

THE LAW SOCIETY OF ZIMBABWE
versus
MANDE BAERA

LEGAL PRACTITIONERS DISCIPLINARY TRIBUNAL

HARARE, 22 November 2019 & 12 May 2021

Before: CHATUKUTA J (Chairperson),

MUSAKWA J (Deputy Chairperson)

MR D KANOKANGA & MRS S. MOYO (members)

B. Pesanai, for the Applicant
G.R.J Sithole, for the respondent

CHATUKUTA J: On 28th of February 2013, one Pia Violet Jumo lodged a complaint with the applicant against the respondent. The complaint is based on the following facts which are largely common cause. The complainant and her husband (the complainants) entered into an agreement of sale with one Blessing Tusaumwe (the seller) in terms of which they purchased an immovable property from the seller for a sum of US\$27 000. The transaction was facilitated by a real estate and property management company known as Tshukudu Properties & Management (the company). The respondent, who is the principal of the law firm Baera & Company, is a director in the real estate company. The company operated from the same premises as Baera & Company, being 2 Floor West Wing, Coal House, 17 Nelson Mandela Avenue, Harare.

It was a term of the purchase agreement that the purchase price would be deposited into the trust account for Baera & Company. It was also a term of the agreement of sale, that the purchase price would be held in the trust account until such time that the transfer of the property had been effected into the names of the complainants. The respondent's firm was appointed to carry out conveyancing.

The complainants paid the full purchase price into the respondent's trust account. They paid a further sum of US\$ 1 570 being conveyancing fees and a sum of US\$ 300 being administration costs. After some time, the husband was asked by the respondent to give authority for the release of the purchase price to the seller. He was assured that the transfer process was near completion. On 4 May 2012 he authorised, in writing, Tshukudu Properties to release the full purchase price to the seller. On the same day, Baera & Company released

US\$24 500 to Abigail Homera, the Managing Director of the company. US\$4 000 was released by the firm to the same Homera on the following day.

After a lapse of time, the respondents inquired from the seller why the transfer was being delayed. The seller advised them that he had cancelled the agreement for non-payment of the purchase price. The complainants approached the respondent who informed them that one of their employees had converted the money to her own use. The respondent undertook to pay the complainants the money. On 18 June 2012, he executed an acknowledgement of debt in favour of the complainants. By the 18th of September 2012, the respondent's law firm had refunded the complainants a total of US\$21 500, leaving a balance of USD\$7 370. After attempts to get the balance failed, the complainants approached Zimbodza and Associates for assistance. On 12 December 2012, Zimbodza and Associates wrote a letter to Baera and Company requesting refund of the balance to the complainants. On the 15th of January 2013, Baera and Company made a payment of USD\$2 000 to Zimbodza and Associates. The firm failed to pay the remaining balance. The complainants, through Zimbodza and Associates, issued summons in the Magistrates Court against Baera and Company for the recovery of the outstanding balance. The firm entered an appearance to defend the claim.

The applicant filed the present application seeking an order for the deletion of the respondent's name from the register of legal practitioners. It is alleged that the respondent

- (a) misappropriated trust funds notwithstanding his duty to keep the funds intact;
- (b) failed to effect transfer of property on behalf of client despite the full purchase price having been transferred into his account
- (c) was conflicted by acting as the estate agent and the conveyancer at the same time;
- (d) failed to repay the amount owing to his client.

It was contended that the respondent's conduct was unprofessional, dishonourable and unworthy. It prayed for the de-registration of the respondent.

The application was opposed. The respondent stated in his response to the application that the company was subletting offices at the same premises where his firm was also renting offices. He was, together with his late partner one Stephen Rugwaro, a non-executive director in the company. One Abigail Homera was the managing director. A Peter Dube was the registered agent. The legal firm and the company were separate entities. He was not precluded from accepting conveyancing work from the company.

He only became aware from Ms Homera of his appointment as a conveyancer after the transaction had been concluded. Unbeknown to him, Ms Homera had obtained his firm's trust account banking details and included them in the purchase agreement instead of the banking details of the trust account of the company. Payment of the purchase price was made into the firm's trust account also without his knowledge. Ms Homera handed over to him a copy of the title deeds with an undertaking that the original would be released once payment of the purchase price had been secured.

He further averred that the complainants consented in writing that he release the purchase price to the seller before transfer. He withdrew the funds and passed them on to Ms Homera for onward transmission to the seller. He only became aware that Miss Homera had not paid the seller and had converted the funds to her personal use when the complainants inquired why the seller had not been paid. The property had already been sold to a third party. He signed an acknowledgment of debt because the money had initially been deposited in his trust account and he had a reputation to protect. He paid the full amount due to the complainants. He could not proceed with the transfer of the property because the seller refused to release the original title deeds when he did not receive payment.

The following are the issues for determination.

1. Whether the respondent misappropriated trust funds;
2. Whether the respondent failed to pay the acknowledged amount when the money was due;
3. Whether the respondent failed to effect transfer of property into the complainants' names without lawful cause; and
3. Whether the respondent was conflicted when he acted as both conveyancer and estate agent?

These issues are discussed below.

1. **Whether or not the respondent misappropriated trust funds**

Mr *Pesanai* submitted that the respondent did not have authority to release funds from his trust account and remit them to the estate agent for onward transmission to the seller. The authority which the respondent seeks to rely on, was actually authority given to Tshukudu

Properties. The respondent could not therefore rely on it as authority to him to release the money.

Mr *Sithole* submitted that the complainants tacitly accepted in paragraph 7 of the letter of complaint that they gave the respondent the requisite authority. Paragraph 7 reads:

“as time progressed we got a call from Mr Baera that we ought to report to their offices, my husband was the one who went there I was to learn from my husband that he had been asked by the lawyers to authorise the release of the US\$27 000 to the seller Blessing Tusaumwe as the transfer of the property into our names was almost done which he did.”

It was the respondent’s contention that once the Applicant brings into contention a charge of misappropriation of trust funds, which is akin to theft, then the proof required before this Tribunal is the same as in a criminal matter, that is proof beyond reasonable doubt. The respondent referred to the matter of *Law Society of Zimbabwe v Mugabe & Another 1994* (2) ZLR 356.

The respondent had an obligation to hold the funds in the trust account until transfer had been effected. He could only release the funds with the authority of the purchaser. The respondent did not, in his opposition of the application, rely on the “tacit authority” alluded to in the oral submissions. He relied on an Annexure B attached to his opposition. Annexure B reads:

“AUTHORITY TO RELEASE PAYMENT

We, CRYTON JUMO I. D. NO 24-064983-P-24 and PIA VIOLET JUMO I. D. NO 29-132121-Y-77 authorise TSHUKUDU PROPERTIES to release US\$27 000 (TWENTY SEVEN THOUSAND UNITED STATES DOLLARS ONLY), to BLSSING TUSAUMWE, ID No 75-2015505-Q-75 being purchasing price for Stand 1271 Parktown, Waterfalls, Harare.”

The above authority was clearly directed to Tshukudu Properties. It does not refer to the respondent or his firm in any manner. The respondent could not therefore be mistaken that it was directed at him. The respondent cannot rely on a “tacit authority” where there is an explicit authority given to Tshukudu Properties. The authority directed the company to release the purchase price yet according to the purchase agreement the funds were held in the respondent’s trust account. Any diligent legal practitioner would have noted that the authority was addressed to the wrong person. Additionally, the authority to release payment clearly stated that the funds were to be released directly to the seller, Blessing Tusaumwe, and not to the estate agent. This is consistent with the law that money held in a trust account is payable to the intended beneficiary. The intended beneficiary in this case was the seller and not the company.

The respondent clearly did not have authority from the complainants to release the purchase price to the seller.

The respondent attached two acknowledgments of receipt of the funds duly signed by Ms Homera. According to the first receipt, the respondent released US\$24 500 on 4 May 2012. The second receipt reflects the release of an amount of US\$4 000 on 5 May 2012. The respondent evidently released the purchase price in instalments. The full purchase price, conveyancing fees and administration fees was paid on 31 March 2012. There is no explanation why the full purchase price could not all be released on 4 May 2012, four days after the amount was deposited into the respondent's trust account. The conclusion that can be drawn from the releases by instalments is that on 4 May 2014 the respondent did not have funds in the trust account sufficient to pay out the full purchase price.

As rightly noted by Mr Sithole, the applicant was required to prove beyond a reasonable doubt that the respondent misappropriated trust funds (See *Law Society of Zimbabwe v Mugabe & Another (supra)* at 356 E-F. The applicant, in our view, proved beyond a reasonable doubt that the respondent misappropriated trust funds in breach of his duty to keep the funds intact.

2. Whether the respondent failed to pay the acknowledged amount when the money was due

Mr *Pesanai* submitted that, despite signing an acknowledgment of debt on 18 June 2012 undertaking to pay back the complainants \$28 000 within 3 months from date of the acknowledgement, an amount of US\$ 5370 remained unpaid up to 2017. It was only on 18 July 2017, that the complainants confirmed receipt of the remaining balance.

Mr *Sithole* submitted that this issue had become moot as the entire debt had been paid at the time of filing the present application.

The respondent does not have any defence to the charge. It is common cause that it took the respondent five years to pay what was due to the complainants. The complainants had to incur expenses in engaging the services of *Zimbodza and Associates* to recover the balance. They had to issue summons in the Magistrates Court for the recovery of the balance. The respondent, as a legal practitioner must always honour his word. A practitioner who fails to honour a professional undertaking is *prima facie* guilty of misconduct. (See *BD Crozier Legal Ethics: A Handbook for Zimbabwean Lawyers* (2009) at page 36). The respondent took five years to honour an obligation he had undertaken to discharge within three months.

The respondent's behaviour is therefore unprofessional, dishonourable and unworthy conduct which brings the reputation of the profession into disrepute.

3. Failure to effect transfer

The respondent submitted that he commenced the process of conveyancing the property. He prepared the seller's power of attorney to pass transfer and the seller's declaration. The seller refused to sign the two documents and to release the original title deed because he did not receive payment of the purchase price. He therefore could not effect transfer of the property.

The respondent's submissions are incomprehensible. The purchase agreement was concluded on 31 March 2012. The full purchase price, conveyancing fees and administration fees were paid on the same day. The purchase price was released on 4 and 5 May 2012, one month and four days later. The respondent asked the seller for the title deeds after having released the full purchase price. In fact, the complainant stated in paragraph 7 of the letter of complaint that the respondent had assured them that it was safe to release the money to the seller because the transfer was almost complete. The respondent did not dispute this averment. The respondent therefore misled the complainant into consenting to the release of the purchase price.

The respondent therefore failed to effect transfer of the property without lawful cause.

4. Whether or not the respondent was conflicted

It is trite that a legal practitioner must ensure that he or she does not act in circumstances where he is conflicted.

It was the applicant's contention that, the respondent had pecuniary interest in Tshukudu Properties in his capacity as a non-executive director. It is because of the pecuniary interest that he was ready to act on instructions which were given to Tshuduku Properties and not him.

The respondent submitted that there was no conflict of interest, the estate agent and the respondent are 2 different entities who had common individuals occupying positions of non-executive directors and also being principals in the law firm.

The conflict of interest is quite apparent. According to the respondent the company had only three directors that is the late Stephen Rugwaro, Ms Homera and himself. This

directorship also appears on the front page of the purchase agreement. The late Stephen Rugwaro and the respondent were both partners in Baera & Associates. There were therefore common personalities between the law firm and the estate agent. It was also inexplicable that Ms Homera could clandestinely obtain the banking details of the firm's trust account and appoint the firm as conveyancers. The acceptance by the respondent of the decision by Ms Homera, who was not an employee of the legal firm, to hold funds in his trust account despite the fact that he was not a party to the negotiations proves the connection between the firm and the company. The respondent stood to benefit from dealings of the company irrespective of the fact that he was a non-executive director. The respondent released the purchase price when he did not have the original title deeds. The seller had not signed the seller's power of attorney and the seller's declaration. This must have been motivated by the pecuniary interest. On the other hand, he had an obligation to keep the complainant's funds in the trust account intact. The pecuniary interest and the professional obligation were conflicting. The respondent had a duty to avoid the conflict, but he failed to do so.

From the totality of the evidence, the applicant proved that the respondent misappropriated trust funds. He released funds held in a trust account without authority from the complainants. Further, he was conflicted. His conduct was therefore unprofessional, dishonourable and unworthy.

Sentence

The respondent submitted in mitigation that he was the victim of theft by Ms Homera. The delay in the conclusion of the matter from 2013 is mitigatory. The sentence proposed by the applicant is excessive. The Tribunal should therefore consider other sentencing options.

The applicant submitted that the seriousness of the respondent's conduct warranted his de-registration.

We find that the respondent's blameworthiness is high. The transgressions that the respondent is guilty of are very serious. They impact negatively on the integrity of the profession. It is trite that the abuse of trust funds is viewed as a very serious transgression warranting the deletion of the respondent's name from the applicant's register. (See *Chizikani v Law Society of Zimbabwe* 1994 (1) ZLR 382 SC)

It is common cause that the complainants were put out of pocket as they had to seek legal representation and resort to litigation to recover the money due to them. Despite the

inconveniences the complainant had to endure to recover what was due to them, the last payment was made in July 2017. It appears the payment was prompted by the filing of the present application.

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
C Mpame & Associates, respondent's legal practitioners