1. TAPERA SENGWENI
versus
THE LAW SOCIETY OF ZIMBABWE

2. AUGUSTINE RUNESU CHIZIKANI
versus
THE LAW SOCIETY OF ZIMBABWE

LEGAL PRACTITIONERS DISCIPLINARY TRIBUNAL
HARARE, 28 September 2018, 3 October 2018 & 30 October 2019
Before: CHATUKUTA J (Chairperson), MUSAKWA J (Deputy Chairperson)
MR D KANOKANGA & MS S. MOYO (Members)

D. Mwonzora, for the 1st applicant
2nd applicant in person
C. Z Chikara, for the respondent

CHATUKUTA J: The two matters, though argued separately, have been dealt with under one judgment as they raise a common issue, whether or not the Tribunal can rescind its decision. Both applicants were legal practitioners registered as such with the applicant.

1. Tapera Sengweni

On 5 March 2013 the respondent sought, under case number LPDT 3/13, the deregistration of the applicant from the register of legal practitioners on allegations of abuse of trust funds. It was alleged that the applicant was engaged by one Nicholas Masuku to collect a sum of US$27 294.00 from one Zedias Nene. The applicant after collecting the money in 2010, forwarded to Nicholas Masuku US$13 000, leaving a balance of US$14 500 which amount remained outstanding at the time of filing of the application.

The application was set down for hearing for 10 May 2013. The notice of hearing was served on Advocate Uriri at the Advocates' Chambers on 20 March 2013. On 10 May 2013, the matter was postponed at the instance of the applicant to 31 May 2013 and thereafter to 21 June 2013, 26 July 2013 and finally to 18 October 2013. Advocate Uriri appeared for the applicant on all the dates except on 21 June 2013 when Advocate Magwaliba appeared and explained that Advocate Uriri was appearing in the Constitutional Court. On 26 July 2013 a

postponement was sought with the undertaking that the applicant would pay the outstanding amount to the respondent failing which he would be deemed to have consented to the order for his deregistration. He had not paid the amount at the hearing on 18 October 2013. Advocate Uriri appeared again for the applicant and advised the Tribunal that the applicant had failed to honour his undertaking. An order for the deregistration of the applicant was duly granted in accordance with the undertaking of 26 July 2013. It is the rescission of this order that the applicant now seeks.

The application for rescission was filed on 18 October 2018. The essence of the application is that the applicant was not served with the application and Advocate Uriri did not have instructions to represent him in the matter.

The application was opposed and the respondent raised a preliminary point that the application was improperly placed before the Tribunal. Mr Chikara submitted that the Tribunal is a creature of statute and can only exercise powers conferred upon it by the statute. The Tribunal was not empowered to rescind its judgments. He referred to *Post and Telecommunications Corporation* v *Chizema* SC 108/04 in support of the point *in limine*.

Mr Mwonzora conceded that the respondent is a creature of statute and that there is no provision in the Act empowering it to rescind its own judgments. He submitted that the judgment being a default judgment, one could not appeal against the judgment or seek a review. It was unjust that the judgment remains extant solely because the Tribunal is not empowered to rescind its own judgment. He submitted that it is reasonable and justifiable, as envisaged under section 3 of the Administrative Justice Act [*Chapter 10:28*], for the Tribunal to rescind its judgment.

2. Augustine Chizikani

On 14 June 2018 the respondent sought, under case number LPDT 8/18, the deregistration of the applicant from the register of legal practitioners. It was alleged that the applicant failed to account to a client for money collected during a debt collection process and abused trust funds. The applicant was engaged by Southern Africa Media Development Fund based in Botswana. The Fund advanced a loan to a company called Anling Media operating in South Africa as Ice Media (Pvt) Ltd. The company failed to pay the debt. The Fund instructed the applicant to recover the debt on its behalf in the sum of US$103 906.04. The applicant

obtained a court order for the recovery of US$34 620.49 only and failed to account to the Fund if the order had been executed. No explanation was given why the full amount of US$103 906.04 could not be recovered. The Fund had to engage another firm of lawyers, A M Vilakazi, in South Africa to follow up with the applicant. Numerous letters inquiring on the matter were written to the applicant by the firm and no satisfactory responses were given by the applicant. The applicant later responded that he would pay amounts of US$5 000.00 *per* week without explaining why the payment of US$34 620.49 could not be made in full.

The applicant was further charged for failure to discharge his obligations to pay rent for his office accommodation. He was sued by the property owners for arrear rental resulting in an order against him in an amount in the sum of $15 244.00. His office equipment and assets were attached in execution.

The application for the deregistration of the applicant was set down for hearing on 29 March 2019. The matter did not take off on that date as the applicant had filed his counterstatement on 22 March 2019 and served it on the respondent on 25 March 2019. The respondent intended to reply to the counter statement and a postponement was allowed to 10 April 2019. The applicant did not attend on that date. Following submissions by the respondent on the merits of the application, an order was granted for the deregistration of the applicant.

The applicant filed the present application for rescission on 20 May 2019.

The application was opposed and the respondent raised the same preliminary point as in the Sengweni matter.

The applicant's submissions in response to the preliminary point were incomprehensible. I however shall attempt to make sense out of them. It appears the applicant was submitting that an application for rescission is a fundamental right to be heard. It was further submitted that the Tribunal had inherent powers to rescind its own judgment. The applicant could not advance any authority for his propositions.

A distinction must be made between the two cases in that in the Sengweni case, Mr Sengweni was represented by counsel and therefore was deemed to be present (despite the now challenge that counsel did not have instructions to represent him). Concessions were made on his behalf and the order was granted with his "consent." His counsel had indicated that he had accepted liability and intended to pay the amount owing. The decision of the Tribunal was therefore on the merits.

In the case of Mr Chizikani, whilst a judgment was granted in the absence of the respondent, the applicant addressed the Tribunal on the merits of the matter. It further considered the respondent's counter-statement and came to the conclusion that the explanation advanced therein did not mitigate the respondent's culpability hence the granting of the order.

Despite that distinction, the question for determination is whether the Tribunal has the jurisdiction to rescind its own decisions. The Tribunal is a creature of statute, having been created by the Legal Practitioners Act. Consequently it is bound by the four corners of the enabling legislation. This means that it has no power other than that conferred upon it by the statute creating it. In *Post and Telecommunications Corporation* v *Chizema* (*supra*) ZIYAMBI JA observed at pp 3-4 that:

> "The request by the respondent for a *mandamus* from the Tribunal does not fall within any of the functions of the Tribunal set out in s 89 *supra*. This being so, the Tribunal had no jurisdiction to entertain the application since the authorities are clear that:
>
> > "… nothing shall be intended to be within the jurisdiction of an inferior court but that which is alleged."

See *Peacock* v *Bell & Kendal*, (1667) IWMS Saund 73 cited in Jerold Taitz, *The Inherent Jurisdiction of the Supreme Court* at p 3.

> "The proper forum for an application for *mandamus* is the High Court. On this ground alone the appeal should succeed."

As submitted by the applicant, there is a plethora of case authorities on the principle. See *Vengesai & Ors* v *Zimbabwe Glass Industries Ltd* 1998 (2) ZLR 593 (H) *Founders Building Society* v *Mazuka* 2000 (1) ZLR 528 (HC) *Dombodzvuku* v *CMED (Pvt) Ltd* SC 31/12; *Nyahora* v *CFI Holdings (Pvt) Ltd* SC 81/14, *Hatfield Town Management Board* v *Mynfred Poultry Farm [Pvt] Ltd 1962* RLR at 802, *Founders Building Society* v *Mazuka* 2000 (1) ZLR 528 (HC), *Nyaguwa* v *Gwinyayi* 1981 ZLR 25, *Mabhaudi* v *Mhora* HH 60/2011, *Karimatsenga* v *Tsvangirai & Ors 20*12 (2) ZLR 195, *Jonathan Nathaniel Moyo* v *Roseline Nkomo* SC 67/14, *Chris Stylianou & Ors v Moses* v *Mubita and 25 Others* SC 7/17, *Joseph Lungu and Others* v *Reserve Bank of Zimbabwe* SC 1/2017, *Vengesai Chirasha* v *National Food Limited* SC 20/18.

Both applicants conceded that the Act does not empower the Tribunal to rescind its own judgments. The Tribunal is not a superior court with inherent jurisdiction to regulate its own proceedings outside the Act as suggested by Mr Chizikani neither does it have implied jurisdiction. It cannot derive its jurisdiction from the Administrative Justice Act as suggested by Mr *Mwonzora*. The Act provides for the right to administrative justice by an administrative

authority. An administrative authority is defined in s 2 of the Administrative Justice Act to mean:

> "…any person who is-
> (a) an officer, an employee, member, committee, council or board of the State or a local authority or parastatal; or
> (b) a committee or a board appointed in terms of any enactment;
> (c) a minister or a deputy minister of the State;
> (d) any other person or body authorised by any enactment to exercise or perform any administrative power or duty;
> and who has the lawful authority to carry out the administrative function concerned."

The Tribunal is none of the above. It is a quasi-judicial body and does not exercise administrative functions. It therefore lacks the jurisdiction to entertain the application. The applications cannot therefore succeed,

It is accordingly ordered that:

1. Application for rescission under case number LPDT 8/18 be and is hereby dismissed with costs.
2. Application for rescission under case number LPDT 27/18 be and is hereby dismissed with costs.

MUSAKWA J agrees ……

Mwonzora & Associates, 1st applicant's legal practitioners