LAW SOCIETY OF ZIMBABWE
versus
TOINDEPI MAHASO

HIGH COURT OF ZIMBABWE
CHAIRMAN: BHUNU J
DEPUTY CHAIRLADY: CHATUKUTA J.
HARARE, 26 September 2011 and 18 January 2012 and 28 February 2013 and 22 May 2013

MEMBERS: 1. Mr KANOKANGA
2. Mrs S. MOYO.

LEGAL PRACTITIONERS DISCIPLINARY TRIBUNAL

M Mahlangu, for the applicant
R Chingwena, for the respondent

BHUNU J: This is an application for the deregistration of the respondent from the applicant's register of Legal Practitioners, Notaries Public and Conveyancers in terms of s 28 (1)(c)(i) of the Legal Practitioners Act [*Cap 27:07*]. The application has had a long winding circuitous route starting from 22 March 2002 to date. However, although the application was filed in 2002, the respondent was out of the country and only returned in 2003. It is only then that the application became active.

The respondent raised a preliminary issue alleging the violation of his constitutional right arising from the delay in concluding this hearing.

The right to a fair hearing within a reasonable time in civil matters is enshrined in s 18 (9) of the Constitution which provides that:

> "Subject to the provisions of this Constitution, every person is entitled to be afforded a fair hearing within a reasonable time by an independent and impartial court or other adjudicating authority established by law in the determination of the existence or extent of his civil rights or obligations."

Thus the respondent was entitled to a fair hearing and determination of his case by this Tribunal within a reasonable time. The Constitution does not however, define what constitutes reasonable time. What constitutes reasonable time in my view, depends on the prevailing circumstances and exigencies of each given case.

It is not in issue that there was a delay in determining this case. However, the case of *Bruce Ivin Whatson* v *The State* SC 17/06 is authority for the proposition that where there has been a prolonged delay there must be a reasonable explanation for the delay to avoid permanent stay of the proceedings. I now proceed to examine the peculiar circumstances of this case to determine whether or not the apparent inordinate delay in determining his case amounts to an infringement of his constitutional rights.

The matter was initially set down for hearing before the then Chairman of the tribunal CHIWESHE JP. On 4 February 2004 the respondent wrote to the applicant's Secretary proposing that the disciplinary proceedings be held in abeyance until the criminal proceedings had been determined by the criminal court. The letter reads in part:

> "There are 21 counts of Theft FP against me emanating from all the transactions that I handled in my offices. This clearly puts to rest your disciplinary proceedings in terms of Second proviso to Section 26(2) of the legal Practitioners Act Chapter 27:07, which says:-
>
> > 'Provided that-
> >
> > (ii) if the allegation forms or is likely to form the subject of criminal proceedings in a court of law, the Council may postpone referring the matter to the Disciplinary-Tribunal until such criminal proceedings have been determined.'
>
> This is a very clear provision. The complainants have reported to the police. The CRB No is 10538/2003 at Harare Magistrates Court (Known as Rotten Row Court). The cases are still pending I am still on remand. All attempts to resist placement on remand have failed."

Apparently taking a cue from the respondent's letter CHIWESHE JP on 9 June 2004 issued a binding order in the following terms:

> "WHEREUPON, after reading documents filed of record and hearing Counsel
>
> IT IS ORDERED THAT:
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> 1. The Matter be and is hereby postponed *sine die*.
> 2. The applicant is directed to pursue the progress being made with ZRP and Attorney General's Office *vis a vis* the pending criminal trial.
> 3. The respondent to advise when he is in possession of further documents relevant to his matter including supporting documents and furnish the applicant and the Tribunal."

The order assigned obligations to both the applicant and the respondent, which it appears were intended to expedite the determination of the disciplinary hearing. In a letter dated 2 August 2006 addressed to the Law Society, it is apparent that the Law Society as far back as 16 September 2005 had pursued the matter with the Attorney General's Office as directed by CHIWESHE J in his order of 9 June 2004. The respondent does not appear to have complied with his obligations in para 3 of the order. It can be concluded that he was content with the fact that the hearing had been postponed indefinitely

CHIWESHE JP was subsequently reassigned to other duties before he could deliberate over the matter. Following the reassignment of the then Chairman to other duties it took quite a while before the tribunal was properly constituted in terms of the Act. The Tribunal was only properly constituted sometime in June 2007 with my appointment as its Chairman.

Despite the Tribunal being properly constituted, it could not immediately embark on setting down the matter for hearing because the entire High Court bench including the vice Chairperson and myself had been appointed as Electoral Court judges. This was necessitated by the volume of electoral applications preceding and during the 2008 elections and the electoral petitions after the elections. For good and cogent reasons there was a directive that electoral matters be given top priority as the Electoral Act [*Cap 2:13*] enjoins determination of electoral petitions within 6 months of the elections. The results of the elections in almost all the constituencies were being contested.

The Tribunal was only ready to hear and determine the matter at the end of September 2008. By then the applicant had been arrested and incarcerated in prison. Being a captive litigant the respondent found it difficult to effectively conduct his defense from prison. He requested to have the matter postponed on a number of occasions to put his house in order.

As a result of the respondent's incarceration, the applicant found it difficult to locate and serve the applicant with the necessary documents in prison, resulting in further delay. Owing to the then prevailing economic challenges the prison authorities were finding it difficult to convey the respondent to Court for trial thereby compounding the delay.

The respondent's submissions filed on 22 August 2012, portray a very misleading picture that the respondent did not in any way contribute to the delay in the determination of this matter. The blame for the delay is attributed to the applicant, the Zimbabwe Prison Services and the Tribunal. However, it is not in issue that the following delays were at the instance of the respondent:

4 February 2004	the respondent wrote to the applicant's Secretary proposing that the disciplinary proceedings be held in abeyance until the criminal proceedings have been determined by the criminal court resulting in the order by CHIWESHE JP postponing the hearing *sine dire.*
23 April 2007	the respondent filed a Chamber Application in HC 1891/07 seeking dismissal of disciplinary application for want of prosecution and reissuance of practicing certificate. The application was not pursued and remains unresolved
27 November 2007	the respondent filed Chamber Application in HC 6687/07 seeking an order for permanent stay of execution. The application was not again pursued and remains unresolved.
28 November 2008	the hearing was postponement to 20 March 2009 at the instance of the respondent on the basis that a Ms Rubaya of Mandizha & Company was to represent him. Ms Rubaya never represented him and never attended the hearing. The respondent also objected to the hearing resuming on the basis that the matter was *res judicata* as it had been resolved by CHIWESHE JP and the Tribunal did not have jurisdiction to revive the hearing.
30 January 2009	between 28 November 2008 and 30 January 2009 attempts were made to locate the record of the determination by CHIWESHE J to no avail. The respondent was not able to furnish the court with the record or a copy of his counter-claim. He withdrew his objection that the matter was *res judicata*. For the six years that the respondent had been stalling the determination of the hearing, he had not filed his counter-statement to the application. The hearing was again postponed to enable the respondent to file the counter-statement.
29 February 2009	Respondent filed a counter-statement in which he raised preliminary issues why the hearing could not proceed.
26 March 2009	the preliminary issues in his counter-statement were argued and the hearing was postponed for the Tribunal to consider the preliminary issues.
13 December 2010	the respondent filed an application in the Supreme Court under case number SC 299/2010 seeking an order permanently staying the

proceedings on account of the delay. Thereafter he objected to the matter being set down for hearing in this court preferring to wait for the Supreme Court determination before proceeding. He however failed to prosecute his application to finality in the Supreme Court. The respondent only withdrew his objection to the continuance of the hearing in 2012 when it became apparent that the application was pronounced by the Supreme Court to be unprocedural. He then resubmitted the same issue for determination by this Court as the preliminary issue under consideration and again compounding the delay.

22 September 2011 — the respondent filed an urgent chamber application in HC 9393/11 seeking an order restraining the Tribunal from hearing the matter on the basis that the respondent had filed the constitutional application in SC 299/10. Although the respondent had been served with the notice of set down of the hearing for 26 September 2011, the urgent application was only filed on 22 September 2011. The application was considered not urgent

26 September 2011 — the respondent applied for a postponement pending the determination of the urgent application in HC 9393/11.

All these applications necessitated the postponement of the hearing to enable the Tribunal to determine the applications resulting in protracted delays. The applications were either not pursued or ill-conceived. In this case, it is self evident that the postponements and attendant delays were by and large at the respondent's specific instance and request. For him to then turn around and complain that the delay is in violation of his constitutional rights to a speedy trial, smacks of dishonest and a set mind to mislead. The inordinate delays in concluding this matter cannot therefore be laid solely at the door of one party. A perusal of the record of proceedings however, shows that the bulk of the delay can squarely be laid at the respondent's door. The respondent did acquiesce to postponement at the instance of the applicant. Once the postponement and attendant delays had been converted into a binding lawful court order no legal harm could arise from the observance of such order. The adage *volenti non fit injuria* is apt, for there can be no harm where there is consent.

I accordingly hold that there was no violation of the respondent's constitutional rights to a speedy trial within a reasonable time.

I now turn to consider the matter on the merits. The respondent a registered legal practitioner is alleged to have on numerous occasions embezzled monies entrusted to him by his clients for purposes of buying houses. Following the alleged theft of trust monies he is alleged to have failed to respond to correspondence from the applicant without good cause. Thereafter he is alleged to have abandoned his legal practice without notifying the applicant and or his trust creditors. He is alleged to have failed to submit his annual report as is required by law. Finally, the accused was convicted on 29 July 2008 and sentenced to 24 months imprisonment of which 3 months imprisonment was suspended on appropriate conditions in the magistrates court of a dishonest offence arising from the fraudulent sale of a house during the course of discharge of his practice as a legal practitioner.

The respondent mounted a spirited defense to all the allegations leveled against him. It is however, common cause that he is a convict. The respondent completed serving his sentence. He submitted that he filed an appeal against the conviction and sentence. He however failed to furnish the court with an order of the Supreme Court setting aside the conviction or even the notice of appeal despite numerous requests by the Tribunal to produce the same. In the absence of an order of the Supreme Court, the conviction and sentence still stand.

Section 31 (3) of the Civil Evidence Act [*Cap 8:01*] provides that a criminal conviction by a competent court of competent jurisdiction creates a presumption that the convict committed all the acts constituting the offence. It reads:

> "Where it is proved in any civil proceedings that a person has been convicted of a criminal offence, it shall be presumed unless the contrary is shown –
>
> (a) That he did all the acts necessaryto constitute the offence, or
> (b) Where the offence is constituted by an omission to do anything, that he omitted to do: that thing; as the case may be."

The above section shifts the onus onto the respondent to prove his innocence on a balance of probabilities. In the absence of such proof he is presumed guilty of the offence charged. In this case the accused has failed to discharge the onus. This Tribunal can therefore only come to the conclusion that the accused is guilty of fraud in terms of his conviction in the Magistrates Court on 29 July 2008. See p 123 of the bound application.

That finding of fact is damning on the respondent's defense as it seals his fate such that it is no longer necessary to determine all the other allegations leveled against him. A

legal practitioner who perpetrates a fraud in the course of duty warranting imprisonment is clearly beyond redemption. (See *Chirambasukwa and the Law Society of Zimbabwe* 1995 (2) ZLR 188 at 192E-193 G and *Aitken and the Law Society of Zimbabwe* 1995 (2) ZLR 383 at 389 D-393F). That being the case, the application can only succeed.

It is accordingly ordered:

1. That the application be and is hereby allowed with costs.

2. That the respondent's name be and is hereby deleted from the applicant's register of Legal Practitioners, Notaries Publics and Conveyancers in terms of s 28 (1)(c)(i) of the Legal Practitioners Act [*Cap.27:07*].

Gill Godlonton & Gerrans, applicant's legal practitioners
Mangwana & Partners, respondent's legal practitioners