

REPORTABLE (49)

LLOYD MUNYARADZI MANOKORE
v
(1) PERKINS ZHAWARI (2) LILIAN ZHAWARI

**SUPREME COURT OF ZIMBABWE
GUVAVA JA, KUDYA JA & MWAYERA JA
HARARE: 25 NOVEMBER 2021 & 31 MAY 2024**

F Girach, for the appellant

H Mukonoweshuro, for the respondents

KUDYA JA: The appellant appeals against an order handed down by the High Court (the court *a quo*) on 29 June 2021. The court *a quo* dismissed his application for condonation and upliftment of the bar. The bar arose from the appellant's failure to serve his appearance to defend on the respondents within 24 hours, in breach of r 49 of the then subsisting High Court rules, 1971. These rules were repealed and replaced by the new rules, High Court rules, 2021 on 23 July 2021.

The inordinate delay in the handing down of this judgment is sincerely regretted.

THE PRELIMINARY ISSUE

At the commencement of the hearing, Mr *Girach* for the appellant and Mr *Mukonoweshuro*, for the respondents, agreed that the appellant's court application to consolidate SC300/21 with the present appeal was a misnomer. This was because SC 300/21 was a court

application to amend the appellant's grounds of appeal in SC 100/21, an appeal against the Legal Practitioners Disciplinary Tribunal's adverse order against the appellant. The application had already been moved and granted in SC 100/21. We therefore, on the turn, made the following order:

“By consent, the application in SC 300/21 be and is hereby dismissed with no order as to costs.”

THE BACKGROUND

The appellant is a former legal practitioner and managing partner of Manokore Attorneys legal practitioners. He was disbarred from practicing as a legal practitioner, conveyancer and notary public by the Legal Practitioners Disciplinary Tribunal (LPDT or the tribunal) on 15 April 2021 in case No. LPDT 09/18 (judgement No. HH 167/21). His fate was sealed, notwithstanding his appeal in SC 100/21, by the Tribunal on 12 May 2021 (LPDT 1/21, HH 230/21), when it dismissed his application for the suspension of its order, pending his appeal to this Court. This is because, in terms of s 29 (3) of the Legal Practitioners' Act [*Chapter 27:07*], an appeal against an order of the tribunal does not suspend the order unless, on application, it directs otherwise.

The respondents are husband and wife, who were the joint owners of an immovable property situated in Bellevue Bulawayo until it was sold by the appellant, who also facilitated its transfer, to Grace Nyoni (the purchaser) on 12 December 2014.

On 6 November 2012, the respondents signed a power of attorney (the surety) and an affidavit. The power of attorney served the following purposes. It appointed the attorneys of

National Foods Operations Ltd (NFL) as the respondents' attorney and agent. The appellant was the attorney for NFL. It further empowered the attorney, in the event that their own indebtedness to NFL remained seven (7) days past the due date, to alienate their Bellevue property, whose title deeds they voluntarily surrendered to NFL, in satisfaction of any such debt. The attorney was required to remit the balance of the purchase price to them.

The affidavit was deposed to by the husband. He ceded the Bellevue property to NFL "to support the credit application of Celgrim Bakeries (Private) Limited t/a Freshbake" (the debtor).

NFL duly advanced a credit facility to the debtor, which failed to repay on due date. On 19 February 2013, the debtor executed two acknowledgements of debt to NFL. It undertook to repay the debt in monthly installments failing which NFL would be entitled to "issue summons in any competent court" for the unpaid principal debt. The debtor, however, further defaulted. On 24 January 2014, the appellant, on behalf of NFL, called on the respondent's surety of 6 November 2012. The respondents contacted the debtor. On 7 February 2014, the debtor's legal practitioners wrote to the appellant. They indicated the impropriety of the appellant's intention to sell the respondent's property without a court order. They also conveyed the debtor's offer to sell an array of its own equipment that would adequately meet its indebtedness. The debtor further offered to place the equipment under NFL's custody during the sale. The appellant rejected the debtor's offer and advice.

On 11 February 2014, the appellant advised the respondents of the impending sale of their property. He also undertook to remit the balance from the purchase price to the respondents. The property was duly sold to Grace Nyoni (the purchaser) in September 2014 for US\$35 000.

She took transfer on 12 December 2014. The credit balance due to the respondents, after deducting the principal debt and interest, expenses, collection commission and legal fees, was in the sum of US\$6 802.54. The appellant remitted this amount to NFL and not the respondents.

It was common cause that the respondents did not provide the sellers' power of attorney to pass transfer and declaration

Aggrieved by the appellant's conduct, on 20 June 2016, the respondents complained to the Law Society of Zimbabwe (LSZ) that their property had been sold and transferred without their consent. The LSZ hauled the appellant before the LPDT. The tribunal found him guilty of unprofessional, dishonorable and unworthy conduct and duly disbarred him from legal practice.

The appellant noted an appeal, which, in terms of s 29 (3) of the Legal Practitioners Act, did not suspend his conviction and penalty. His application to the tribunal for the suspension of its order, pending the determination of the appeal, was unsuccessful.

THE PROCEEDINGS IN THE COURT A QUO

In March 2017, the respondents issued summons out of the Harare High Court in case No. HC 2210/17 against NFL, the appellant, the debtor, the purchaser and the Registrar of Deeds, Bulawayo. They sought the cancellation of the sale and transfer of their immovable property, alternatively, amongst others, damages in the sum equivalent to the replacement value of the property. The summons was served on the appellant on 15 March 2017.

The appellant entered appearance on 20 March 2017. He did not serve it on the respondents within the 24 hour period (by 22 March 2017) prescribed in r 49 of the old rules. Rule 49 was replaced by r 20 (6) of the new rules. The new rule, unlike r 49, provides a sanction against a defendant who fails to serve an appearance to defend within seven (7) days from the date of filing. The anomaly was brought to his attention by the respondents' erstwhile legal practitioners on 4 April 2017. They requested the appellant to regularize the anomaly, in terms of the rules of court. The appellant declined to do so. He proceeded to file a special plea and exception on 5 April 2017, which he served together with the appearance to defend on the respondents on the same date. He ignored the protestations of the respondent's legal practitioners that his actions were alien to the rules of Court. At his request, the special plea and exception, were set down. In an unreported judgment issued on 15 September 2020, the court *a quo* struck the matter off the roll with costs on the basis that the appellant had "flagrantly and knowingly" refused to seek condonation for a breach of a mandatory rule of the Court. It warned him that he would remain barred until he sought and was granted condonation for the breach.

The appellant abided by the order and sought condonation *a quo* on 30 September 2020. The application was contested. In the court *a quo*, the parties were *ad idem* on the requirements for condonation. While the list of considerations is not exhaustive, they limited themselves to the extent of the delay, the reasonableness of the explanation for the delay, prospects of success and prejudice to the appellant and interests of justice. In his founding affidavit, the appellant provided an explanation for the non-service of the appearance but did not do so for the late filing of the application for condonation. He, however, explained the reason for filing the application out of time in his answering affidavit. He further relied on the contents of the respondents' power of attorney and affidavit of 6 November 2012 for his defence. He also averred

that if his application were unsuccessful, he would be prejudiced in that he would be forced to pay the replacement value of the Bellevue property. He further averred that the balance of convenience was tilted in his favour. This was because a dismissal of his application would firstly, prejudice the interest of justice by abridging his right to be heard and secondly, would prejudice him by making him liable for a claim that was unmeritorious.

THE CONTENTIONS BEFORE THE COURT *A QUO*

Mr *Kadye*, who appeared for the appellant *a quo*, relied on the averments in the appellant's papers and contended that the delay was not inordinate, the explanation thereof reasonable and the prospects of success of his defence on the merits high. He further submitted that the appellant would be prejudiced in the manner highlighted in his founding papers. Counsel took two points to demonstrate that the appellant genuinely held that condonation was not required. Firstly, that r 49 unlike 50 and later r 20 (6) did not provide a sanction for failing to serve the appearance. Secondly, he invoked the common law principle, "*cessante ratione legis, cessat ipse lex*", which translates to "if the reason of the law falls away, the law falls away". He argued that the latter principle obviated the need for service, once the respondents became aware of its presence in the chamber book on 4 April 2017. He thus submitted that the failure to serve in these circumstances constituted a mere technical breach. He thus argued that such an awareness prior to the service cured the automatic bar.

Mr *Kadye* also argued that the power of attorney constituted a surety and consent to the sale and transfer of the immovable property in the event that the debtor failed to pay the outstanding principal amount. The debtor had failed to meet its pending obligations. The appellant

was therefore empowered by the surety agreement to alienate the property to settle the indebtedness.

On the other hand, Mr *Mukonoweshuro*, for the respondents conceded that the explanation for the failure to serve the appearance within the prescribed time frame was reasonable. He however contended that, as the appellant had not proffered an explanation for the delay in filing the application in his founding affidavit, the extent of the delay was overly inordinate. He argued on the strength of *Fuyana v Moyo* SC 54/06 at p 10 and *Muchini v Adams* 2013 (1) ZLR 67 (S) at 70A that, for it to be valid, the *cessante* based explanation should have been raised in the founding affidavit and not in the answering affidavit. He therefore requested the court *a quo* to ignore the belated explanation. He also argued that the failure to comply with a mandatory legislative decree was a material breach, which could only be rectified by a condonation order.

Mr *Mukonweshuro* further contended that, as the appellant did not have a good and *bona fide* defence to the claim, he did not have any prospects of success on the merits. He also argued that the surety agreement, encapsulated in the power of attorney, as between NFL and the respondents, would have constituted an illegal and therefore unenforceable *pactum commissorium*, had the respondents been indebted to NFL. Further, that, as the respondents did not bind themselves as co-principal debtors with the debtor, their property could only be sold and transferred by an order of court or with their consent. He also contended that the absence of the seller's power of attorney and declaration to transfer the property affirmed that they never consented to the sale and transfer. The overall absence of either of these two, so his argument went, invalidated the sale and transfer of the immovable property. He further argued that the

respondents had been seriously prejudiced by the deprivation of their property and the US dollar denominated rentals that they were receiving before the sale and transfer. He also contended that the purported breach of the appellant's right to be heard was a necessary and unavoidable consequence arising from his flagrant and intentional breach of the then subsisting rules of Court.

THE FINDINGS OF THE COURT *A QUO*.

The parties argued on the import of the LPDT findings, at the instance of the court *a quo*. The court *a quo* found that, even though the appellant was arrogant in refusing to seek condonation at the prompting of the respondents' legal practitioners, his explanation for the delay in launching the application before it, was reasonable. He was awaiting the decision of the court *a quo* on the propriety of his special plea and exception in the face of r 49. It accordingly found that the delay was not inordinate. The court *a quo* specifically held that the nub of the application was on prospects of success. By reference to the LPDT decision, it held that the appellant did not have any prospects of success on the merits. It accordingly dismissed the application for condonation and upliftment of the bar.

Dissatisfied with the findings *a quo*, the appellant appeals to this Court on the following grounds of appeal.

“THE GROUNDS OF APPEAL

1. The court *a quo* erred at law in finding that the High Court was bound by the factual findings of the Law Society Disciplinary Tribunal in HH 167/21 and HH 230/21.

2. The court *a quo* erred by making a finding that the prospects of success had already been dealt with in judgment number HH 167/21 and HH 230/21.
3. In any event, the court *a quo* erred in failing to place any consideration to the fact that HH 167/21 is the subject of an appeal.
4. Further, the court *a quo* erred by treating the respondents as if they were parties to the Law Society Disciplinary Tribunal proceedings.
5. The court *a quo* misdirected itself by finding that there was no reasonable explanation of the delay in seeking condonation in circumstances where the respondents admitted on oath that the appellant did in fact have a reasonable explanation.
6. The court *a quo* erred in not finding that the appellant had shown, on the papers, that he had reasonable prospects of success in defending the claim.

RELIEF SOUGHT

WHEREFORE appellant prays that the appeal succeeds with costs and prays for the following order:

- A. The judgment of the High Court is set aside and the following is substituted:
 1. The application for condonation for non-compliance with time limits set out in Rule 49 of the High Court rules 1971, be and is hereby granted.
 2. The appearance to defend filed on 20 March 2017 shall be deemed to have been filed and served on the respondents in accordance with the rules of this Court.
 3. The bar operating against the applicant be and is hereby removed.
 4. Leave be and is hereby given to applicant to take steps to set down the special plea and exception filed of record in terms of the High Court rules, 1971.

5. The respondents shall pay costs of suit.”

THE CONTENTIONS BEFORE THIS COURT

Mr *Girach*, for the appellant, while conceding that the LPDT matters were related to the present matter, submitted that the causes of action in these two matters were different. He therefore argued that the prospects of success could not be the same. He contended that the main LPDT matter sought to determine whether the appellant had breached the ethics of the legal profession. He also argued that the second matter was concerned with the suspension of the adverse penalty imposed against him in the first matter. He submitted that these two causes are distinguishable from the present matter, which seeks to determine “the appellant’s civil liability to the respondents.” He contended that the prospects of success in the present matter are therefore different from those pertaining to the disciplinary matters because of the differences in their respective causes of action. He criticized the way the court *a quo* adopted the reasoning of the tribunal. He argued that it showed that the court *a quo* erroneously considered itself to have been bound by the factual findings of the tribunal. He further argued that the court *a quo*’s failure to consider whether the power of attorney constituted a *pactum commissorium* or a *parate executie* between NFL and the respondents adversely affected its finding on the appellant’s prospects of success. He submitted that the arrangement between the respondents and NFL, which was embodied in the power of attorney, constituted a valid and therefore legal *paratie executie*.

Per contra, Mr *Mukonoweshuro*, for the respondents supported the decision of the court *a quo*. He submitted that the court *a quo* did not hold that it was bound by the findings of the tribunal but merely adopted the reasoning of the tribunal. He contended that, like the tribunal,

the court *a quo* found that the appellant breached his duty of care to the respondents. Firstly, by his erroneous treatment of the respondents as debtors to NFL. Secondly, by deliberately ignoring the fact that the respondent's affidavit was "in support of" the debtor's credit application. He therefore submitted that the appellant's argument that he alienated the immovable property on the authority and consent of the respondents was not supported by these two documents. He also argued that, even if the power of attorney were regarded as a surety agreement, the appellant could not have sold and transferred the immovable property without a court order. This, so he contended, was because the power of attorney did not bind the respondents as co-principal debtors. He also argued that the appellant's apparent failure to produce the sellers' power of attorney and declaration to pass transfer clearly showed that his prospective defence did not have any prospects of success.

THE ISSUE

The sole issue that arises from the appellant's grounds of appeal is whether the court *a quo* erred in finding that the appellant's prospective defence did not have any discernible prospects of success.

ANALYSIS

The requirements for an application for condonation in this jurisdiction are well established. The primary ones are: the extent of the non-compliance with the rules of court, the reasonableness of the explanation and the prospects of success. See *Forestry Commission v Moyo* 1997 (1) ZLR 254 (S) at 260E-F and *Mhora v Mhora* CCZ 5/22 at p 8. The submissions in this Court revolved around the prospects of success.

The submissions of both Mr *Girach* and Mr *Mukonoweshuro* were predicated on the construction of the power of attorney and the affidavit. Mr *Girach* argued that these two documents constituted a *parate executie*, which essentially permitted the appellant to alienate the immovable property without a court order or the respondent's power of attorney and declaration to sell and pass transfer to the purchaser. He therefore contended that the appellant's prospective defence, based as it was on his valid and legal conduct, had discernible prospects of success. He thus submitted that the court *a quo* erred in finding that his prospective defence was unlikely to succeed on the merits.

A *parate executie*, which is translated as "immediate execution" is the right of a creditor to dispose of the hypothecated property of its debtor without first obtaining the permission of a court. Such an arrangement is constitutional, valid, legal and enforceable in Zimbabwe, in respect of both movable and immovable property. See *Glens Removal & Storage Zimbabwe (Pvt) Ltd v Mandala* 2017 (1) ZLR 20 (CC), *Nyamukusa v Agricultural Finance Corporation* SC 174/94, *Change v Standard Finance Ltd* 1990 (2) ZLR 412 (S) at 414A-C, *Agricultural Finance Corporation v Pocock* 1986 (2) ZLR 229 (S) and *Aitken v Miller* 1951 (1) SA 153 (SR) at 155H.

It is necessary at this stage to reproduce both the power of attorney and affidavit of 6 November 2012. They are found in the main judgment of the tribunal that was attached to the appellant's written heads of argument. The power of attorney reads as follows:

"We Perkins Zhawari and Lilian Zhawari ...do hereby appoint Manokore and 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)

And the affidavit states:

“I, Perkins Zhawari, ID No 05-002888 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.” (My emphasis)

The major hurdle to the submission made by the Mr *Girach* is that the power of attorney, which was correctly recognized as a surety agreement by the court *a quo* and before it, the tribunal, governed the creditor-debtor relationship between NFL and the respondents. It did not relate to the creditor-debtor relationship between NFL and Celgrim Bakeries. The common cause facts on which the summons claim is based confirm that the surety arrangement did not bind the respondents as co-principal debtors with Celgrim Bakeries. It does not therefore constitute a *parate executie* for Celgrim’s indebtedness. Clearly, the sale and transfer of the respondents’ property under the guise of a *parate executie* was invalid. The appellant had no legal basis for doing so without a court order or the consent of the parties. He could not properly rely on the power of attorney and substitute it for the requisite seller’s power of attorney and declaration to pass transfer. His prospective defence would therefore be devoid of merit. Mr *Girach* further assailed the court *a quo* for adopting the reasoning of the tribunal without undertaking its own detailed examination of the common cause factual conspectus before it. Mr *Mukonoweshuro*, on the other hand, argued that the court *a quo* merely found the reasoning of the tribunal to have been persuasive. This is what the court *a quo* said at p 3 of its judgment:

“What is critical is that the reasons for the order made involved the sale of an immovable property belonging to the respondents, the same subject matter in HC 2210/17.”

It also stated at p 4 that:

“This Court cannot ignore the two (tribunal) matters since they involve the same issues as in HC 2210/17. These findings cast a shadow on the applicant’s special plea and exception that he seeks should be heard on the merits should the application for condonation be granted. In my view, the findings buttress the respondents’ position as submitted by Mr Mukonoweshuro that the applicant has no prospects of success if he were to be condoned for the late service of the notice of entry of appearance to defend. It cannot be correct as submitted by Mr Kadye that the findings are related to the present application but not to the extent of affecting the application for condonation. The findings clearly are significant to the prospects of success.”

And at pp 4-5:

“The respondents deserve finality in litigation. I am fortified in my view by the fact that the LPDT hearings are unique in that they are presided over by two judges and three legal practitioners. The findings they make are the product of thorough considerations of all the facts at hand and the law. The three legal practitioners have no interest in disciplinary matters other than ensuring that an errant legal practitioner is punished accordingly, meaning that they also ensure that one who is not errant is protected. The Tribunal found that the applicant deserved to be punished and this they did by ordering deletion of his name from the Register of Legal Practitioners.

The application for condonation therefore has no merit.”

A proper reading of the above remarks shows that the court *a quo* made the following findings. Firstly, that the causes of action in the disciplinary matter and the condonation matter were based on the same conspectus of facts. Secondly, that the appellant breached his duty of care towards the applicant. He failed to diligently bring his mind and experience to bear on the import of the clear and unambiguous wording of the power of attorney and affidavit. Thirdly, the power of attorney did not make the respondents co-principal debtors with Celgrim Bakeries. Fourthly, the power of attorney was invalid *ab initio* in that it did not nominate and imbue an individual or individuals with the powers embodied therein but improperly appointed his law firm.

Fifthly, that these findings buttressed the respondent's submissions that the appellant did not have any prospects of success. Lastly that the tribunal was a *sui generis* tribunal of experts whose findings were persuasive. See *Ndebele v Bhunu* NO HH 14/10 at p5.

In our view, courts of all levels are in the business of adopting and applying the reasoning of other courts, whose decisions are not necessarily binding on them. See *Barclays Bank of Zimbabwe v Zimbabwe Revenue Authority* SC 31/06 at p 8 where ZIYAMBI JA pertinently remarked that:

“The decisions referred to, though not binding on this Court would of course be persuasive authority which could assist this Court in arriving at a decision in the instant matter. But, as it was put by RUMPF JA in *Mooi's* case, *supra*, at p 686, referring to the decision in *Abbott v Philbin*:

‘What does persuasive authority mean? In my view certainly not the mere final order of that Court, but the force and validity of the reasoning upon which the order is based.’”

There was therefore nothing remiss about the court *a quo's* recognition and adoption of the tribunal's findings, which were based on the same set of facts.

We also find, contrary to Mr *Girach's* submissions, that the above remarks by the court *a quo* constituted an adequate basis for its findings. In the circumstances, we agree with Mr *Mukonoweshuro* that the appeal is devoid of merit and must be dismissed.

COSTS

There is no reason why costs should not follow the result.

DISPOSITION

It is accordingly ordered that:

“The appeal be and is hereby dismissed with costs.”

GUVAVA JA : I agree

MWAYERA JA : I agree

Manokore Attorneys, appellant’s legal practitioners.

H. Mukonoweshuro & Partners, respondents’ legal practitioners.