THE LAW SOCIETY OF ZIMBABWE
versus
LLOYD MANOKORE

LEGAL PRACTITIONERS DISCIPLINARY TRIBUNAL
Before CHATUKUTA J (Chairperson), MUSAKWA J (Deputy Chairperson)
HARARE, 23 November 2018, 25 January 2019, 24 March & 15 April 2021
Mr D. Kanokanga & Mrs S Moyo (Members)

S Gahadzikwa, for the plaintiffs
F Girach, for the defendants

CHATUKUTA J: This is an application for the deletion of the respondent's name from the Register of Legal Practitioners, Notaries Public and Conveyancers and payment of expenses incurred by the applicant in connection with these proceedings. The respondent is alleged to have acted at the same time for two different parties where the interests of the parties were conflicted or were bound to be conflicted. He sold the immovable property of a client without the client's authority or an order of court. After selling the immovable property and receiving the purchase price, he failed to remit the balance of purchase price to the client. He instead forwarded the money to the client's creditor without client's consent. He is further alleged to have disregarded instructions of a client to revoke a Power of Attorney. The respondent's conduct was alleged to be unprofessional, dishonourable and unworthy warranting the deletion of his name from the Register of Legal Practitioners, Notaries Public and Conveyancers.

On 20 June 2016, Perkins Zhawari and his wife, Lilian Zhawari (the complainants) submitted a complaint to the applicant against the respondent giving rise to this application. The following facts surrounding the allegations against the respondent are common cause. The complainants were owners of an immovable property called Lot 2 of Stand 91M Bellevue Township, Bulawayo measuring 2931 square metres (the immovable property) held under Deed of Transfer Number 4058/96. Sometime in 2012, Celgrim Bakeries (Private) Limited (Celgrim Bakeries) made an application for a credit facility with National Foods Limited. The company was represented by Grimmond Nyatanga. Grimmond Nyatanga requested the complainants to provide security required by National Foods Limited for the credit facility in

the sum of $3 000. The complainants made available the immovable property as security for the credit facility which was extended to Celgrim Bakeries. They signed a Power of Attorney on 6 November 2012 appointing Manokore & Partners to act as their attorney and agent whenever the debt due to National Foods fell due and remained unpaid. On the same day, that is, on 6 November 2012, Perkins Zhawari deposed to an affidavit in which he ceded the immovable property to National Foods in support of the application by Celgrim Bakeries for the credit facility. The respondent's firm was the legal practitioners of National Foods Limited.

Celgrim Bakeries failed to pay the debt owed to National Foods Limited. On 19 February 2013, Celgrim Bakeries signed an acknowledgment of debt in the sum of US$10 520,53. It undertook to pay the debt by consecutive monthly instalments in the sum of US$2 000 until the debt was extinguished. It failed to honour the acknowledgment of debt.

On 24 January 2014, the respondent acting on behalf of National Foods Limited, sent a letter to the complainants indicating the firm's intention to sell their immovable property in satisfaction of the debt due to National Foods Limited. On 11 February 2014, he wrote another letter to the complainants referring to a telephone conversation between Perkins Zhawari and one Ms Wutete of Manokore Attorney wherein the complainants had consented to the sale of their immovable property. On 12 February 2014, the respondent wrote a letter addressed to Zuze Law Chambers who were representing Celgrim Bakeries and Grimmond Nyatanga. In that letter, the respondent referred to a letter from Zuze Law Chambers of 7 February 2014. It appears Zuze Law Chambers, acting on instructions from Celgrim Bakeries and Grimmond Nyatanga had offered to sell an array of equipment to satisfy the debt. On the 17 February 2014, Zuze Law Chambers wrote to the respondent undertaking on behalf of Celgrim and Nyatanga to surrender the equipment into National Foods Limited's custody during the sale. Also attached to the list were the prices of the property believed to have been in accord with a forced sale. The letter was received by the respondent on 19 February 2014.

By letter dated 21 February 2014, the respondent declined the offer and indicated that National Foods Limited was proceeding with the sale of the immovable property. The immovable property was subsequently sold to one Grace Nyoni. It was transferred to her on 12 December 2014 under Deed of Transfer 1691/14. In September 2014, the complainants were summoned to the respondent's offices where they were informed that their immovable property had been sold. They were presented with a statement of account which indicated that the immovable property had been sold for $35 000. An amount of $6 802.54 was due to the complainants after payment of the debt to National Foods Limited, legal fees and arrear utility

bills. The respondent did not remit the amount to the complainants. The amount was however remitted to National Foods Limited without the complainants' authorisation.

The Power of Attorney and the complainants' affidavit both of 6 November 2012 are central to the determination of this application. It is therefore prudent to quote the two documents at the onset. The Power of Attorney reads:

> "We Perkins Zhawari and Lilian Zhawari ……..
>
> do hereby appoint Manokore & Partners the Attorneys of National Foods Operations Limited (hereinafter referred to as "NFOL") or his nominee duly approved by NFOL, to be my attorney and agent, whenever any debt owed to NFOL by me falls due and remains unpaid for 7 days, to sell or otherwise dispose of, on my behalf, the properties specified in the Schedule to this Power of Attorney, the Title Deeds to which I have voluntarily surrendered to NFOL, and to use the proceeds for the sale or disposal to settle the debt owing and due by me to NFOL and, if there is any balance remaining, to return the balance to me forthwith."

The Affidavit reads:

> "I, Perkins Zhawari, ID No o5-002888 W 75
> …….
> do hereby solemnly and sincerely swear/declare the following
>
> Cede the property (Lot 2 of Stand 91m Bellevue Township of subdivision A of Bellevue) to National Foods to support the credit application of Celgrim Bakeries (Private) Limited t/a Freshbake."

The respondent raised a preliminary point. We dismissed the point and indicated that full reasons were to follow, these are our reasons.

Mr *Girach* submitted that the respondent filed an urgent chamber application under case number HC 7349/18 seeking the stay of the proceedings before the Tribunal pending the finalisation of case number HC 2210/17. HC 2210/17 is an action by the complainants against the respondent, National Foods Limited, Grace Nyoni, Celgrim Bakeries seeking the cancellation of the sale of their immovable property, in the alternative claiming the replacement value of the property or payment of a sum of US$6 802.54 being the balance after remittance of the amount due to National Foods Limited and collection of fees and commission by the respondent for services rendered. They maintained in that action that they did not consent to the sale. The respondent alleged that central to case number HC 2210/17 are the same issues being raised in this application being that the respondent did not have the complainants' consent or an order of court authorising the sale of the complainant's immovable property. The

law does not permit the two processes to run at the same time. There is a danger that if the Tribunal proceeds with the matter, it may arrive at a different decision from that of the High Court. The matter is therefore *sub judice*. In support of the submissions, Mr *Girach* referred to *Dicron Investments (Pvt) Ltd* v *Eliphas Kawa & Ors* HH 129-17, *Mushaishi* v *Lifeline Syndicate & Anor* 1990 (1) ZLR 284 (HC) and *Derdale Investments (Private) Limited* v *Econet Wireless (Private) Limited* 2014 (2) ZLR 662 (HC).

The applicant's response to the preliminary point was that the authorities referred to by the respondent were not relevant. In all the three cases, the High Court dismissed applications to review decisions which were the subject of appeals before the Supreme Court. The Tribunal was not being invited to interfere with a decision of any court or tribunal pending before any superior court. Mr *Gahadzikwa* further submitted that the matter in the High Court is primarily to determine whether the respondent is civilly liable to the complainants or not. The proceedings before the Tribunal are to determine whether the respondent is a fit and proper person to practice law. The two processes are not related.

As rightly submitted by the applicant, the purpose of the present inquiry is to determine whether or not the respondent violated any of the ethics that a legal practitioner is expected to comply with and whether he should continue to practice as a legal practitioner. The processes before this Tribunal and in High Court are therefore clearly distinguishable, the one not necessarily dependent on the outcome of the other. The matter cannot therefore be said to be *subjudice*. Case authorities are abound that disciplinary proceedings are *sui generis* and can be conducted parallel to either criminal or civil proceedings. (See *Law Society of Zimbabwe* v *Sheelagh Cathrine Stewart* HC-H- 39 – 89 and *Siwanda Kennedy Mbuso Sibanda* v *The Law Society of Zimbabwe* S.C. 162-91).

Mr *Girach* ultimately conceded that a determination by the High Court in favour of the respondent is not a bar to the Tribunal making a determination on the suitability of the respondent to continue practicing as a legal practitioner. The concession put to rest the preliminary point raised by the respondent, hence the dismissal of the point.

Turning to the merits of the application, Mr *Gahadzikwa* submitted that it was improper for the respondent to act for the complainants and at the same time act for National Foods where the two had conflicting interests. When the principal debtor of National Foods failed to pay the debt, the respondent sold the complainants' immovable property without obtaining a court order to execute against the immovable property. This was in contravention of Section

4 of the Contractual Penalties Act [*Chapter 8.04*] which stipulates that in circumstances where there is a penalty stipulation, a creditor must obtain a court order and then execute.

The respondent opposed the application. His response to the application is that the complainants voluntarily ceded their immovable property as security in support of the credit facility to Celgrim Bakeries. They voluntarily signed a Power of Attorney authorising the sale of the property when the debt became due and remained unpaid. They did not object to the sale of their immovable property when they were advised of the impending sale. The conduct of the respondent was therefore at all times beyond reproach.

A W**hether the respondent represented two different parties where the interests of the parties were conflicted or were bound to be conflicted;**

It is trite that where there is a dispute between parties or there is likely to be a dispute between the parties and the interests of the parties would be incompatible the same legal practitioner or firm cannot act for both parties. (See **Legal Ethics: Handbook for Zimbabwean Lawyers**, by B.D. Crozier and *Watson* v *Gilson Enterprises (Pvt) Ltd & Ors* 1997 (2) ZLR 318). It is not in issue that the respondent's legal firm represented National Foods Limited at all times in the dispute between National Foods Limited and Celgrim Bakeries. It is not in issue that the complainants offered their immovable property as security for the credit facility extended to Celgrim Bakeries by National Foods Limited, the respondent's client. It is not in issue that the respondent's legal firm was given by the complainants Power of Attorney to represent them as their attorney and agent whenever any debt owed by the complainants to National Foods Limited became due and remained unpaid for seven days and to sell or otherwise dispose of their immovable property. In other words, the complainants were giving the firm authority to act on their behalf in all legal and financial matters associated with the sale of their immovable property. It should therefore have been apparent to the respondent, that in the event of Celgrim Bakeries failing to meet its obligations under the credit facility, the respondent would represent National Foods Limited in any litigation to recover the amount owed by Celgrim Bakeries. It should further have been apparent that the complainants' immovable property was likely to be a subject of that litigation. It was therefore inescapable that the interests of the complainants and National Foods Limited were incompatible. Inspite of the incompatible interests, the respondent accepted to act on behalf of the complainants as per the Power of Attorney. It is difficult to conceive how the respondent would have acted for both National Foods Limited and the complainants at the same time in a dispute between the

two where National Foods Limited would be the plaintiff/applicant and the complainants the defendants/respondents as is now the case. The complainants instituted the action under case number HC 2210/17. It was therefore improper for the respondent/his legal firm to have accepted to act on behalf of both National Foods Limited and the complainants.

In *Towers* v *Chitapi* 1996 (1) ZLR 399 referred to by the applicant, the High Court had occasion to deal with a similar matter where a legal practitioner represented two parties with conflicting of interests. At 411 D-H GILLESPIE J remarked that:

> "It appears to me that the defendant's attorneys have allowed themselves to act, to the defendant's prejudice, in a case where there is the clearest conflict of interest between the defendant and Mrs Kamangwana. The attorneys should never have allowed this to happen. It was unprofessional. **A legal practitioner has the clearest of duties not to act for parties with conflicting interests. His duty to place his best endeavours at the service of a client necessarily precludes him from exerting those efforts for another whose interests oppose the first client.** Although in some cases it may be appropriate to make disclosure of the conflict and to continue to act with the parties' consent, in others it is improper even to seek that consent.* As a result of what has happened the defendant will now have a judgment against her which is enforceable, whereas had she been advised timeously of her rights she would, I think inevitably, have been able to claim an indemnity from Mrs Kamangwana. That she would have made such a claim is clear from her answers to questions which I put to her." (Own emphasis)

The respondent in this matter acted in favour of National Foods Limited to the prejudice of the complainants. The complainants' immovable property was sold at a price that the complainants allege was below the market value. The disparity between what was due to National Foods Limited by Celgrim Bakeries ($19 520 174), the alleged market value of the property ($60 000 as per offer dated 22 August 2013 by one Mahenge Rabson) and the sale value of the property ($35 000) demonstrates the alleged prejudice suffered by the complainants. The bias towards National Foods is further shown by the fact that according to the debtors account from the respondent to the complainants, $6 802.54 remained in the trust account after deductions from the proceeds of the sale of the complainant's immovable property. The respondent had paid to National Foods Limited its dues, deducted his legal fees and commission. Instead of remitting the amount to the complainants, the respondent remitted the amount to his client, National Foods Limited, which had already received its dues without the complainants' instructions to do so. The respondent's justification for the remittance comes out in the letter dated 22 November 2016 to the applicant from one N Mkandla, who was National Foods Limited's Finance Executive-Risk, Audit and Credit. N. Mkandla explained in

his letter that National Foods Limited had requested the amount to settle an outstanding ZESA bill on the complainant's immovable property in the sum of $4 296. The relevant portion of the letter reads:

> "On our instruction, the offer was accepted and Manokore duly completed the sale agreement with the Purchaser. As standard, Manokore levied their collection commission and legal fees from the proceeds and completed a spread sheet to account for these funds. On 17th of June 2015, the new purchaser advised that there was an overdue ZESA bill of $4 296. The lawyers then transferred the balance held in trust of $9 023.75 into National Foods Limited account for the part to be applied against the ZESA bill. Manokore requested and were readily furnished with a bond of indemnity by ourselves in their favour as is the norm with matters of this nature. Complainants are free and have always been advised to approach us to direct us on where to transfer excess funds that we remain holding in our books since our debt has now been settled in full."

According to the above extract, what was required by National Food Limited was a sum of $4 296. There is no explanation why the respondent transferred to National Food Limited the entire amount held in the trust account in the sum of $9 023.75. National Foods Limited was thus holding in its books a sum of $4 727.75 contrary to the respondent's contention that what was due to the complainants is a sum of $6 802.54. Had the complainants consented, it would not have been necessary for National Foods Limited to furnish the respondent with a bond of indemnity. He would, as is expected, have had in his possession written consent by the complainants.

Further, that explanation is at variance with the explanation given by the respondent during the hearing. In response to a question on why the money ended with National Food Limited, Mr Girach responded as follows:

> "It ended up with National Foods because the tender was refused and the reason behind them holding on to it; the tender had been refused, National Foods undertook to hold on to the money because there were some problem in relation to the ZESA account, so they were going to hold onto the money. But his prime reasoning behind that was the tender at that stage was refused back in 2014 when the tender was made and the accounting was made to the complainants, the complainants refused to take that money.
> .....
> .....
>
> ……. if the respondent had taken that money and put it into somebody's else account that would be different but the person who for the purposes of the transaction and for the purposes of the dealings the National Foods and the respondent would be one so that does not matter this is not a conveyancing in the ordinary sense where I will hold on to the money and it is only after the transfer is done and you give me your assurance that the transfer is done that I as a legal practitioner forward it to your trust account and

> you will then undertake to give me the title deeds. This is not that sort of transaction. This is a straight forward *parate executie*, and because it is a *parate executie* he does not have to hold on to it as a matter of law. As a matter of conduct I think the only difficulty that might have arisen is if they did not tender the money or they were unable to or they were unwilling to tender the money and there is no question about that. My learned friend knows no matter how he tries and spin it that the money is there it is available it has always been available from the complainants' point of view they just do not want to take the money."

Two issues arise from the above convoluted response. The first was that this is the first time that an explanation is given by the respondent that the money was tendered to the complainants and the complainants refused to accept the money. The second issue is that the explanation contradicts the explanation given by the respondent in his response to communication from the applicant. In paragraph 25 of the respondent's letter dated 16 August 2016, the respondent stated:

> "At NatFoods' request we, in the meantime, transferred the amount held in trust to our client and hold an indemnity from our client for repayment of this amount to the Complainants if they wish to receive the funds. We attach hereto a copy of the indemnity marked as Annexure G. Complainants are free at any time to have these funds transferred to them."

The last issue is that the respondent was operating under the misapprehension that once the complainants refused the alleged tender, it was proper to give the money to the creditor whose debt had already been acquitted. This negates the entire rationale for having a trust account. In *Mitchell* v *Estate Agents Council* MCNALLY JA observed at 226 C-D that:

> "Central to the whole concept of professionalism in the handling of clients' money is the trust account. Whether one is speaking of lawyers, accountants or estate agents, the principle is the same. Clients must know, with absolute conviction, that their money is safe. The machinery which has developed to ensure that safety is the trust account system."

The respondent therefore seems not to understand the purpose of a trust account. This is apparent from the respondent's counter statement. He stated paragraph in 14:

> "14.2 I deny that I neglected to forward the monies due and payable to the Zhawaris after disposal of their immovable property. As set out even in the response to the Law Society dated 16 August 2016, the Zhawaris have always been free to approach National Foods for the balance of the amounts outstanding.
>
> 14.3 I must emphasise that the Zhawaris are debtors of National (F)oods and thus a nexus exists and directing them to National Foods cannot in any way be detrimental to them or be negatively construed."

The amount was deposited into the trust account for the respondent to hold the amount in trust for remittal to the intended beneficiaries. Having paid one beneficiary, National Foods Limited, the respondent was obliged to hold the balance in trust for remittal to the Zhawaris.

National Foods Limited did not at law have the responsibility to hold the amount in trust on behalf of the Zhawaris. Further, since the money was due to the complainants, the respondent could only take instructions from the complainants and it was only the complainants who would have been entitled to indemnify the respondent.

It is further clear that the respondent was not circumspect in analysing the Power of Attorney that he relies on as authority for the disposal of the immovable property. By accepting to be the complainants' attorney and agent, the respondent owed the complainants a duty of care. Had he done so, it would have been clear to him that the complainants are identified in the Power of Attorney as being indebted to his client National Foods Limited. The complainants did not have a contractual relationship with National Foods Limited in terms of which they were indebted to that company. They were sureties to the credit facility extended to Celgrim Bakeries. Further, they did not hold themselves in the Power of Attorney to be co-principal debtors with Celgrim Bakeries. The respondent did not interrogate the Power of Attorney as any diligent legal practitioner should have done. Had he done so he would have identified the above anomalies in the Power of Attorney. He further would have noted the affidavit which states that the complainants "ceded" their property to National Foods limited and clearly stated the basis for such purported cession, which was to "to support the credit application of Celgrim Bakeries (Private) Limited t/a Freshbake". The impression created by the lack of diligence exhibited by the respondent is that he was eager to have documents that would assist National Foods Limited in disposing the complainants' property in satisfaction of a debt owed by Celgrim Bakeries. Such conduct exhibits the respondent's bias in favour of National Foods Limited.

The last indicator of the conflict of interest is evidenced by the sale of the complaints' immovable property without the client's authority or an order of court. The complainants stated in paragraph 10 of their letter of complaint that their property was sold without their involvement. In paragraph 12 of the letter they stated that their property was sold without a court order. In paragraph 1 they stated that Nyatanga brought the Power of Attorney ready for signature. They are in fact not the ones who inserted the name of the respondent's firm in the Power of Attorney. This explains the misleading portions of the Power of Attorney. There was no challenge from the respondent as to the circumstances alluded to by the complainants surrounding the signing of the Power of Attorney and the affidavit. The respondent did not dispute the complainants' assertion that the contents of the affidavit were dictated by Nyatanga who was anxious to get a credit facility from National Foods.

The respondent therefore acted for two parties who had conflicting interests. This conduct is unprofessional.

B Was the sale of the complainants' immovable property by the respondent and National Foods Limited lawful?

The applicant contended that the complainants pledged their immovable property as security for a credit facility to be extended to Celgrim Bakeries. The respondent sold the property without either the consent of the complainants or an order of court. The respondent and National Foods Limited therefore resorted to self-help. It was further contended that the portion in the Power of Attorney authorising the sale of the property was a *pactum commissiorium* and therefore illegal. The sale of the property was therefore illegal. It was further illegal in asmuch as it was contrary to s4 of the Contractual Penalties Act [*Chapter 8.04*] which stipulates that in circumstances where there is a penalty situation, a creditor must obtain a court order and then execute.

The respondent submitted that the complainants authorised the sale of the immovable property in the Power of Attorney and the affidavit by Perkins Zhawari. The complainants consented to the sale of the property as evidenced by the fact that they surrendered their title deeds to the property. They further ceded the property as per the affidavit. The provision in the Power of Attorney was therefore a *parate executie* and not a *pactum commissiorium*. Further, the respondent's firm advised the complainants of the imminent sale and the complainants yet again consented to the sale. In support thereof, the respondent referred to the communication from the respondent's firm to the complainants dated 24 January 2014 and 11 February 2014. In the latter letter, it is indicated that there was a telephone conversation between the complainants and one Ms Wutete during which the complainants consented to the sale of the property.

The respondent placed reliance on the Power of Attorney and the affidavit as the two primary documents that authorised him to sell the immovable property. It appears that the issue whether or not the sale was lawful is determinable on whether the Power of Attorney was valid. Firstly, the complainants appointed a law firm, Manokore Partners, to act on their behalf. A law firm is not a legal persona and could not therefore act on behalf of the complainants. Secondly, as indicated earlier, the Power of Attorney is misleading as it refers to the

complainants as National Foods Limited's debtors which they were not. As rightly submitted by Mr Gahadzikwa, the Power of Attorney and the affidavit, having been signed on the same date, must be read together. The complainants could not be indebted to National Foods Limited (in terms of an unspecified agreement between the two) and at the same time cede their property in support of a credit facility advanced to Celgrim. Both the Power of Attorney and the affidavit were therefore, in our view, invalid ab initio. Our finding that the Power of Attorney is invalid does not detract on our earlier finding that the respondent was conflicted when he acted on behalf of two incompatible parties. Assuming we are wrong in finding that the power of Attorney was invalid, the fact remains that the respondent persisted with his defence that he acted on the strength of the Power of Attorney in circumstances he should not have acted for both the complainants and National Foods Limited.

The question whether the authority to sell the complainants' immovable property constituted a *pactum commissorium* or a *parate execution* would have been relevant had the Power of Attorney as read with the affidavit been valid. The respondent therefore could not rely on those two documents as authorising him to sell the property as they were invalid. The sale of the immovable property was therefore invalid.

The purported consent by the complainants to the sale communicated in the letters dated 24 January 2014 and 11 February 2014 does not assist the respondent. The consent was being sought on the basis of documents that were invalid. In any event, the respondent failed to explain the absence of a Power of Attorney to pass transfer and the sellers' declaration. Mr Girach could not explain who signed the two documents. The following was the exchange between Mr Kanokanga and Mr Girach:

> "**MR KANOKANGA**: Mr Girach this immovable property was held under title?
> **MR GIRACH**: Yes.
> **MR KANOKANGA**: So there was a transfer?
> **MR GIRACH**: Yes.
> **MR KANOKANGA:** Who signed the transfer papers on behalf of the complainants?
> **MR GIRACH**: The correspondent practitioner, the immovable property is in Bulawayo so the transfer was going to be effected in the deeds office in Bulawayo so it is a corresponding practitioner who will do the rest and who would load the papers.
> **MR KANOKANGA**: Who signed the Power of Attorney to pass transfer and the seller's declaration?
> **MR GIRACH**: Am unable to answer that question.
> **MR KANOKANGA**: Because that is important in light of what you are referring to?"

The respondent alleged that he had the authority to sell the property and effect transfer. Such authority would have been evidenced by the Power of Attorney to Pass Transfer and the Seller's Declaration. Having alleged that he had the requisite authority, it was incumbent on the respondent to at the least indicate to the Tribunal who signed the documents on behalf of the complainants and at the most produce copies of the two documents. Failure to do so supports the complainants' allegations and the applicant's contention that the complainants did not consent to the sale of the property.

The complainants having not consented to the sale and the power of attorney having been invalid, the respondent could only sell the complainants' immovable property having obtained an order of court. He did not have an order of court to do so. The respondent's conduct was therefore dishonourable.

During the oral hearing of the application, the applicant did not motivate the allegation that the respondent disregarded instructions of a client to revoke a Power of Attorney. It is therefore assumed that the allegations were abandoned.

It is our view that the applicant has succeeded to prove on a balance of probability that the respondent's conduct, firstly, in acting for two parties who were conflicted, secondly, in selling the complainants' property without their consent or order of court and lastly, failing to remit the balance of the purchase price to the complainants and instead remitting it to National Foods Limited was unprofessional, dishonourable and unworthy of a legal practitioner.

SENTENCE

Having found the respondent's conduct to be unprofessional, dishonourable and unworthy of a legal practitioner, the Tribunal must consider whether to direct the deletion of the respondent's name from the register, as a legal practitioner, notary public, and/or conveyancer, suspend him from practising as legal practitioner, notary public, and/or conveyancer for a specified period or impose a fine. (S 28 of the Act). The sentence is within the discretion of the Tribunal. In arriving at an appropriate sentence, the Tribunal must consider, *inter alia*, the following sentencing objectives:

(a) upholding public confidence in the administration of justice;
(b) safeguarding the collective interest in upholding the standard of the legal profession;
(c) punishment of the errant legal practitioner for the misconduct; and

(d) setting standards to be observed by other practitioners and in the process deterrence against similar offences by like-minded legal practitioners (See *Law Society of Singapore* v *Chiong Chin May Selena* [2005] 4 SLR ® 320 at 26).

In *Law Society of Singapore* v *Ravindra Samuel* [1999] 1 SLR 696, YOUNG PUNG HOW CJ observed at 11-12 that:

> "It is not simply a question of punishing the solicitor concerned. A further consideration must be what course should the court take to protect the public and to register its disapproval of the conduct of the solicitor. In the relevant sense, the protection of the public is not confined to the protection of the public against further default by the solicitor in question. It extends also to the protection of the public against similar defaults by other solicitors through the court publicly marking the seriousness of what the instant solicitor has done. The orders must therefore accord with the seriousness of the default and leave no doubt as to the standards to be observed by other practitioners. In short, the order made should not only have a punitive, but also a deterrent effect. There are also interests of the honourable profession to which the solicitor belongs, and those of the court themselves, to consider. The administration of justice can only proceed on the basis that solicitors can place reliance upon the honesty of the solicitors with whom they deal. The public too must be able to repose confidence in a profession which plays so indispensable a part in the administration of justice. Similarly, the courts of this country must be able to depend on the honesty and integrity of all practitioners appearing before them and to expect that they will maintain the highest standards of personal honesty and integrity in their dealings with the courts."

In *Bolton* v *Law Society* [1994] 1 WLR 512 at 519, it was held that the "reputation of the profession is more important than the fortunes of any individual member " because "[a] profession's most valuable asset is its collective reputation and the confidence which that inspires". It is for this reason that the Tribunal must be guided by the opinion of the applicant in arriving at an appropriate sentence.

In this regard, we refer to *Law Society of Zimbabwe* v *Sheelagh Cathrine Stewart* HC-H- 39 – 89 where it was observed at p6 that-

> "In an application, such as this, the court is not dealing with a normal civil or criminal case where the parameters of the sentence are defined by the amount of the claim or by judicial precedent. The Law Society petitions the Tribunal to discipline the delinquent practitioner in a manner it sees fit, if the Tribunal finds that the practitioner has been guilty of unprofessional, dishonourable or unworthy conduct. Such proceedings (before a court) have been described as being *sui generis* (see Wessels, C.J. in *Solomon* v *Law Society of the Cape of Good Hope*, 1934 AD 401 At 408). "The law Society is an exclusive professional organisation". And where such a Society is of the opinion that the particular offender is no longer suitable as a member thereof and should be prevented from practising the profession concerned, serious consideration should be given to that opinion. (per M T Steyn, J. in *Law Society of the O.F.S.* v *Schoeman*, 1977 (4) SA 588 at 603 A (in translation).

In this regard, De Villers, J. said in *Transvaak Incorporated Law Society* v *K.*, 1950 (4) SA 449 at 454-455

> "The Law Society are custodians of the honour of their profession and their vigilance in bringing misconduct on the part of practitioners to Court is a matter that the Court appreciates. Their opinion is entitled to be given due weight. When they form a view as to what the punishment should be and ask for a particular form of sanction, the Court is loathe not to fall in with the suggestion unless there is a reason to mete out a lesser punishment."

The rationale for placing reliance on the opinion of the Law Society is also found in *Chizikani* v *The Law Society of Zimbabwe* (*supra*) at 390 C-E where GUBBAY CJ (as he then was) remarked that-

> "In the first place, lawyers as a professional class live by their own high code of ethics and their own moral standards. Every legal practitioner owes a duty to his colleagues to uphold those standards of the profession to which he belongs. Secondly, if legal practitioners, as a professional group, are to earn a respected position as guardians, not only of public, but also of private, interest, then every legal practitioner must live up to the principles of decency in the relationship of a trustee to the goods and monies entrusted to him by the person who has sought his protection. A legal practitioner who breaches this trust casts a shadow on the good name of the rest, and also remains a danger to the unsuspecting public, unless his name is expunged from the register of legal practitioners. See generally in this regard *Law Society, Transvaal* v *Matthew* 1989 (4) SA 389 (T) at 394 B-396 H."

It was further remarked at 392 B- E that

> "In applications by the Law Society for the 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. Thus in *Reyneke* v *Wetszenootskap Van Die Kaap Goeie Hoop* 1994 (1) SA 359 (AD) at 361 I the headnote reads:-
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> > " That although the charges against the appellant and the findings of the Court *a quo* did not relate directly to his professional practice as such in that he had not acted to the detriment of his client nor stolen from his practice, and although these factors elicited a measure of sympathy for the appellant, the fact remained that he was guilty of two serious transgressions which reflected upon his honesty and integrity and which detracted from his fitness to practice as an attorney."

There must therefore be compelling reasons warranting the Tribunal discounting the applicant's opinion.

The applicant calls for the deregistration of the respondent. On the other hand, the respondent submitted that the appropriate sentence is at the least a fine and at the most suspension from practising as a conveyancer.

The respondent submitted in mitigation that he was admitted as a legal practitioner, conveyancer and notary public on 16 July 1992 and thereafter started practising as a professional assistant. In 1993 he left practice and took up employment in commerce. He returned to practice in 2011 and founded Manokore Attorneys. He is currently the Managing Partner of that practice. Between September 2014 when the complaint against him was lodged and 24 March 2021 when the decision was made by the Tribunal finding him guilty of unprofessional conduct, the applicant did not withhold the issuance to the respondent of practising certificates for the respective years. By letter dated 6 January 2017, the applicant recognised the respondent's contribution to the professional development of "younger legal practitioners".

Regarding the circumstances of the offences for which he was found guilty, he submitted that there were no allegations that he acted dishonestly. His conduct in accepting to represent the complainants when he was already representing National Foods Limited and in selling the complainant's property without an order of the court amounted to an error of judgment. Further, his conduct in relying on authority given over the telephone was also an error of judgment. His conduct was therefore distinguishable from that of the legal practitioners in *Muskwe* v *Law Society of Zimbabwe* SC 72-20, *Chizikani* v *Law Society of Zimbabwe* 1994 (1) ZLR 382 SC and *The Law Society of Zimbabwe* ***v*** *Washington Muchandibaya* HH 114-17 who were deregistered for abuse of clients' trust funds for their personal benefits.

The respondent further submitted that the finding of the Tribunal related to a conveyancing transaction and not to the other areas of practice. In the event that the Tribunal decides to suspend the respondent, the suspension should be limited to practice as a conveyancer only. Alternatively, the respondent prayed for the imposition of a fine. In support of the prayer, he referred to *Summerlely* v *Law Society of Northern Province* 2006 (5) SA 613 SCA at 19.

The respondent attached to his submissions in mitigation, character references by Jeremy Joseph Brooke and Vimbai Nyemba. Jeremy Joseph Brooke attested that he has known the respondent in various capacities for over 25 years. He is a director of Cardinal Corporation (Pvt) Ltd which is a client of Manokore Attorneys. The respondent has acted as lead counsel and conveyancer for the company. He has processed and is still processing title deeds for the

company's clients in various projects. He holds for the company numerous trust accounts running in millions of United States dollars. The company has not had any issues with the manner in which the respondent has dealt with the trust funds and the conveyancing. The respondent has contributed to the mentorship and training of young lawyers.

Vimbai Nyemba attested that she has known the respondent for over 20 years. She has worked with the respondent in corporate advisory related work. He is a highly skilled corporate and real estate lawyer. He has contributed to the economic development of the country and the SADC region. His proficiency has placed the legal profession on the African map.

The applicant submitted in aggravation as follows: In arriving at an appropriate sentence, the Tribunal should be guided by the applicant's opinion as stated in *Law Society of Zimbabwe* v *Stewart* HCH 39/89. The respondent's transgressions were gross. They reflect "a subtle and subterranean streak of dishonesty." The Zhawaris had reposed their trust and immovable property in the respondent. The respondent however abused that trust by disposing of their property without their consent or an order of court. The applicant's duty is to protect the integrity of the profession and to protect members of the public, such as the Zhawaris, from errant legal practitioners. The only way this can be achieved is by imposing an appropriate sentence. An appropriate sentence in the circumstances of this case is the deregistration of the respondent.

It was submitted that the only distinction between the authorities that the respondent referred to (*Muskwe* v *Law Society of Zimbabwe* SC 72-20, *Chizikani* v *Law Society of Zimbabwe* 1994 (1) ZLR 382 SC and *The Law Society of Zimbabwe* ***v*** *Washington Muchandibaya* HH 114-17 is that trust money was directly abused by the practitioners for their own benefit. However, trust money was still abused in the present case, albeit for the benefit of National Foods Limited.

As submitted by the respondent, the history of the complaint has a bearing on the penalty to be imposed. The Zhawari's property was sold and transferred to the new owner in 2014. The complaint was lodged with the applicant by letter dated 20 June 2016. The application was filed on 29 June 2018 and the final determination of the matter was made on 24 March 2021. The delays alluded to are not of the respondent's making. However, there is not much difference in the delays in this matter and the *Muskwe* and *Muchandibaya* cases (*supra*). In the *Muskwe* case the offence was committed in 2013. The complaint was lodged with the applicant in 2016 and the respondent was deregistered in 2018. In the *Muchandibaya*

case, the offence was committed in 2012. The complaint was lodged with the applicant in 2013 and the respondent was deregistered in 2017.

The delay in finalising the matter would, however, have been highly mitigatory had the respondent shown some measure of contrition. The respondent seems to maintain his innocence when he refers in paragraph 18 of his submissions in mitigation to the proceedings before the High Court as the proceedings that "will ultimately determine the legal implications of what sanctions, if any, will attach to proceeding with the sale in the absence of a court order." He seems to be oblivious of the fact referred to earlier in this judgment that the proceedings before this Tribunal are *sui generis* and different from the proceedings before the High Court. A lawyer who lacks a basic understanding of the functions of the Tribunal has no expectation and right to remain on the register. He/she is likely to continue with the same conduct as he/she does not appreciate the wrongfulness of the conduct. The respondent chooses to downplay or trivialise his moral blameworthiness as a simple "error of judgment" when in fact the Tribunal classified it as gross negligence. To act in conflicted circumstances is a basic ethical issue which cannot be characterised as an "error of judgement". Such characterisation of the transgressions by a senior partner of a legal firm who holds himself to be skilled is a cause for concern. The respondent further misunderstands the nature of the transaction he was dealing with. His understanding is that the transgression related to mere conveyancing. The transgression started as a commercial transaction, was then transformed to debt collection and lastly conveyancing. It therefore cuts across all different areas of practice of the legal profession. The respondent is entitled to give a spirited defence to the allegations. However, once the Tribunal has made a finding of guilt, his attention should be directed at mitigation. Any further denial of wrongdoing may be misconstrued, as in this case, firstly as disdain of the decision of the Tribunal and secondly as misunderstanding of the operations of the Tribunal. It illustrates that the respondent does not appreciate the seriousness of his transgression despite the lapse of six years. In either case, any protestation bolsters the applicant's submissions that the respondent is not fit to remain on the register of legal practitioners, notary public and conveyancer. The respondent has therefore failed to convince us that he will not repeat the same transgression.

The tender by the respondent to the Zhawaris of the balance remaining from the sale of the property comes too late in the day. The respondent maintained throughout the proceedings that the complainants were free to approach National Foods Limited who were holding the balance in their accounts. The alleged previous tender to the complainants and rejection thereof

was only raised in the oral submissions by Mr Girach. The respondent maintained throughout the engagement with the applicant and in the counter-statement that the complainants could get their money from National Foods Limited. The tender in paragraph 19 of the written submissions in mitigation comes six years later after the amount ought to have been remitted to the Zhawaris. The Zhawaris have in the meantime approached the High Court to retrieve the money from National Foods Limited and the respondent. In fact, it was stated in the power of attorney that the respondent relied on to sell the Zhawaris' immovable property that the balance was supposed to have been remitted to the Zhawaris upon the sale of the property. Surely, had the Zhawaris consented, as persisted by the respondent, to the sale of their property and directed remittal of the balance to them upon the sale of the property they would have provided their banking details of the account into which the balance would be deposited. Further, the respondent has not indicated whether he has taken any measures to retrieve the balance from National Foods Limited and place them in the trust account where they ought to be. The respondent should have known as a seasoned conveyancer, who owned money in the trust account and to whom the money should have been remitted. He relied on a bond of indemnity issued by National Foods Limited. In the bond, National Foods Limited indemnifies Manokore Attorneys from and against all charges, damages, and expenses arising from any action, suit either at law or equity which may be prosecuted by the Zhawaris. The bond however could not absolve the respondent from unprofessional responsibility or conduct. It is undesirable that the Zhawaris have had to approach the court for relief against the respondent arising from these acts of misconduct. They have had to incur legal expenses in addition to having lost their immovable property at the most and at the least money due to them, being the balance of proceeds of sale of the property

This is aggravated by the fact that the respondent was eager to bypass legal process and sell the Zhawari's immovable property when he ought to have instead proceeded against Celgrim Bakeries. He had in his possession an acknowledgment of debt by Celgrim Bakeries, which is a liquid document. The debtor had tendered movable assets for sale. Had the respondent proceeded against the debtor and obtained an order on behalf of the creditor, there would have been assets to attach and execute against. Submissions by the respondent, that the debtor had previously offered to sell movable property but failed to do so, was not justification for not proceeding against the debtor on the liquid document. Such eagerness to sell an immovable property without an order of court or requisite consent of the owner of the property

in such circumstances as of this case, would be expected of a layman not familiar with legal processes and not by a senior practitioner.

The character references by Jeremy Joseph Brooke and Vimbai Nyemba are not relevant despite the fact that the two are a prominent businessman and a respected member of the legal profession respectively with the latter being an ex-president of the applicant. Although they both speak highly of the respondent as a legal practitioner and conveyancer of great skill and integrity who has enhanced the integrity of the profession internationally it is not clear if at the time of deposing to the affidavits the two were fully aware of the nature and extent of the allegations against the respondent. The affidavits were both deposed to and commissioned on the same date, that is on 30 March 2020. This was before the finding of the Tribunal that the respondent's conduct was unprofessional and unworthy of a legal practitioner. The affidavits do not make any reference to the conduct the respondent was found guilty of and what might have occasioned such conduct. We find the remarks of PONNAN JA in *Johannesburg Society of Advocates & Anor* v *Seth Azwihangwisi Nthai & Ors* [2020] ZASCA 171 to be apposite. He remarked at paragraph 87 that:

> "[87] The high court criticised the PSA for trying 'to downplay the significance of the Mr Bizos's support for Nthai's application'. It suggested, '[t]his, in our view, is an attack upon the integrity of an eminent jurist, such as Mr Bizos' in that, the high court misconstrued the contention advanced on behalf of the PSA. Consequently, it did not engage with the gist of the argument, which was articulated thus by Wallis JA in Edeling's case: 'Most of the references were unhelpful and meaningless, because all they did was paint a favourable picture of Mr Edeling, without indicating the extent of their knowledge of Mr Edeling's wrongdoings or whether they knew about the personality traits or character defects which gave rise to his misdeeds and led to his striking off. None referred to the fact that dishonesty lay at the root of the decision to strike him from the roll of advocates. In regard to similar character references, Wessels JP said in Ex parte Wilcocks:
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> > "It is not sufficient to produce before the court a few certificates from interested friends or to say that he has led an honest life. The evidence with regard to that must be overwhelming: the court must be satisfied that it will make no mistake if it reinstates the applicant."'
>
> It follows that the high court could not, without more, on the strength of the character references have been satisfied that 'it will make no mistake' in readmitting Mr Nthai. [88] ….."

Jeremy Brooke and Vimbai Nyemba both speak highly of the respondent and thus merely "paint a favourable picture of the respondent". As indicated they do not refer in any way to the transgressions committed by the respondent giving the impression that they are character references for other matters not associated with these proceedings.

The Tribunal found that the respondent's conduct amounts to gross negligence. CHINHENGO J in *S* v *Chaita* 1998 (1) ZLR 213 at 221 D defined the phrase "gross negligence" as follows:

> "REYNOLDS J in Mtizwa's case supra explained the meaning of gross negligence and recklessness. He said at 233G-234A:
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> 'Gross negligence' is simply a very serious or aggravated form of ordinary negligence-negligence of a high degree (see *S* v *Smith & Ors* 1973 (3) SA 21 (T). In Drake v Power (1961) 46 MPR 91, a Canadian case cited by Saunders Woods and Phrases Legally Defined vol 3 p 332, the expression "gross negligence" is usefully defined as implying 'conduct in which there is a marked departure from the standards by which responsible and competent drivers habitually govern themselves'".

The above remarks, though referring to gross negligence in a road accident case aptly define gross misconduct within the present context of a disciplinary matter. The respondent chose to execute against a more vulnerable 'clients'' in favour of a well-established corporate client. The respondent's conduct is both legally and morally wrong and is comparable to abuse of trust funds given the considerable prejudice suffered by the Zhawaris which prejudice has not been rectified to date. Selling of property without a court order or the consent of its owner goes to the heart or root of the practise of law. The respondent's conduct thus constituted a departure from the standards by which responsible and competent legal practitioners habitually govern themselves. The sentence must therefore be commensurate with our finding.

In *The Law Society of Good Hope* v *C* 1986 (1) SA 616 at 640 C-D GALGUT AJA remarked on implications of deregistering a legal practitioner as follows:

> "The implications of a striking-off order are serious and far-reaching. Such an order envisages that the attorney will not be re-admitted to practice unless the Court can be satisfied by the clearest proof that the applicant has genuinely reformed, that a considerable time has lapsed since he was struck –off, and that probability is that, if reinstated, he will conduct himself honestly and honourably in the future."

Whilst taking heed of the above remarks, we find no reasons compelling us to disregard the opinion of the applicant. In our view, the imposition of a fine or suspension would trivialise the offence.

It is accordingly ordered that:

1. The respondent's name be deleted from the Register of Legal Practitioners, Notaries Public and Conveyancers.
2. The respondent is ordered to pay the expenses incurred by the applicant in connection with these proceedings.

The Law Society of Zimbabwe, applicant's legal practitioners
Manokore Attorneys, respondent's legal practitioners