REPORTABLE (60)

LLOYD MANOKORE
v
LAW SOCIETY OF ZIMBABWE

SUPREME COURT OF ZIMBABWE
MAKONI JA, MATHONSI JA & CHITAKUNYE JA
HARARE, 14 OCTOBER, 2021 & 23 JUNE, 2022

F. Girach, for the appellant

S. Gahadzikwa, for the respondent

CHITAKUNYE JA: This is an appeal against the whole judgment of the Legal Practitioners Disciplinary Tribunal handed down on 15 April 2021 as judgment number HH 167-21, under case number LPDT 09/18. The Disciplinary Tribunal (the Tribunal) found the appellant guilty of conduct that was unprofessional, dishonourable and unworthy of a legal practitioner and ordered the deletion of his name from the register of Legal Practitioners, Notaries Public and Conveyancers.

BACKGROUND

On 20 June 2016, Perkins Zhawari and his wife, Lillian Zhawari (the complainants) lodged a complaint with the respondent in its capacity as the regulatory body for legal practitioners complaining about the conduct of the appellant. Upon considering the complaint the respondent duly filed an application before the Tribunal relating to the appellant's conduct and seeking his

deletion from the register of Legal Practitioners, Notaries Public and Conveyancers. The facts giving rise to the complaint and subsequent application are largely common cause. These are they.

The complainants were owners of an immovable property called Lot 2 of Stand 91M Bellevue Township, Bulawayo measuring 2931 square meters held under Deed of Transfer Number 4058/96. Sometime in 2012, Celgrim Bakeries (Private) Limited, represented by Grimmond Nyatanga (Nyatanga), applied for a credit facility with National Foods Operations Limited. National Foods Operations Limited (NFOL) required security in the form of immovable property. Nyatanga approached the complainants and requested them to provide the security required by NFOL for the credit facility. They made available their immovable property as security in support of Celgrim Bakeries' application for the credit facility. On 6 November 2012 they signed a Power of Attorney appointing a law firm, Manokore & Partners, to act as their attorney and agent whenever the debt to NFOL by them became due and remained unpaid. On the same date Perkins Zhawari (Perkins) deposed to an affidavit in which he ceded the immovable property to NFOL in support of the application for the credit facility by Celgrim Bakeries. Manokore & Partners were the legal practitioners for NFOL.

On 19 February 2013 Nyatanga, on behalf of Celgrim Bakeries, signed two acknowledgements of debt in the sums of US$10 520 and US$19 520.53 over the same debt, undertaking to pay the debt in instalments. Apparently Celgrim Bakeries failed to pay the debt as per the terms of the acknowledgements of debt. On 24 January 2014 the appellant, acting on behalf of NFOL, sent a letter to the complainants indicating the firm's intention to sell the immovable property so as to settle the debt. In early February 2014 the appellant received a letter from Celgrim

Bakeries' legal Practitioners, Zuze Law Chambers, advising that the complainants had informed them of the threat to sell their immovable property. Zuze Law Chambers advised that they should not sell without a court order. The Appellant responded to that letter on 12 February 2014 indicating that they would proceed to sell without a court order as the property had been ceded to NFOL and not pledged.

On 11 February 2014, the appellant wrote another letter to the complainants referring to a telephone conversation in which Perkins had communicated with a representative of Manokore & Partners and had allegedly consented to the sale of the immovable property. In that letter, the appellant informed Perkins that the sale of the immovable property was underway and that once transfer of the property had been effected, the appellant would subtract the principal debt owed by Celgrim Bakeries, their legal fees, collection commission and any outstanding rates before transmitting the remaining funds to him.

On 17 February 2014 Zuze Law Chambers wrote to Manokore & Partners indicating that their client, Celgrim Bakeries, wanted to surrender movable properties into NFOL's custody which would be sold so as to settle the debt. The appellant declined the offer and indicated that NFOL was proceeding with the sale of the complainants' property.

In September 2014, the complainants were advised by the appellant that their property had been sold. They were presented with a statement showing that the property had been sold for US$35 000. An amount of US$6 802.54 was due to them after payment of the debt to NFOL, legal

fees and arrear utility bills. That amount was not remitted to the complainants. The amount was instead remitted to NFOL without the complainants' authorisation.

The complainants made an application for the setting aside of the sale in the High Court under case number HC 819/15. In addition, they lodged a complaint against the appellant with the respondent. They complained, *inter alia*, that their property was sold without their consent and in the absence of a valid court order.

That complaint formed the basis of the respondent's application before the Tribunal. The appellant opposed the application.

PROCEEDINGS BEFORE THE DISCIPLINARY TRIBUNAL

Mr *Gahadzikwa*, for the respondent, submitted before the Tribunal that the appellant's name be deleted from the register of legal Practitioners, Notaries Public and Conveyancers for the reason that he had conducted himself in an unprofessional, dishonourable and unworthy manner. He averred that the appellant was guilty of unprofessional conduct in that:-

i. He accepted instructions to act for the complainants as well as National Foods Limited wherein the interests of the parties were conflicted or were bound to be conflicted, which was improper.

ii. He sold the complainants' property without their consent or a court order in contravention of s 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.

iii. After selling the immovable property and receiving the purchase price, he failed to remit the balance of the purchase price to the complainants, forwarding the money instead to the creditor without the complainants' consent.

Mr *Girach*, for the appellant, submitted that the appellant was not guilty of the conduct complained of. The appellant's contention was that the complainants voluntarily ceded their immovable property as security in support of the credit facility to Celgrim Bakeries. He also argued that the interests of NFOL and the complainants were not conflicted. Further, the appellant denied that he sold the property without authority. It was his argument that a court order was not required as the complainants had signed a power of attorney authorising the sale of their property in the event of default by Celgrim Bakeries. Counsel submitted that the appellant denied that he failed to remit the balance which remained after the settlement of the debt. The appellant's stance was that he transferred the money to NFOL and the complainants were free to approach NFOL for their money.

FINDINGS OF THE TRIBUNAL

The first issue was whether the appellant had represented two different parties where the interests of the parties were conflicted or were bound to conflict. It found that the appellant was guilty of unprofessional conduct in that he acted for two parties who had conflicting interests. The Tribunal held that because the appellant's firm represented NFOL at all times and it was also appointed to act on behalf of the complainants through a power of attorney, it should have been apparent to the appellant that the interests of the complainants and NFOL were incompatible.

Further, the Tribunal found that the appellant acted in favour of NFOL to the prejudice of the complainants. It noted that by accepting to be the complainants' attorney, the appellant owed them a duty of care. It further stated that the appellant was not circumspect in analysing the power of attorney that he relied on as authority for disposal of the immovable property, thus missing the anomalies in the power of attorney.

The Tribunal also held that the appellant failed to observe that the complainants had been identified in the power of attorney as being debtors of NFOL whereas they were only sureties to the application for credit facility by Celgrim Bakeries. They did not have a contractual relationship with NFOL in terms of which they were indebted to it. Consequently, the Tribunal found that the appellant was eager to have documents that would assist NFOL in disposing of the complainants' property to satisfy the debt owed by Celgrim Bakeries, therefore showing his bias towards NFOL at the expense of the complainants. In addition, the Tribunal noted that the appellant's conflict of interest was evinced by the sale of the complainant's immovable property without their consent or an order of court.

The second issue that the Tribunal had to determine was whether the sale of the complainants' immovable property by the appellant and NFOL was lawful. The Tribunal found that the sale of the immovable property was unlawful as the documents relied upon by the appellant as authorising him to sell the property were invalid. It found that both the power of attorney and the affidavit which ceded the complainants' property to NFOL were invalid *ab initio* in that they appointed Manokore & Partners to act on behalf of the complainants yet a law firm is not a legal *persona* capable of acting on behalf of someone. It also found that the power of attorney was

invalid as it referred to the complainants as the debtors of NFOL yet Celgrim Bakeries was the debtor of NFOL. Further, the Tribunal found that the sale was illegal as a court order was not obtained first before the property was sold.

On the question of remitting the balance of the purchase price to NFOL without complainants' authority the Tribunal found such conduct to be improper.

The Tribunal concluded that the respondent had successfully proved on a balance of probabilities, that the appellant's conduct was unprofessional, dishonourable and unworthy of a legal practitioner. In the result it issued an order for the appellant's name to be deleted from the Register of Legal Practitioners, Notaries Public and Conveyancers. The appellant was also ordered to pay costs incurred by the respondent.

Aggrieved by the decision of the Tribunal, the appellant noted the present appeal against both conviction and sentence.

GROUNDS OF APPEAL

The appellant raised 9 grounds of appeal against conviction and 4 grounds of appeal against sentence.

SUBMISSIONS BEFORE THIS COURT

Ad conviction

At the hearing of this appeal, *Mr. Girach* amended the grounds of appeal against conviction by abandoning grounds one, two, three, six and eight, which amendment the Court granted with the consent of *Mr. Gahadzikwa* for the respondent. The grounds that remained were as follows:

1. The Tribunal erred in failing to place sufficient emphasis on the fact that it was only when the tender was refused by complainants that payment of the residue was made to National Foods Operations Limited.
2. The Tribunal erred, in any event, in not finding that the appellant could not have been conflicted in circumstances where he acted in terms of a power of attorney which power of attorney the Tribunal has found to be invalid *ab initio*.
3. The Tribunal erred in finding that the appellant exhibited a bias in favour of National Foods Operations Limited and erred in failing to place sufficient weight on the fact that the power of attorney and the cession had not been drafted by appellant.
4. In any event, the Tribunal erred in finding that the arrangement between the parties did not constitute *paratie executie.*

It is appropriate to discount the fourth ground of appeal from the outset. There is no such finding as is being attributed to the Tribunal. The Tribunal stated that in view of its finding on the invalidity of the documents the appellant was relying on as authority for his conduct; it was not relevant to consider the question of *paratie executie*. In effect therefore only three grounds are available for consideration.

In motivating the appeal in respect of the amended grounds of appeal, *Mr Girach* submitted that he had three principal points to elaborate on. Firstly, he submitted that the Tribunal erred by making a finding that there was an attorney-client relationship between the appellant and the complainants. He submitted that the complainants knew at all times that Manokore & Partners were not their lawyers but were acting on behalf of NFOL. He also submitted that the complainants had not appointed the appellant to act as their attorney. He added that the fact that the complainants appointed their own legal practitioners at the time was an indication that they did not consider that an attorney-client relationship had been formed with the appellant.

The second submission by *Mr Girach* was that the Tribunal erred by failing to take into account the express terms of the power of attorney which authorised the appellant to sell the complainants' immovable property. He argued that the power of attorney was sufficient for the purposes of securing transfer for the property. Counsel also submitted that the fact that the Registrar of Deeds had accepted the power of attorney without raising any issues was an indication that the power of attorney was legally valid. He further argued that the charge against the appellant was that he had sold the complainants' property without consent but the evidence submitted showed that the complainants had consented to the sale. He referred to the letter dated 11 February 2014, written to Perkins, wherein he is alleged to have consented to the sale of the property. He further submitted that once there was consent, there was no need for a court order before selling the property.

On the appellant's conduct of remitting the balance of the purchase price to NFOL, Counsel submitted that the appellant only transferred the money to NFOL after the complainants

had refused to disclose their banking details. He submitted that it was an error of judgment on the appellant's part but such conduct was not dishonourable.

Per contra, Mr *Gahadzikwa* for the respondent submitted that the Tribunal was correct in finding the appellant guilty of unprofessional conduct. He submitted that the appellant was guilty because he acted for both NFOL and the complainants in circumstances where their interests were conflicted. Counsel submitted that the finding by the Tribunal that there was an attorney-client relationship between the appellant and the complainants was well grounded. This was because the mandate given to the appellant's firm to act on behalf of the complainants through the power of attorney was akin to the establishment of an attorney-client relationship. In addition, counsel submitted that where a legal practitioner is appointed to act on behalf of someone, they have to act in favour of the principal. Thus, because the appellant was acting for both NFOL and the complainants, there was conflict of interest.

Mr *Gahadzikwa* further submitted that the appellant sold the immovable property of the complainants without authorisation. He argued that the charge against the appellant regarding selling the property without consent or a court order was premised on the fact that when Celgrim Bakeries failed to pay the debt due to NFOL, what ought to have happened is a law suit against Celgrim Bakeries to recover the debt. He added that in the event the debt was not recovered from Celgrim Bakeries, that is when the appellant ought to have proceeded against the sureties. He added that proof that the sale was not done procedurally was seen in the failure of the appellant to furnish a power of attorney or the seller's declaration to pass transfer of the property. Counsel

submitted that these were all indications that the appellant did not have the complainants' authority for the sale of the property.

Counsel further submitted that the complainants did not consent to the sale of their property. He argued that when the appellant wrote to the complainants regarding the outstanding debt, the complainants engaged their nephew, Nyatanga, who in turn engaged legal practitioners from Zuze Law Chambers. The legal practitioners, communicated with the appellant's law firm a tender by Celgrim Bakeries of its equipment in settlement of the debt. Counsel submitted that this showed unwillingness by the complainants to have their property sold in settlement of the debt owed by Celgrim Bakeries to NFOL.

In his final submission, Mr *Gahadzikwa* averred that the appellant transferred trust funds to NFOL without authority. He stated that the payment of the balance of the purchase price of the complainants' property to NFOL amounted to an abuse of trust funds by the appellant as the funds were given to a party who was not entitled to them.

There are four main issues that arise in this matter for determination on conviction. They are as follows:

1. Whether the Tribunal erred and misdirected itself in holding that there was conflict of interest as the relationship between complainants and appellant was one of attorney-client.
2. Whether it was proper for the appellant to execute against the sureties' property before suing the principal debtor in recovering the debt.

3. Whether there was need for the complainants' consent or a court order before selling their property.
4. Whether the appellant's conduct in transferring the balance of the purchase price to National Foods Operations Limited instead of to the complainants amounts to an abuse of trust funds.

APPLICATION OF THE LAW TO THE FACTS

Whether the power of attorney from the complainants established an attorney-client relationship between the parties.

It is common cause that the complainants signed a power of attorney on 6 November 2012 appointing Manokore and Partners to act as their **attorney and agent** whenever any debt owed to NFOL by the complainant(s) became due and remained unpaid. The said power of attorney reads as follows:

> "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 my 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." (my emphasis)

From the above, it is quite clear that the complainants signed the power of attorney with the intention to appoint a law firm, Manokore and Partners, as their Attorney and agent. The complainants also gave the law firm the mandate to act on their behalf in the event that 'any debt owed to' NFOL by 'me' was not paid off within 7 days of becoming due. The part of the debt

owing and due by 'me' to NFOL is repeated in the latter part of the power of attorney showing clearly it had to be a debt owed by the complainants. By virtue of such appointment Manokore & Partners were now agents with the complainants as the principals. Their mandate was to carry out certain tasks in the interests of the principals. They were thus expected to act with due care in the fulfilment of that mandate.

In *Ritenote Printers (Pvt) Ltd & Anor v Adam & Company* SC 26/16, this Court stated the following regarding the attorney-client relationship:

> "The position in English law is clear. A legal practitioner is his client's agent. …This is the position both in contract or delict."

The Court further cited the South African case of *Eksteen v Van Schalkwyk en'n Ander* 1991 (2) S.A 39 (T), wherein it was confirmed that an attorney–client relationship is based on a mandate. The *Ritenote* case *supra* establishes that an attorney-client relationship is formed on the basis of a mandate and that the attorney is the client's agent whilst the client is the attorney's principal. A mandate has been defined as an act by which one person gives power to another to transact for him and in his name one or several affairs. (Black's Law Dictionary)

The appellant averred that at no point was he appointed by nor did he act for the complainants. However, that the appellant's law firm was given a mandate by the complainants to act as their agent is undeniable based on the contents of the power of attorney (POA). Not only was the appellant's law firm appointed as an agent by the complainants, the appellant purported to be acting in terms of that POA when he sold the property after the debt due to NFOL by Celgrim Bakeries remained owing and unpaid. This clearly shows that an attorney-client relationship had

been established between the appellant's law firm and the complainants. It is that relationship that he perceived to have given him the authority to act as he did. I am therefore of the view that the appellant's ground of appeal that there was no agent-principal relationship between Manokore & Partners and the complainants has no merit..

In Herbstein and Van Winsen, *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*, 5th ed., Juta & Co. Ltd at pages 274-275 the authors in commenting on form and content of a power of attorney stated, *inter alia,* that:

> "A power of attorney is a document which is strictly construed and must therefore be carefully drawn. If it is vague and lacks the necessary details an objection that there is no authority will be upheld….
>
> The power of attorney should give the full name of the attorney and, if practising as a firm, the firm's name also. If there is more than one partner in the firm who will be dealing with the matter, the names of all of them should be set out and the name of the firm as well. Nevertheless, although it is desirable to set out the full names of the partners as well as the name of the firm (to remove any uncertainty as to whether the person who signs for the firm and issues summons on behalf of the client is a partner), the omission to do so does not invalidate the power, and may be condoned by the court in the absence of any prejudice to the other party.
>
> The mere omission of the attorney's name will not invalidate the power and the attorney can insert his name personally."

In *casu*, the POA did not just fail to mention the name of the attorney but it also wrongly described the complainants as debtors of NFOL which they were not. The POA does not mention the actual debtors, Celgrim Bakeries. It instead makes it clear that the debt for which the property may be sold is the debt owed by complainants to NFOL. This was a condition precedent to the sale of the property. The relationship of creditor/debtor must first be established between NFOL and the Complainants before their property could be sold. It was incumbent upon the appellant or his law firm to protect the complainants' interest in this regard and only proceed to

sell where the condition precedent had been met. Considering that a POA ought to be strictly construed, it follows that the POA was fatally defective as authority to the appellant to sell the complainants' property when they were not yet debtors of NFOL and without following due process.

It is this POA that appellant used to step in as the appointed attorney and used as consent to sell property placed as security for an application for a credit facility by Celgrim Bakeries without their authority or court order. The document thus contained a falsity or misrepresentation affecting its validity as authority to sell the complainants' property without their consent or court order. The debtor was Celgrim Bakeries and not the complainants. It is common cause that the complainants had not stepped into the shoes of Celgrim Bakeries, they remained sureties.

The appellant purported to act under the POA. In that regard he accepted the relationship of attorney-client created by that POA. The POA the appellant purported to act upon can thus not be ignored for the purpose of establishing whether even as per his version there was conflict of interest.

The next point is therefore whether the appellant acted in circumstances where there were conflicting interests. Mr *Girach* submitted that there was no conflict of interest as the complainants knew at all times that the appellant was acting as the attorney for NFOL, as evinced from the POA in question in which the they acknowledged that the appellant was the attorney for NFOL.

In my view, the fact that the appellant accepted the POA, defective as it is, which made it clear that he was acting as an attorney on behalf of NFOL and also as an agent for the complainants shows a lack of diligence on his part. It is trite that a legal practitioner must not act for the other party if there is a conflict or potential conflict between himself and the other party. See DB Crozier, *Legal Ethics: A handbook for Zimbabwean Lawyers* at pg. 28. In *Pertsilis v Calcateria & Anor* 1999 (1) ZLR 70 (H) the court aptly held that a legal practitioner must decline or cease to act, not only where the interests of a client are prejudiced if the legal practitioner continues to act for the other client, but also where the client's interests might appear to be prejudiced. In *casu,* in terms of the documents the appellant said he relied on as consent to sell without a court order, the complainants had to be debtors of NFOL before their property could be sold to settle their indebtness. This was a condition precedent. Their position as sureties could only be turned to debtorship through a court process and not by dint of default by Celgrim Bakeries. The appellant, conflicted as he was, did not embark on such due process.

Thus, because the appellant sold the complainants' property to satisfy the debt due to National Foods Limited without suing Celgrim Bakeries first, there was a conflict of interest as the appellant was determined to ensure that NFOL recovered its money to the prejudice of the complainants who were not the debtors. The submission by appellant's counsel that the complainants knew that Manokore &Partners were attorneys for NFOL and that the appellant was not the author of the POA and the affidavit he relied on would not absolve him from the ethical requirement to decline to act in conflicted circumstances. He could easily have declined the appointment as attorney and agent for the complainants.

The conduct of remitting the balance of the purchase price for the property to NFOL instead of remitting to the complainants further shows the conflict of interest the appellant found himself in as he preferred the more affluent client to the vulnerable client. In light of this, the appellant's contention that there was no conflict of interest on his part has no merit.

Whether or not it was proper for the appellant to execute against the sureties before suing the principal debtor first in recovering the debt.

When the debt owed by Celgrim Bakeries to NFOL became due and remained unpaid, Celgrim Bakeries attempted to pay the debt through signing two acknowledgments of debt on 19 February 2013, wherein it undertook to satisfy the debt in monthly instalments. Clause 5 of the acknowledgments of debt provided that: -

> "Should any payment due in terms hereof not be made on due date the creditor may regard the balance of the Principal debt and interest owing in terms hereof as due and payable immediately and may issue summons therefore in any competent court without further notice or demand to the debtor."

As fate would have it, the debtor, Celgrim Bakeries, failed to extinguish the debt. The appellant, without suing the debtor, then proceeded to inform the complainants that he intended to sell their immovable property in order to satisfy the debt. Before the sale was proceeded with the debtor offered to surrender to NFOL some of its equipment for sale to settle the debt but the appellant declined this offer without just cause. He was bent on proceeding with the sale of the complainants' property.

The appellant's stance was that the POA and the affidavit by Perkins gave him the necessary consent by the complainants to sell without following due process. The fact that the

complainants were not debtors but only sureties evaded him in his haste to sell the property. As sureties complainants were entitled to certain benefits requiring that the principal debtor be sued first.

In R.H. Christie, *Business Law in Zimbabwe*, Juta & Co Ltd, 1998 at pg. 458 the author aptly notes that the common law allows sureties a number of privileges or benefits which protect them. One of these benefits is the benefit of excussion (*beneficium excussionis seu ordinis*), which entitles the surety to demand that before proceeding against the surety, the creditor must first *excuss* the principal debtor by, if necessary, obtaining judgment and executing against him, or realizing any security he holds for the debt. See also the case of *Farthing v Pieters & Co* 1912 CPD 215. In *Wolfson v Crowe* 1904 TS 682 at683 INNES CJ noted that:

> "It is settled that every surety … is entitled to insist on the benefit of *excussion*. "

There are some exceptions to this benefit which include where the surety has expressly or impliedly renounced such benefit. In *Muchabaiwa v Grab Enterprises (Pvt) Ltd* S-230-96 this Court noted that renunciation of the benefit is implied when the surety binds himself as surety and co-principal debtor. In Caney's *The Law of Suretyship* by C.F Forsyth & JT Pretorius, 6th ed, Juta & Co Ltd, 2010 at pg. 56, the scenario in which a person binds himself as surety and co-principal debtor was described as follows:

> "A person may bind himself as surety and co-principal debtor expressly in the suretyship document but in the absence of express undertaking to that effect, the answer to that question, whether he binds himself both as surety and co-principal debtor depends on the language of the document and on all the circumstances. Even if he signs a promissory note as maker of it, this is only one of the circumstances and is not conclusive in itself that he is a principal debtor, for evidence is admissible to show the true relationship of the parties to each other."

The distinction between liability as a surety and liability as surety and co-principal debtor was elucidated in *Caney's supra* at pg. 56-57 as follows:

> "One who has bound himself as surety and co-principal debtor is…a surety who has undertaken the obligations of a co-debtor: his obligations in the latter respect are co-equal in extent with those of the principal debtor and thus of the same scope and nature; he is liable with him jointly and severally. The obligation of the surety and co-principal debtor becomes enforceable at the same time as that of the principal debtor.
>
> But he does not undertake a separate independent liability as a principal debtor; he is a surety."

It thus follows that where a surety has not renounced the benefits of *excussion*, the creditor must first proceed against the principal debtor before turning to the surety for payment.

In *casu*, the suretyship of the complainants for the debt due to NFOL arose from the POA which they signed and the affidavit signed by Perkins. Though in the POA, the complainants refer to a situation where they would be debtors to NFOL, at that stage they were not debtors. As at 6 November 2012 they were simply offering security, as demanded by NFOL, in support of an application for a credit facility by Celgrim Bakeries. The affidavit makes it clear that this was to support the credit application of Celgrim Bakeries (Pvt) Ltd and nothing more. In neither these documents nor in subsequent correspondence were the complainants identified as sureties and co-principal debtors or as having renounced the benefit of *excussion.*

The property they provided was as security for the credit facility extended to the debtor by NFOL. This is common cause from the facts of the case. It did not transform the sureties into debtors of NFOL; Celgrim Bakeries remained as the debtor. The appellant as a diligent legal practitioner ought to have noticed that the POA granted by the complainants was not truthful as it

portrayed them as debtors to NFOL when they were not. The complainants were sureties only and not co-principal debtors. It was never the appellant's contention that the complainants were co-principal debtors. Any reference to them as debtors was thus wrong.

As aptly observed by the Tribunal the POA granted by the complainants is written in the singular first-person pronoun whereas there are two people declaring themselves as sureties. This supports the contention by the complainants that the power of attorney had been brought by Nyatanga who was representing Celgrim Bakeries for their signatures. In the circumstances, it cannot be inferred that the complainants intended to bind themselves as sureties and co-principal debtors to NFOL. It follows that they did not renounce the benefit of *excussion*. The appellant therefore ought to have sued the principal debtor, Celgrim Bakeries, before proceeding to sell the complainants' property.

Whilst it is true that the benefit of *excussion* is a defence, it could only be available where legal action is taken against the surety. In *casu*, no suit was taken against them instead the appellant just proceeded to sell the property despite a flurry of correspondence between and amongst the parties involved showing that the complainants were not consenting to the disposal of their property. The correspondence also shows that the debtor had put some assets at the disposal of the creditor which would have liquidated the debt or at the very least reduced the indebtness. The Tribunal correctly held that in the circumstances it was highly improper for the appellant to decline to accept the equipment tendered by the debtor in settlement of the debt and instead insisted on selling the sureties' property without suing the principal debtor first. There was no justification for the appellant's refusal to accept the offer by Celgrim Bakeries, whose duty it was to settle the

debt as the principal debtor. Unfortunately, the appellant, in haste to satisfy the needs of his more affluent principal, opted to prejudice the vulnerable principals by selling their property without their consent or a court order. The finding by the Tribunal on this aspect cannot be faulted.

Whether there was need for the complainants' consent or a court order before selling their property.

Mr *Girach* submitted that the appellant sold the complainants' property with their consent as expressed in the POA and the letter of 11 February 2014 by the appellant hence there was no need for him to obtain a court order first.

Mr *Gahadzikwa*, on the other hand, submitted that the complainants had not consented to the sale of their property. Perkins refuted the allegation that he had consented to the sale in his communication with appellant's law firm leading to appellant's letter of 11 February. That denial was buttressed by subsequent events which showed that the complainants were not consenting to the sale. Counsel submitted that further evidence of lack of consent was the absence of the sellers' declaration and a power of attorney to pass transfer duly signed by the complainants. It is pertinent to note that before the Tribunal, and even before this court, Mr *Girach* could not explain the absence of such documents for the transfer to be effected or even state who had signed those documents on behalf of the sellers.

It is trite that in order to pass transfer of an immovable property, one has to have a power of attorney to pass transfer signed by the seller as well as a declaration by the seller. See M.L. Mhishi, *The Law and Practice of Conveyancing in Zimbabwe*, 2004 at pages 35-36. I agree

with Mr *Gahadzikwa* that the absence of such documents in the transfer of the complainants' property is a clear indication that they had not consented to the sale.

Thus, in the absence of consent from the complainants to sell their property, the appellant ought to have approached a court of law, seeking an order for the sale of the property in order to settle the debt. It is a settled principle in our jurisdiction that individuals are not to resort to self-help in solving legal problems.

Therefore, it was wrong for the appellant to resort to self-help by selling the property of his own volition, without a court order.

The appellant's insistence that the property was sold because of a failure by the debtor to pay the debt would still not save him. I find merit in the submission by Mr *Gahadzikwa* that, in that case, the sale of the complainants' property without their consent or a court order was therefore done in contravention of s 4(1) of the Contractual Penalties Act [*Chapter 8:04*], which provides that a penalty stipulation shall be enforceable in any competent court. The complainants' property was sold due to the failure by the debtor to pay the debt owing to National Foods Limited, the sale was therefore done in fulfilment of a penalty stipulation. A penalty stipulation is defined in s 2 of the Contractual Penalties Act as:

> "…a contract or provision in a contract under which a person is liable—
> (a) to pay any money; or
> (b) to do or perform anything; or
> (c) to forfeit any money, right, benefit or thing;
> as a result, or in respect of—
> (i) an act or omission in conflict with a contractual obligation; or
> (ii) the withdrawal of any person from a contract;

> whether the liability is expressed to be by way of penalty, liquidated damages or otherwise."

The sale of the complainants' property would then fall within the definition of a penalty stipulation. The appellant should therefore have approached a competent court for the enforcement of the penalty stipulation instead of selling the property on his own without a court order. I therefore find that the appellant's contention that he did not need a court order has no merit. The Tribunal's finding that there was need for a court order cannot be faulted.

Whether the appellant's conduct in transferring the balance of the purchase price to National Foods Operations Limited instead of the complainants amounts to abuse of trust funds.

Mr *Girach* conceded that the appellant ought not to have remitted the balance of the purchase price to NFOL but argued that this was only a minor infraction which did not necessarily amount to abuse or misappropriation of trust funds. Counsel submitted that the appellant ought to have been given the benefit of the doubt that he did not put the money in his pocket and should therefore have been given a less severe sentence.

The importance of trust accounts was underscored in the case of *Mitchell v Estate Agents Council* 1996 (1) ZLR 222 (S) wherein this Court stated 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." (my emphasis)

The Court in *Law Society, Transvaal v Matthews* 1989 (4) SA 389 (T) at 394 expressed the same sentiments as follows:

> "I deal now with the duty of an attorney in regard to trust money. … where trust money is paid to an attorney it is his duty to **keep it in his possession and to use it for no other purpose than that of the trust.** It is inherent in such a trust that the attorney should at all times have available liquid funds in an equivalent amount. The very essence of a trust is the absence of risk. **It is imperative that trust money in the possession of an attorney should be available to his client the instant it becomes payable."** (my emphasis)

From the above cases, it is apparent that it is the duty of the legal practitioner to safeguard clients' trust funds from risk and to use those funds for no other purpose except that of the trust. The legal practitioner is also bound to avail the trust funds to the client from the moment they become available. The appellant in this case failed to do so. When the money which was due to the complainants became available, the appellant remitted the same to NFOL without the authority of the complainants. This in my view amounts to misappropriation of trust funds.

Misappropriation of funds may be defined to mean 'the unauthorized or unlawful use of funds or property for purposes other than for which intended."(www.Law.cornell.edu.wex). Furthermore, s 3 (8) of the Legal Practitioners' (Code of Conduct) By Laws, 2018, provides that the following is unprofessional, dishonorable or unworthy conduct by a legal practitioner:

> "Handling any money, securities or other assets received for a client or in the course of his or her practice dishonestly, negligently or in a manner other than is required by law regarding the handling thereof."

The appellant released the complainants' share of the purchase price to NFOL. This was contrary to the POA he purported to have acted under. It is trite that money held in a trust account is payable to the intended beneficiary, who in *casu,* were the complainants and not NFOL.

The Tribunal properly discounted the submission that the complainants had refused to accept the money as a belated excuse which, in any case, did not justify remitting the money to NFOL.

Further, the contention by the appellant that he did not misappropriate the trust funds by reason that he did not convert the money to his own use has no merit. This is because misappropriation of funds from the definition given above, also involves intentionally using the funds for any other unauthorized purpose. This is what the appellant did as he transferred the money to NFOL when it was supposed to be transferred to the complainants in line with the provisions of the POA. The appellant therefore misappropriated the money by remitting it to NFOL for an unauthorized purpose.

I therefore find that there is no merit in the appeal against conviction.

Ad Sentence

The four grounds of appeal against sentence raised by the appellant all related to the exercise of discretion by the Tribunal in arriving at the penalty it imposed. Only one issue arises therefrom, that is: whether the Tribunal erred and misdirected itself in assessing an appropriate sentence given the circumstances of the case.

The question of assessment of an appropriate sentence to impose is within the discretion of the sentencing Tribunal. An appellate court is slow to interfere with the exercise of such discretion. The circumstances where an appellate court will interfere with the exercise of such discretion include where the Tribunal has improperly exercised its discretion by considering wrong

principles; has acted capriciously; has failed to take into account relevant considerations, or where the sentence induces a sense of shock such that no reasonable Tribunal judiciously applying its mind to the circumstances of the case could have arrived at such a sentence and thus out of sync with cases of a similar nature.

In arriving at the sentence to order deregistration of the appellant, the Tribunal considered a number of sentencing objectives in such cases which include:

(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.

Mr *Girach* contended that the sentence imposed by the court *a quo* was excessive and induced a sense of shock. He conceded that the appellant made an error when he transferred the remaining balance of the purchase price of the property to NFOL instead of transferring it to the complainants. However, he submitted that such an error was not dishonourable and did not warrant the deletion of the appellant's name from the register of legal practitioners. He argued that the appellant ought to have been given the benefit of the doubt as he did not put the money in his pocket and should therefore have been given a less severe sentence for his transgression.

Mr. *Girach* did not attack as irrelevant or improperly applied, the above cited objectives on sentencing in such cases relied on by the Tribunal. He, however, was of the view

that the transgressions upon which appellant was convicted were not deserving of deregistration. He also submitted that the Tribunal did not give due weight to mitigatory features provided by the appellant.

The net effect of appellant's submission was to trivialize the transgressions upon which he was convicted suggesting that his circumstances called for a lighter sentence.

Mr *Gahadzikwa,* on the other hand argued that the sentence was appropriate given the status of the legal profession and the principles governing penalties for the transgressions the appellant was convicted of.

A careful perusal of the Tribunal's reasons for sentence shows that it considered all the factors, both in mitigation and in aggravation, in arriving at the sentence. It aptly noted with concern the appellant's apparent lack of appreciation of the gravity of the transgressions he was convicted of which he termed minor errors of judgment yet the Tribunal had found this to be gross negligence. If therefore appellant considers as trivial acting in conflicted circumstances, selling a surety's property without a court order or consent and remitting trust funds to NFOL instead of to the rightful beneficiary as trivial then he certainly does not deserve to be on the register.

It is apposite to note that regarding the balance of the purchase price wrongly and unlawfully remitted to NFOL, the appellant had the audacity to refer the complainants to NFOL yet it was his duty, and not that of NFOL, to account to the complainants. Such attitude clearly shows that the appellant was oblivious of his duties regarding funds in the trust account. These are

basic issues a legal practitioner desiring to be on the register must know. The selling of an immovable property without a court order or the owner's consent cannot be glossed over as minor errors of judgment.

The Tribunal aptly noted that the character reference letters provided did not address the transgressions the appellant was convicted of. They instead addressed other matters and not this case where the appellant's conduct was found to amount to gross negligence. Regarding the selling of property in a conflicted circumstances and then failing to remit the balance to the complainants or retain it in his trust account the Tribunal aptly noted that:

> "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 practice 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 circumstances the Tribunal aptly held that such dishonorable, unworthy and unprofessional conduct warranted the deletion of the appellant's name from the register of legal practitioners, notaries public and conveyancers. In *Muskwe v Law Society of Zimbabwe* SC 72/20 in para 9 GWAUNZA DCJ noted that:-

> "A look at the relevant cases and other authorities clearly suggests that courts of law take a very serious view of the abuse of trust funds by a legal practitioner. Further, that lawyers, as a class, generally hold themselves up to very high standards of honesty, integrity and professionalism in the discharge of their legal duties. In the case of *Incorporated Law Society Transvaal v Behrman*, 1977(1) SA 904(T) at 905 H the court unequivocally stated that a practitioner who contravened the provisions relating to his trust account was guilty of unprofessional conduct and liable to be struck off the roll or suspended from practice."

In *Chizikani v Law Society of Zimbabwe* 1994(1) ZLR382 (SC) this court alluded to the fact that a legal practitioner who falls foul of the high standards expected of registered legal practitioners casts a shadow on the good name of his peers and also remains a danger to the unsuspecting public, unless his name is expunged from the register of legal practitioners.

I find no merit in the appellant's submission that the Tribunal erred in imposing the sentence in question. The Tribunal judiciously exercised its discretion, after a proper consideration of the facts of the case, relevant authorities and applicable principles in imposing the impugned penalty. The court in *Law Society of the Cape of Good Hope* v *C* 1986 (1) SA 616 (A) at 637B – C reasoned that the exercise of the court's discretion in matters of this nature involves the weighing up of the conduct complained of against the conduct expected of an attorney and, consequently making a value judgment. There is nothing to suggest that the Tribunal failed to judiciously exercise its discretion in determining the appropriate penalty. There is no merit in the appeal against sentence.

Consequently, I find no reason for this court to interfere with the sentence imposed by the Tribunal. As such this appeal cannot succeed.

Costs

I find no reason to depart from the norm that costs follow the cause.

DISPOSITION

The appeal as a whole has no merit.

Accordingly, the appeal is hereby dismissed with costs.

MAKONI JA: I agree

MATHONSI JA: I agree

Manokore Attorneys, appellant's legal practitioners