ASTON ALOIS MUSUNGA
versus
LAW SOCIETY OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE 17 AND 24 JULY 2013

A. Masango, for the applicant
L. Uriri, for the respondent

Opposed application

MATHONSI J: The applicant is a legal practitioner and senior partner at the law firm of Musunga & Associates which cherishes its domicile in Harare, Zimbabwe. The respondent is the regulating authority governing the activities of legal practitioners in this jurisdiction. The applicant has made an approach to this court in terms of Order 33 Rule 256 of the High Court of Zimbabwe Rules, 1971 seeking a review of the decision of the respondent handed down on 14 July 2010 in which he was found guilty of professional misconduct and "reprimanded and warned to always act as a diligent conveyancer."

The circumstances giving rise to that reprimand are that on 2 November 2005 the applicant received conveyancing instructions to attend to the transfer of stand 10894 Kuwadzana Township which had been sold by the complainant, one Michael Bvirindi and his wife, to Ruvengo Madyangove and Langelihle Siwawa. He also received the full purchase price in Zimbabwean currency which he had to disburse to the sellers upon transfer.

Owing to a number of factors, including the non payment of his conveyancing fees, the applicant did not attend to transfer, he did not renounce agency and more importantly, he did not disburse the purchase price but kept it in his trust account right up to the time a complaint was lodged against him by Bvirindi to the respondent. The purchasers had obtained an order of this court for transfer of the house to be effected, which was done without Bvirindi receiving any

consideration, the money having remained stashed in the applicant's trust account until the Zimbabwean dollar ceased to become functional currency, thereby rendering it valueless.

Responding to the complaint lodged against him through a letter dated 27 July 2010 to the deputy secretary of the respondent, the applicant defended his decision to hold onto the purchase price for almost 5 years until it became nothing as follows;-

> " 8. I still stand by my position that the cardinal principle in conveyancing is that a conveyancer only releases the purchase price to the seller upon a successful completion of the transfer and that transfer must follow sequence. It is clear Mr Michael Bvirindi did not comply with our requirements to transfer the property from Sisca Matare to himself and his wife. He did not pay the required transfer fees and secondly my law firm could not forward the purchase price to him because the transfer had not been completed. The property was only transferred to the purchasers after the judgment of the Honourable Justice CHITAKUNYE on the 2nd of October 2009. See letter from Messrs Chinamasa, Mudimu, Dondo and Chinongwenya dated 12 October 2009 attached hereto as Annexure 8. This letter came to my attention when the Deputy Secretary wrote to me on the 22nd of January 2010, that is when the purchase price became payable to Mr Michael Bvirindi and I accordingly tendered payment which Mr Michael Bvirindi has not collected. I received Zimbabwe dollars and held the money in the trust account, accordingly Mr Michael Bvirindi will receive his payment in Zimbabwe dollars."

This, despite the fact that the Zimbabwe dollar was losing value virtually every hour to the extent that a number of zeros were struck off the currency over the years. God help property owners who dare sell properties through the medium of such legal practitioners. The applicant religiously buried the purchase in the typical biblical parable style of that servant who buried his master's sack of silver instead of investing it and returned it to the master as it was, except that this time there was nothing to return to the master. The moral of the story being that to those that have more shall be given and from those that have nothing, even the little that they have shall be taken from them.

Be that as it may, although the applicant received the determination on 14 July 2010, and after unsuccessfully asking the respondent to review it, he received the respondent's refusal to change it on 10 December 2010, he only filed this review application on 19 December 2011, more than a year later. From whichever date one reckons the time, be it from 14 July 2010 or from 10 December 2010, this review application is hopelessly out of time. In terms of r259;

> "Any proceedings by way of review shall be instituted within eight weeks of the termination of the suit, action or proceedings in which the irregularity or illegality complained of is alleged to have occurred.
>
> Provided that the court may, for good cause shown extend the time."

The applicant has not made an application for condonation or for the extension of the time allowed to file the review application. He has only made this application in which he half – heartedly alludes to condonation and states in paragraph 4 of his founding affidavit;-

> "Out of an abundance of caution I hereby apply for condonation of the late filing of the application for review."

That no application for condonation has been made despite the cursory reference to it, can be gleaned from the contents of paragraph 8 of the same affidavit where the applicant confidently states;-

> " I would submit therefore that the weeks stipulated in Rule 259 must be calculated from the date on which (the) respondent declined to refer my matter to the Tribunal which is the 3rd November 2011 and therefore my application in terms of Rule 259 is therefore within the time limits and I humbly request the Honourable court to entertain the application for review."

It is either the applicant is seeking condonation or he is not. There can be no half way house and the court cannot extend an indulgence which has not been sought. The applicant cannot have his cake and eat it at the same time. Even more important is the fact that no formal application for condonation has been made. It has long been decided that in the absence of a substantive application for condonation, a review application filed out of time, would be improperly before the court and should be dismissed: *Masuka v Chitungwiza Town Council* 1998(1) ZLR 15 (H) 18B. The Supreme Court put that point beyond doubt in *Forestry Commission v Moyo* 1997(1) ZLR 254(S) where at 260D-261B GUBBAY CJ pronounced:

> "I entertain no doubt that, absent an application it was erroneous of the learned judge to condone what was, on the face of it, a grave non – compliance with r259. For it is the making of the application that triggers the discretion to extend the time. In *Mtsambire v Gweru City Council* S -183-95 (not reported) this court held that where proceedings by way of review were not instituted within the specified eight week period and condonation of the breach of r259 was not sought, the matter was not properly before the court. I conceive of no reason to depart from that ruling. One only has to have regard to the broad factors which a court should take into account in deciding whether to condone such non-compliance to appreciate the necessity for a substantive application to be made."

See also *Director of Civil Aviation v Hall* 1990(2) ZLR 354(S) 357 D-G; *Viking Woodwork* (Pvt) *Ltd v Blue Bells Enterprises (Pvt) Ltd* 1998(2) ZLR 249(S) 215C-D; *Sai Enterprises (Pvt) Ltd v Girdle Enterprises (Pvt) Ltd* 2009(1) ZLR 352(H) 354E-F; *Ncube v CBZ Bank Ltd & Others* HB99/2011.

I have already stated that no substantive application for condonation has been made. The application is therefore improperly before me and is susceptible to being dismissed. I do not think this court needs to be detained further by the nervous submission made by the applicant that the application was not made out of time because the proceedings were concluded in November 2011. Clearly that is simply disingenuous. It is trite that the date of termination of the proceedings before the respondent is the date when the decision was communicated to the applicant. *Cluff Mineral Exploration (Zimbabwe) Ltd v Union Carbide Management Services* (*Pvt) Ltd & others* 1989 (3) ZLR 338 (S) 344D.

It is unnecessary for me to consider the merits of the matter save to state that even the merits would have presented the applicant with serious difficulties. I must also add that the respondent's opposition was filed out of time and condonation, I am advised, is being sought separately. That however pales to insignificance because this application itself is improperly before me.

In the result, the application is hereby dismissed with costs.

Musunga Law Chambers, applicant's legal practitioners

Gill, Godlonton and Gerrans, respondent's legal practitioners