one if the other is resorted to otherwise a police officer suffers double jeopardy, is misplaced and arises out of a misinterpretation of the law."

Whilst the remarks by CHAREWA J relate to disciplinary proceedings under the Police Act they equally apply to the present case and fortify our decision in the *Mwonzora* case, particularly the reference to s 193 of the Constitution and s 278 of the Criminal Code.

As the respondent rightly noted, he is being charged of abuse of funds and not theft thereof. The requirements for the two charges are clearly different It is hoped that this will bring to an end the raising of the defence in all disciplinary matters before this Tribunal.

The second preliminary point raised is that the charges have prescribed. The complainant complained of conduct that had occurred between 2014 and 2015. The applicant failed to take action then and only waited to do so in 2018. The Tribunal was at pains to comprehend how the law on prescription applies to disciplinary proceedings. The Prescription Act [*Chapter 8:11*] provides for:

> "the acquisition of ownership of things by prescription, the acquisition and extinction of servitudes by prescription and the extinction of debts by prescription; and to make provision for matters connected therewith."

Disciplinary proceedings do not in our view fall under the Prescription Act. Prescription is applicable to claims for ownership of things and claims for debts. We can only assume the respondent wanted to invoke his constitutional right to a hearing within a reasonable time guaranteed under section 69 of the Constitution. In order for the Tribunal to permanently stay these proceedings on the basis of the perceived delay, the respondent must satisfy the Tribunal that the delay is unexplainable, unreasonable and inordinate. In the present matter the complaint was raised with the applicant on 30 October 2015. In April 2016 the respondent responded to the query. Thereafter there have been communications flying between the applicant and the complainant and the applicant and the respondent. There were challenges in locating the respondent resulting in the applicant applying for substituted service. The respondent places the blame for the challenges squarely on the applicant. The delay between the date of complaint and the filing of the application cannot therefore be said to unreasonable warranting the stay of proceedings.

Mr *Magwaliba* raised other preliminary issues. The first issue is that the Tribunal having taken the decision to hold an inquiry failed to communicate that decision to both the applicant and the respondent as is required under s 7 (2) of the Legal Practitioners (Disciplinary Tribunal) Regulations, 1981 (SI 580 of 1981). The section is peremptory and its non-compliance therefore

renders the proceedings of the Tribunal a nullity. The respondent would have been entitled to challenge the decision had it been communicated to him. In support of this contention, the respondent cited the case of *Sam's Group (Private) Limited* v *Meyburgh & Ors* SC 45/15 a case dealing with the non-compliance with the High Court Rules.

As rightly submitted by Mr *Mutasa*, s 7 (2) should be read together with s 8 of the By-laws. Section 7 (2) reads:

> "The Registrar shall advise the applicant and the respondent and if the applicant is not the Society, the secretary of the Society of the decision of the Disciplinary Tribunal in terms of this section."

Section 8 provides for the setting down of the inquiry on a date, time and place to be decided upon by the Chairperson of the Tribunal.

Section 7 (2) does not prescribe the form which the communication to the parties should take. It is however obvious that the setting down of the matter on an identified date, time and place and service of that notice of set down is communication to the parties that the Tribunal would have decided to hold an inquiry. Any of the parties aggrieved by the notice can approach the Tribunal with their grievance before the date of hearing. The respondent had adequate time to do so given that the notice of set down was issued on 18 July 2018and was served on the respondent two days later on 20 July 2018.

The second preliminary issue raised by Mr *Magwaliba* is that the applicant belatedly filed its reply to the respondent's counter statement and after the Tribunal had set down the matter. Pleadings had not therefore been closed and the matter was prematurely set down for hearing. The respondent is prejudiced as the reply introduces a new charge of overreaching. The charge had not been preferred against him and he was not given an opportunity to respond. The matter should therefore be struck off the roll.

Mr *Mutasa* submitted in response that that the reply did not raise any new charge. It refers to issues raised emanating from the charge and the counter statement. The Tribunal is therefore not being invited to find the respondent guilty of any additional charge.

The Tribunal is mindful of the requirement that the applicant has 14 days after the filing of a counter-statement to file its reply. The Tribunal would thereafter make its decision to set down

the matter. In the event that the applicant does not file a reply, the Tribunal is required to made a decision after the lapse of the 14 days by which the applicant should have filed a response.

The respondent filed his counter-statement on 10 July 2018. There is no indication as to when the applicant was served with the statement. Assuming that it was served on the same date, the applicant would have been required to have filed its reply by 30 July 2018. The reply was filed on 6 August 2018. Under the circumstances, the Tribunal did set down the matter prematurely.

The Tribunal cannot, however, conclude that the reply was out of time in the absence of proof of service of the counter-statement. None of the parties, and particularly the respondent, stated when the counter-statement was served on the applicant. It is that date that would have triggered the 14 day period within which the applicant should have replied to the counter-statement.

It is our view that the premature setting down of the matter does not on its own render the proceedings improperly before the Tribunal. Firstly, the Tribunal's decision to set down a matter is not dependent solely on the reply to the counter-statement. In terms of s 7 (1) (b) the Tribunal can set down a matter even where no reply is filed. Upon perusal of the papers filed of record as at 10 July 2018, the Tribunal was of the view that there was a basis for setting down the matter, with or without the reply. Secondly, the premature setting down of the matter was not prejudicial to the parties in any way.

Turning to the contents of the reply, we are in agreement with the respondent that the reply was indeed prejudicial to the respondent, but only to the extent that the reply introduces new averments not contained in the application. The applicant refers to overcharging of stamp duty contrary to the provisions of the Finance Act [*Chapter 23:04]*. The question on how much stamp duty was not raised in the application. The other statements in the reply issues addressed in the reply are merely elucidating what is contained in the application and the summary of evidence. They are in response to and make reference to what the respondent stated in his counter-statement. The statements would have been and were alluded to in the heads of argument. The respondent would not therefore be prejudiced by those statements. The offending portions of the reply which are paragraphs 2.3 and 2.4 are accordingly struck off.

The second issue was on the clarity of charges. Mr *Magwaliba* submitted that the charges were not clear and it was not the responsibility of the Tribunal to plough through the papers filed by the applicant to establish the exact charges the applicant is preferring against the respondent. The only merited submission by Mr *Magwaliba* the applicant stated in paragraph 5 of the Application that the respondent's conduct is conduct and violates s 23 (2) (b) of the Legal Practitioner's Act. In fact, as rightly submitted by Mr *Magwaliba* the section sets out the powers of the Council, this Tribunal or a court to consider any other conduct not specified in s 23 (1) as constituting unprofessional or unworthy conduct. The applicant did not specify the respondent's conduct that would be considered unprofessional and unworthy.

Apart from the above submission, the Tribunal was constrained to appreciate Mr *Magwaliba*'s challenge on the clarity of the other allegations of violating s 23 (1) (d). The section is quite clear. It considers the "withholding the payment of trust money without lawful excuse" as unprofessional, dishonorable or unworthy conduct. This is to be read together with By-laws 70E and 70 F (2) of the Law Society By-laws, 1982 (Statutory Instrument 314 of 1982). The two By-laws require that a legal firm accounts to client for funds paid by the client into the firm's accounts. It is over view that it is not necessary to dwell on that issue any further.

The last preliminary point was there are material disputes of fact which can only be resolved with the calling of oral evidence. It was submitted that the applicant was alleging that respondent had failed to account for the payments made by the purchaser. It is on the basis on this failure to account that all the other charges were preferred against the respondent. The respondent had respondent to the allegations by submitting that he had accounted to the parties at all times.

It is within the discretion of an applicant or a respondent whether or not to call oral evidence and for the Tribunal to assess the probative value of what has been placed by the parties before it. The Legal Practitioners (Disciplinary Tribunal) Regulations are quite clear that the parties can decide "where appropriate" to call witnesses. Both parties decided not to call witnesses as is within their discretion. We are of the view that there are no material disputes of fact which cannot be resolved on the papers as will appear later.

All the preliminary points are accordingly dismissed.

Turning to the merits of the application, the following facts as appear in the complaint, the respondent's response to the complaint and the counter-statement are common cause: Following the divorce under HC 6808/2001, the late Chimbumu initiated the process of transferring the property into the names of the beneficiaries. He paid the capital gains tax and obtained the capital gains tax certificate in 2008. He handed over the certificate to the respondent. He had the property valued in 2009. He paid the respondent certain monies (although there is a dispute as to what the money was intended for).

After his death, the property was sold to Joseph Ngondonga. The complainant, as the executrix of the estate of the late Chimbumu instructed the respondent to transfer the property into Joseph Ngondonga's name. She gave the respondent the consent by the Master to sell the property (consent given in terms of s 120 of the Deceased Estates Act [Chapter 6:01], consent by the Master to transfer the property, rates clearance certificate and Capital Gains Tax Clerance Certificate. The respondent gave the complainant a statement for the purchaser to pay the requisite transfer fees. Joseph Ngondonga paid into the respondent's account with ZB account number 4129101230200 a total of $8 450 by way of three payments. According to a statement of the transaction history of the respondent's account, the first payment of $2 000 was made on 6 January 2015. The second payment was effected on 19 January 2015 with the last payment of $4 450 on 5 May 2015. Of that amount, $4 200 was for stamp duty, $4 200 for Transfer fees, $20 for Registration fees and $30 for petty fees.

The statement reflects that before the payment of the first $2 000 the respondent's account had a debit balance of $1 789. 00. After the payment the account had a credit balance of $211.00. On 19 January 2015 the account had a debit balance of $1 791 05 and with the deposit of the next $2 000 a credit balance of $208.05. On 5 May 2015, the account was in the red by $4 494.25 following a withdrawal of $4 400.00. The purchaser deposited $4 450.00 leaving the account in credit by $205.25. It is quite clear that the only meaningful deposits into that account for the five months between 1 January and 30 May 2015 were by the purchaser and the most that was in the account was $255.20. The deposits by the purchaser, once they were made, went in to clear debit balances. Therefore at no given time were the deposits retained in the account.

The respondent does not dispute being placed in funds by the purchaser. He does not dispute that he did not have the funds so deposited into his account at the time the complaint was lodged. He however denied any wrong doing. In advancing his defence he gave elaborate explanations of the history of the matter from the time of his appointment as the conveyancer pursuant to the judgment under HC HC 6806/01/01. The gist of his defence which is relevant to the determination is set out in his response to the query dated 19 April 2016. He stated as follows:

> "When I was instructed to attend to the transfer of the property to the purchaser, I advised that it might not be possible to do a straight transfer to the purchaser from the Chimbumus because of the provisions of the Court order which stated that transfer had to be effected from the Chimbumus to their children. I also advised that the Registrar of Deeds would probably insist on two (2) transfers since transfers must be done as per the order of the transactions, meaning the transfer had to be effected first from the Chimbumus to their children and then from their children to the purchaser. I advised that transfer fees would have to be paid at each stage of the transfer process. I was told this would be too expensive and that I should just effect a transfer directly from the Chimbumus to the purchaser. I was advised that the two-stage process would only be resorted to if the straight transfer failed. I tried to do a direct transfer. We secured a capital gains certificate from Zimra. I prepared consents to the sale of the property to be signed by children. I went with the papers to the office of the Registrar of Deeds before securing a rates clearance certificate and before I had received signed consents of the children. I was told that because of the provisions of the court order I had to do the transfer in two stages i.e from the Chimbumus to the children and from the children to the purchaser."

The respondent alleges that he prepared three sets of transfer papers. The first set was for the direct transfer. The second set was for the transfer from the deceased estate and his wife to the beneficiaries. The third set was from the beneficiaries to the purchaser. For all the three he was entitled to payment of fees and he got his payment from the funds paid by the purchaser. The payment by the purchaser was sufficient for only one transfer. He would have been entitled to 80% of US$4 200 for each of the three transfers which works out to be US$3 360 per transfer. The respondent would therefore have been entitled to US$10.080. Having withheld the US$8 450 paid by the purchaser, he would still be owed US$1630. The complainant and the purchaser would still each be required to pay stamp duty of US$4200 for their respective transfers.

Having undertaken work in compliance with the above instructions, he was entitled to his fees for his services. He paid himself for that work from the money deposited by the purchaser.

A lot of issues have been raised by both the complainant and the respondent as to the status of the property following the death of the late Chimbumu, whether or not it reverted to the late's estate or it remained donated to the children in terms of the Consent Paper. Either way, it is common cause that the conveyancing of the property involves more than one transaction. The first transaction would have been from the deceased's estate to whoever would have been the beneficiary/beneficiaries under the estate. The second transaction would be from the beneficiary/beneficiaries to the purchaser.

It is further common cause that the beneficiaries of the property were the children of the deceased. The beneficiaries gave their consent to the sale of the property. The Master of the High Court also gave his consent to the sale in terms of s 120 of the Administration of Deceased Estates Act.

Concerned that the Master's decision was not informed in light of the judgment under case number HC HC 6806/01 which had provided for the donation of the property to the children and had set conditions precedent to the transfer of the property into the names of the beneficiaries, the respondent wrote to the Master on 22 July 2014 and 24 November 2015. The Master responded to the respondent's concerns by letter dated 8 January 2016. The Master brought to the attention of the respondent that the estate had been wound up and the estate account confirmed. His views were that the beneficiaries of the property in the Consent Paper (the deceased's children) could either consent to the sale or challenge it. He further suggested that in the alternative, the executrix could amend the account accordingly.

It can be concluded that the beneficiaries to the estate having consented to the sale of the property did not intend to litigate. The executrix did not intend to amend the account hence the instructions to transfer the property to the purchaser. It was therefore the responsibility of the respondent to transfer the property into the name of the purchaser in compliance with the law.

Section 11 of the Deeds Registries Act [*Chapter 20:05*] provides for the procedure to be adopted in transfers of land. It provides that:

> "(1) Save as otherwise provided in this Act or as directed by court-
> (a) Transfers of land and cession of real rights therein shall follow the sequence of the successive transactions in pursuance of which they are made, and if made in pursuant of testimony disposition or in-testate succession they shall follow the sequence in which the right in the land accrued to the persons successfully becoming vested with such right.

(b) It shall not be lawful to depart from such sequence in recording in any deeds registry any change in the ownership in such real right unless the registrar is satisfied that circumstances are exceptional and has consented to such departure:

……

……

……

(2) Prior to the registration of any transfer or cession in terms of paragraph (b) of and the provisos to subsection (1), there shall be paid the stamp duty, estate duty and any other such duty which would have been payable had the land been transferred or the real rights been ceded to each person successively becoming entitled thereto."

The import of the above section is that it is imperative that transfer of immovable property follow the sequence of successive transactions. It is in exceptional circumstances that the Registrar of Deeds would consent to deviation from the peremptory provision. In the event that the Registrar gives his/her consent for a direct transfer, the stamp duty, estate duty and any other duty which would have been payable had the proper sequence of transactions been followed would still be due and payable.

According to the respondent's letter of 19 April 2016, the respondent was clearly aware of the requirements of the above section. The respondent further admitted in his counter statement that he was aware of the existence of s 11 of the Deeds Registries Act. He observed in para 6 (4th line) that:

> "It is clear that the transfer failed because of insistence by the Registrar of Deeds that section 11 of the Deeds Registries Act had to be complied with The Registrar of Deeds also insisted on the court order being complied with i.e. transfer being made to the children. I had already advised the clients before the Registrar of Deeds confirmed the position that two transfers had to be done in order to comply with the order of court and to satisfy the mandate from the Registrar of the High Court and also to satisfy the provisions of section 11. The clients refused to follow the instruction of the Registrar of Deeds arguing that the transfer to the children should have been done 31st October 2007."

Regardless his knowledge of the law, the respondent proceeded to attempt to effect a direct transfer to the purchaser. According to the respondent, the attempt was made on the advice and protestations of the complainant and the purchaser that a transfer in compliance with the law would have been too costly for parties.

The fallacy of the respondent is beyond comprehension. He was a senior legal practitioner and conveyancer. He had been engaged by a client for his competence yet he acted on the advice

of that same client to disregard a peremptory provision of the law. The respondent cannot say he was pressurised or advised by either the executrix or the purchaser or both to proceed with a direct transfer because he was bound by law to follow the sequence of successive transactions. The preparation of transfer documents is primarily the preserve of a notary public. Section 13 of the Deeds Registries Act provides that:

> (1) No deed of transfer, certificate of title, mortgage bond, other than a mortgage bond intended to be registered as security for a loan or advance referred to in paragraph (*c*) of subsection (1) of section *forty-four* cession of a mortgage bond, agreement referred to in paragraph (*o*) of section *five* or consent mentioned in subsection (1) of section *fifty-one* shall be attested, executed or registered by a registrar unless it has been prepared by a notary.

It is therefore expected that a notary public who accepts instructions to prepare transfer documents professes to have the requisite skills to do so and to know the law that is applicable. In Honey & Blankenberg v Law 1965 RLR 685 (G) at 691 GOLDIN J remarked that:

> An attorney's liability arises out of contract and his exact duty towards his client depends on what he is employed to do… In the performance of his duty or mandate, an attorney holds himself out to his clients as possessing adequate skill, knowledge and learning for purpose of conducting all business that he undertakes.
>
> The respondent cannot therefore shift any blame for his conduct on the clients.

The respondent submitted that he did consult the Registrar of Deeds on the possibility of a direct transfer. Any diligent conveyancer would have been aware that the Registrar would only consent to a direct transfer in exceptional circumstances. Even in those exceptional circumstances where direct transfer is allowed, all the duties which would have been payable for the other sequential transfers would still be due to the Registrar in terms of s 11 (2). The rationale for the requirement under s 11 (2) is obviously that fees must be paid into the fiscus for each and every transaction. The fiscus should not be prejudiced by a direct transfer. The only costs that would have been curtailed are the transfer fees for the preparation of the transfer documents in respect of the other transfers which would have been omitted. In other words, the conveyancer is the one who foregoes the transfer fees. The intention of the parties to curtail these fees would therefore not amount in our view to exceptional circumstances. In the present matter, the respondent would therefore have been required to formally and in writing requested to the Registrar setting out the

full history of the property and pointing out that there would be no prejudice to the fiscus. In the absence of such formal request, the Tribunal is at loss as to the nature of the alleged request made to the Registrar by the respondent and the response and reasons thereof by the Registrar.

In any event, in order to satisfy the Registrar of the exceptional circumstance, a conveyancer would have been required to formally communicate with the Registrar. A diligent conveyancer formally communicates in writing so as to have tangible evidence of the communication in order to then account to not only the client but also to the regulator when called upon to do so as in the present case. The respondent, apart from his say so, did not place before the Tribunal any such communication. In fact, despite averring that he had drafted transfer documents in preparation for presentation to the Registrar in support of a direct transfer, no such transfer documents were placed before the Tribunal. The respondent alleges that he drew up transfer documents from the estate to the purchaser. He should not have done so before he had secured the Registrar's formal consent in terms of s 11 of the Deeds Registries Act. It is not clear why he prepared the documents if he intended to enquire with the Registrar if it was possible to make a direct transfer. It is not clear why the respondent prepared transfer documents first if he alleges he intended to enquire with the Registrar of Deeds if it was possible to make a direct transfer. A seasoned and diligent conveyancer would not even have contemplated that route.

Well aware that although it was not lawful to proceed as he intended without the prior consent of the Registrar, which consent would not however have absolved the beneficiaries from the statutory obligation to pay "the stamp duty, estate duty and any other such duty which would have been payable" had the sequential transfers been followed, he charged the purchaser and further proceeded to appropriate the fees to cover his fees. He appropriated funds included for stamp duty which was not due to him. The question is therefore whether or not he was entitled to those fees.

In terms of payment for the sequential transfers, the order of payments is that the first invoice for fees ought to have been made to the children as the beneficiaries. The transfer from the beneficiaries to the purchaser would have been the responsibility of the purchaser. The second invoice should therefore have been issued to the purchaser.

The respondent did not produce before the Tribunal any invoices issued to either the children or the purchaser. What we have is a break down for purposes of direct transfer from the estate to the purchaser.

In terms of the Law Society of Zimbabwe (Conveyancing Fees) By-Law, 2013 (SI 24 of 2013) if a conveyancer draws up documents and the transfer does not go through, the conveyancer is entitled to charge 80% of the conveyancing fees. Paragraph 2 to the Schedule to the By-laws reads:

> "When a transfer, mortgage bond or other matter referred to in this tariff is not proceeded with before registration and all documents have been prepared and all work has been substantially carried out to the point of lodging, the fee to be charged shall be 80 percetum of the tariff fee."

Two issues arise from that paragraph. Firstly, in order for a conveyancer to claim entitlement to 80% of the conveyancing fees, all the work must have substantially carried out to the point of lodging with the Registrar of Deeds of the transfer documents. Secondly, a conveyancer is entitled to 80% of the conveyancing fees only. As alluded to earlier, the respondent has not produced any documents that he had worked on to show that "all the work must have been substantially carried out to the point of lodging". In other words he failed to account that he had done any work at all. Even if we were to accept that he did some work, he would not have been entitled to the 80% for drawing up transfer documents for a direct transfer in breach of the law.

Further, the respondent's conveyancing fees according to his break down were $4 200. He was therefore entitled to 80% of the $4 200. He was therefore required to account for the $4 200 paid towards stamp duty. He would not have been entitled to that money as it does not constitute the conveyancing fees. He should have held the $4 200 in his trust account. As at 30 May 2015, he only had $205.25 in the trust account. Further, assuming he would have been entitled to withhold the 80% of the conveyancing fees, he in essence, overreached by withholding an amount exceeding the prescribed fee.

The next question for consideration is who is supposed to have paid for the $8 450.00 that was paid into the respondent's trust account. Following s 11 of the Deed Registries Act, the buyer did not have the responsibility to pay for the transfer from the estate of the late Chimbumu to the beneficiaries. That was the responsibility of the beneficiaries. The buyer would have been obliged to meet the transfer costs for the transfer from the beneficiaries to himself. The respondent's

submissions on the payments by the purchaser are that the purchaser had undertaken to pay for both transfers in the event that a direct transfer had failed. However, there is nothing in writing tendered by the respondent confirming the purchaser's willingness to make the double payment. There is no allegation that the beneficiaries indicated that they were either unwilling or unable for lack of resources to pay for their own transfer. On a balance of probability, it does not make economic sense that the purchaser would have given such an undertaking. At most his interest would have been in a direct transfer. The fact that it did not make any sense is supported by the respondent's own averments that when the direct transfer failed and the purchaser was advised to make the second payment he refused protesting that the money he had paid was adequate. As it is, the purchaser paid $8 450-00 for transfer of property into his name. He did not get the transfer and he lost the $8 450-00. The respondent therefore did not have a lawful cause to withhold the US$8 450

The import of the above is that the respondent failed to account to the purchaser. Mr *Magwaliba* submitted that respondent owed a duty to account for the transfer to the executrix and not the purchaser. The respondent therefore had not acted unprofessionally. The respondent clearly overlooked the fact that he was not paid by the executrix but by the purchaser. There was therefore need to account to the purchaser particularly where the property had not been transferred to him. In one breath the respondent was saying he took instructions from the purchaser when the purchaser allegedly undertook to pay the fees for the double transfer and at the same time said he did not have to account to the same person who gave him instructions and paid him. The respondent cannot therefore deny the responsibility to account to the purchaser.

The respondent would still be required to explain to the principal, the executrix, who gave the instruction to transfer the property. The respondent alleged that he communicated to the complainant the problems of direct transfer. There was no proof of any such communication.

As rightly submitted by Mr Mutasa By-Law 70 (E) of by-law 1982 is specific as to how the accounting should be done. It reads:

> "(1) Within a reasonable time after performance or earlier termination of its mandate every firm **shall deliver to the client concerned a written statement setting out with clarity-**
>
> (a) details of all amounts received by the firm in connexion with the matter concerned, **with appropriate and adequate explanatory narratives**; and

(b) Particulars of all disbursements and payments made by the firm in connexion with the matter; and
(c) all fees and other charges raises against or charged to the client, and where any fee represents an agreed fee, a statement that it was agreed and the amount so agreed; and
(d) the amount payable to or by the client." (Own emphasis)

The above By-law requires a legal firm to account to a client in writing. The statement of the account must explain with clarity the disbursements and payments made and the fees and other charges raised. There must adequate narratives explaining the disbursements, payments, fees and the charges raised. Most importantly, the statement must be delivered to the client. It is upon delivery that a client would receive an account.

It follows that once allegations of failure to account are raised, the respondent must satisfy not only the applicant, but also the Tribunal that he accounted to client by producing the written statement of account that he authored and delivered to client is compliance with By-Law 70 E. The respondent has failed to produce the requisite statement. The only conclusion that can be drawn from the failure is that the respondent abused client's funds.

What is of great concern to the Tribunal is that the respondent made bare allegations refuting all the allegations leveled against him. He is the custodian of the file on this matter. As alluded to earlier the matter is still work in progress dating back to his appointment after the granting of the order under HC 6806/01 on 26 June 2006. The respondent was given an opportunity to show that he had accounted to both the executrix and the purchaser following the lodging of the complaint and this application. No proof of such accounting was placed before the Tribunal. The Tribunal would therefore be expected to make a determination on the papers placed before it. The thread permeating throughout this application is that the respondent failed to place before the Tribunal any document that he authored prior to the lodging of the complaint. All the documents filed of record related to communication and events post the complaint. The following is the chronology of the pertinent documents on the matter before the Tribunal and their dates:

1. Letter from the Executrix to the respondent
   advising the later of her appointment as executrix

	of the estate Late Christopher Chimbumu	9 July 2014
2.	Letter from the respondent addressed to the executrix asking for payment of outstanding transfer costs	22 July 2014
3.	Complaint to the Applicant	30 October 2015
4.	Letter by respondent to the Master of the High Court Bringing to the Master's attention that the Master's consent to sale of the property had overlooked the order under case number 6806/01	24 November 2015
5.	Response from the Master to letter from respondent	9 December 2015
6.	Statements by the respondent to the police made presumable after the executrix had reported matter to the police	14 January 2016
7.	Response by the respondent to the complaint and addressed to the applicant	19 April 2016

Except for the first two letters, all the communication referred to by the respondent and purporting to explain what had been happening was authored after the complaint. Had the respondent been accounting to client as expected, he would have been able to place before the applicant and the Tribunal the requisite proof.

Lastly, one issue which was not dwelt on to some great length although very important, is the fact that the delays in the conveyancing of the property date back to the period when the late Chimbumu was still alive. Before his demise in 2013, the late Chimbumu initiated the process of transferring the property into the names of the beneficiaries. He paid the capital gains tax and obtained the capital gains tax certificate in 2008. He handed over the certificate to the respondent. He had the property valued in 2009. There is no meaningful explanation from the respondent as to what happened for the period of four years between 2009 and 2013. The respondent accepts receiving some payment from the deceased in Zimbabwean dollars. His explanation is that the payment was not for the transfer of the property as alleged by the executrix but was for other professional services undertaken for the deceased.

In Ecclesiastes 9:5 it is said:

> "For the living know that they will die, **but the dead know nothing**, and they have no more reward, for the memory of them is forgotten"

The dead do not speak and therefore cannot defend themselves. This places the obligation on the living to prove what they allege of the dead. And again, the respondent fell short of what is expected of a diligent legal practitioner. Nothing was placed before the Tribunal to prove that the payments made by the late Chimbumu had been for the transfer of the property in question to the beneficiaries. The impression created by the respondent's failure to produce such proof is that the payment made by the late Chimbumu was for the transfer of the property into the names of the beneficiaries.

The respondent was in our view, therefore paid twice for the same transfer. In both payments he failed to transfer the property and failed to account for the payments.

It is our view that the applicant has succeeded to prove beyond a reasonable doubt that the respondent abused client's monies and acted in an unprofessional manner as alleged by the applicant. This renders the respondent not a fit and proper person to continue to remain on the register of Legal Practitioners, Notaries Public and Conveyancers.

Mr *Magwaliba* submitted in mitigation that the respondent had an unblemished career as a legal practitioner dating back to 1985 when he started practicing. He distinguished himself in a number of ways. In 1986 he jointly with Mr Gambe established the second if not third indigenous law firm in Zimbabwe. He mentored a number of notable senior legal practitioners some of whom were later appointed as judges. He imparted legal knowledge to law students as a tutorial assistant at the University of Zimbabwe and as a lecturer at the Judicial College, Domboshava. He has been a member of the International Bar Association, the Secretary General of the Zimbabwe Association of Democratic Jurists in 1986. He has contributed tremendously in the corporate and legal spheres.

Regarding the commission of the offence, it was submitted that the matter related to a mere mishandling of a transfer. He did not have the intention to commit an offence and enrich himself. He did not embezzle any trust funds. He lodged with the Registrar of Deeds the papers that he had prepared for the direct transfer from the deceased estate to the purchaser under pressure from the purchaser. He was willing to follow the proper sequence of the transfer of the property into the name of the purchaser and at no additional cost to the purchaser.

Because of these mitigating factors, the respondent submitted that a fine was warranted in line with a Table of Fines issued by the applicant in 2018 setting out the applicant's sentencing practice. A failure to keep proper accounts and withholding trust funds each attracts a fine of $1 000.00.

Mr *Mutasa* submitted in aggravation that the manner in which the respondent conducted himself reflected on him badly particularly given his seniority within the profession. His initial stance when the complaint was raised was that he could not transfer the property from the beneficiaries to the purchaser because he had not been placed in funds. He however changed his position after the filing of the application stating that he had retained 80% of the amount paid by the purchaser as fees for work that he had undertaken. This was an afterthought intended to cover up for his misconduct and mislead the court. As at 30 May 2015, his trust account reflected a balance of $205.25 way below the 20% that ought to have been in the account. In fact the respondent was required to have in the account at least $4 450 being stamp duty which did not belong to him. Further, he had overstated the stamp duty by $1 230. His defence that he was pressured by the purchaser not to follow the prescribed sequence of transfer militated against his professional independence and integrity. The Table of Fines alluded to was not applicable in the present matter as it relates to petty offences

In our decision to find the respondent guilty of the charges preferred against him, we concluded that the respondent's conduct amounted to abuse of trust funds. As rightly submitted by Mr *Mutasa*, it is trite that the abuse of trust funds is particularly considered to be serious enough to warrant the extreme penalty of striking-off from the register of legal practitioners as it reflects badly not only on the respondent's integrity but on the profession as a whole. In See *Chizikani v Law Society of Zimbabwe* 1994 (1) ZLR 382 (SC), GUBBAY CJ (as he then was) observed at p 392 F that:

> "This is ominously confirmatory of the principle that a legal practitioner who is guilty of misappropriation of trust funds disentitles himself from having his name retained on the register of practitioners.
>
> We are in no doubt that a legal practitioner who misappropriates his client's funds is not a fit and proper person to be placed in the position of trust and confidentiality to which his enrolment as a member of the Law Society elevates him. If there are any mitigatory

circumstances, they will be placed in the scales and reflected in favour of the appellant, if and when he should apply for reinstatement of his name on the roll.

A few unworthy practitioners should no longer be allowed to hurt the good name of the rest. The Law Society is justified in expunging the name of any member who, in the name of the profession, preys upon the credulity of members of the public to their detriment."

The position adopted in the *Chizikani* case appears to be the position regarding the legal profession worldwide. In *Barry Lee Gorlick, Q.C* v *The The Law of Manitoba Case* 15-06 it was remarked that:

"51. Integrity is fundamental to the practice of law. The preface to the Code of Professional Conduct, the Law Society of Manitoba at p 5 states:

> 'The legal profession has developed over the centuries to meet a public need for legal services on a professional basis. Traditionaly, this has involved the provision of advice and representation to protect or advance the rights, liberties and property by a trusted adviser with whom the client has a personal relationship and whose integrity, competence and loyalty are assured.
>
> In order to satisfy this need for legal services adequately, lawyers and the quality of service they provide must command the confidence and respect of the public. This can only be achieved if lawyers establish and maintain a reputation for both integrity and high standards of legal skill and care. The lawyers of many countries in the world, despite differences in their legal systems, practices, procedures and customs, have all imposed upon themselves substantially the same basis standards. Those standards invariably place their main emphasis on integrity and competence.'

52. Since integrity is such a fundamental attribute of a lawyer, it follows that breaches of integrity must be treated very seriously. Thus disbarment is the presumptive penalty in cases of misappropriation." (See *The Law Society of the Northern Provinces* v *Christopher Mabaso* [2015] ZASCA 109 paragraphs 22-24.)

The respondent took oath to live by the high code of ethics of which the legal profession is associated with. We take note of the mitigating factors submitted by the respondent and particularly the contribution he has rendered to the profession. However, a proper balance must be struck between the interests of the public (and in this case the complainant) and the integrity of the profession on one hand and on the other hand the interest of the respondent in arriving at an appropriate sentence. The imposition of a fine as suggested by the respondent would not strike that balance and would be a clear deviation from the now settled penalty for abuse of trust finds and

the seriousness with which the offence is considered. The Table of Fines referred to by the respondent as a guideline of the sentencing practice is in our view reserved for that the applicant's Council considers petty and for its determination. Once the matter is considered serious enough for referral to the Tribunal, the Tribunal is enjoined to consider the sentencing trends for such serious offences. We do not find any reason to depart from the sentiments expressed by the apex court in the *Chizikani* case. It is accordingly ordered that:

1. The respondent's name be and is hereby deleted from the Registrar of Legal Practitioners, Notaries Public and Conveyancers.
2. The respondent's law firm be and is hereby placed under curatorship for the administration of its trust accounts and/or business accounts.
3. The respondent be and is hereby ordered to pay all the expenses incurred by the applicant in connection with these proceedings.

Costa & Madzonga, legal practitioners for the applicant

Muzangaza Mandaza & Tomana Legal Practitioners, legal practitioners for the respondent