REPORTABLE (37)

YSMIN TACKLAH MAHOMMED
v
TAWURAYI MARVIN KASHIRI

SUPREME COURT OF ZIMBABWE
KUDYA AJA
HARARE OCTOBER 9, 2020 & MAY 4, 2021

P.C. Paul, for the applicant

G. Mhlanga with *T. L. Mapuranga*, for the respondent

IN CHAMBERS

KUDYA AJA: This is a chamber application for condonation of the late filing of an appeal and extension of time within which to appeal launched in terms of r 43 (1) of the Supreme Court Rules, 2018. The application is opposed.

BACKGROUND FACTS

The applicant and the respondent are joint owners of an immovable property, stand 24 Philadelphia Township of Philadelphia, Harare held under deed of transfer 4986/02. On 16 February 2017, they executed a deed of settlement on the disposal of the immovable property in question, whose terms were incorporated in consent orders granted by the High Court in other cases that were pending between them.

The parties agreed to engage two estate agents, Guest and Tanner and Dawn Properties, to value the immovable property. The mean of the two valuations was to be the value of the property. If, however, any party was dissatisfied with any of the two valuations, the parties' legal practitioners would jointly choose a third estate agent, whose valuation

would be final. Thereafter, the applicant had the right to buy out the respondent's one-half share in the property within 6 months of receipt of the acceptable valuation, failing which the respondent had the same right to buy out the applicant's one half share within a further period of 6 months. In the event that the parties failed to exercise their respective rights, the property was to be sold by private treaty with the parties sharing the net proceeds, equally.

The parties jointly instructed the two estate agents to value the property. Dawn Properties valued it at US$250 000 while Guest and Tanner valued it at US$292 000. The two valuators submitted their respective reports on 28 March 2017 and 30 March 2017 to the parties' respective legal practitioners. The applicant's legal practitioners failed to appreciate the valuation methodology applied by Guest and Tanner. Consequently, on 26 May 2017, they sought the estate agent's comments on these aspects without copying their correspondence to the respondent's legal practitioners. In response, the estate agent cryptically asserted that the valuation amount constituted a typographical error and proceeded to rectify the earlier amount by substituting it with the lower figure of US$192 000.

The respondent's legal practitioners were oblivious of the communication between the applicant's legal practitioners and Guest and Tanner. They simply filed away the original valuation report without much thought. The respondent's legal practitioners forwarded the corrected Guest and Tanner valuation report to the applicant's legal practitioners. Apparently, the respondent's legal practitioners, again, simply filed away the rectified report. Thereafter, the respondent's legal practitioners computed the value of the property at US$221 000, being the mean of the lower Guest and Tanner figure and the Dawn Properties figure. The respondent exercised his right of first refusal and on the directions of the applicant's legal practitioners deposited, within the prescribed payment period, on 5

January 2018, the one-half share due to the applicant in the sum of US$110 500 into her nominated bank account and transmitted proof of payment.

` Thereafter, he sought transfer of the property into his name but the applicant refused to cooperate. He applied to the High Court for an order compelling the applicant to make transfer. She contested it on the basis that the respondent's legal practitioners were guilty of material fraudulent non-disclosure of failing to copy the inquiry letter to Guest and Tanner to her legal practitioners, which induced her to accept payment of US$110 500. She averred that the material non-disclosure influenced Guest and Tanner to reduce the value of the property to her prejudice. The court *a quo* accepted that the respondent's legal practitioners had acted unethically but dismissed the objection and granted the application for the transfer of the applicant's one-half share in the property to the respondent.

The applicant appealed to this Court on two grounds of appeal in case number SC 909/2018. The appeal was heard on both the preliminary point raised by the respondent and on the merits on 30 June 2019. The preliminary point raised was that the two grounds of appeal were prolix and argumentative. Judgment was reserved and handed down on 24 October 2019, as Judgment No. SC 85/19. The appeal was determined on the preliminary point. The two grounds of appeal were found to be "prolix and argumentative". The appeal was accordingly struck off the roll on the basis that the notice of appeal was fatally defective.

On 13 November 2019, the applicant's legal practitioners of record wrote to the Registrar of this Court seeking the correction of the judgment in terms of r 73 of the Supreme Court rules as read with r 449 (1) (b) of the High Court rules. Out of an abundance of caution the applicant filed the present application on 21 November 2019. It was opposed on 28 November 2019. The answering affidavit was irregularly filed on 6 December 2019,

outside the period prescribed in r 43 (5) of the Supreme Court Rules, 2018. The matter was set down in chambers on 20 December 2019, and removed from the roll for the reason that the letter of 13 November 2013, seeking correction of the judgment of this Court constituted *lis pendens*. The applicant managed to save her application by withdrawing the letter of 13 November 2019, on 27 January 2020.

Consequently, the respondent filed his heads of argument on 30 January 2020, while the applicant did so on 4 February 2020. The application is silent on the events between that date and 2 October 2020, when the matter was placed before me, without the heads of argument. I set it down for hearing on 9 October 2020, on which date the parties handed copies of their heads of argument from the bar.

At the hearing, the respondent raised five preliminary points. These concerned the use of the wrong form, the lack of authority by the deponent to the founding affidavit to depose to it, *lis pendens*, defective grounds of appeal in the draft notice of appeal and an invalid draft order. I heard argument on both the preliminary points and on the merits. I indicated to the parties that I would not proceed to determine the matter on the merits if I upheld any of the preliminary points raised and reserved judgment. I deal with each preliminary point in turn.

THE PRELIMINARY POINTS

THE USE OF THE WRONG FORM

The respondent contended that, in the absence of a specified form prescribed for use by the rules of this Court in respect of the present application, the applicant should, in terms of r 73 of the Supreme Court rules, have resorted to r 241 of the High Court Rules,

1971, which prescribes the use of Form 29, with appropriate modifications, in a chamber application such as this one.

Rule 73 provides that:

> "In any matter not dealt in these rules, the practice and procedure of the Supreme Court shall, subject to any direction to the contrary by the court or a judge, follow as closely as may be, the practice and procedure of the High Court in terms of the High Court Act *[Chapter 7:06]* and the High Court Rules."

And r 241 of the High Court rules states that:

> "***241. Form of chamber applications***
>
> (1) A chamber application shall be made by means of an entry in the chamber book and shall be accompanied by Form 29B duly completed and, except as is provided in subrule (2), shall be supported by one or more affidavits setting out the facts upon which the applicant relies.
>
> Provided that, where a chamber application is to be served on an interested party, it shall be in Form No. 29 with appropriate modifications."

Mr *Mhlanga*, for the respondent, submitted that the form used in the present application was defective for want of compliance with Form 29 with appropriate modifications. Mr *Paul,* for the appellant, made the contrary submission that the form used by the applicant fully complied with the requirements stipulated in the proviso to r 241. While Mr *Mhlanga* conceded that the format used by the applicant is the one that has always been used before this Court in this kind of application, he contended that the format fell short of the requirements prescribed by MAFUSIRE J in *Base Mineral Zimbabwe (Pvt) Ltd & Anor v Chiroswa Minerals (Pvt) Ltd & Ors* HH 559/14 at p7-8 of the cyclostyled judgment. The learned judge said that:

> "The proviso to r 241(1) permits the modification of Form 29 where the chamber application has to be served. What would constitute "***appropriate modifications***" is not stated. Why then does it become important that every time a chamber application has to be served, the applicant should abandon Form 29B and switch over to Form 29? In my view, once the chamber application becomes one that must be served then the respondent is entitled to a period within which to file opposing papers. The "***appropriate modifications***" would include, in my view, a fusion of the contents of Form 29 and those of Form 29B. In other words, it becomes a hybrid, containing both

"***…. the plethora of procedural rights…..***" of Form No. 29, including the *dies induciae*, and a summary of the grounds of application of Form No. 29B.

The difference between Form 29B and Form 29 is that the former specially prescribes the insertion of a summary of the grounds of the application *ex facie* the application and predicates the application on a draft order. The latter, unlike the former, is a "Take Notice" form predicated upon a draft order specifically premised on a "plethora of procedural rights"[1] alerting a respondent of the time frame within which to take action and the appropriate documentation.

The distinction between the main provision and the proviso in r 241 (1) is that the main provision supplies the documentation that is missing *ex facie* Form 29B while the proviso supplies that information *ex facie* Form 29. It is significant that the proviso designates the use of Form 29 and not Form 29B in peremptory language for chamber applications to be served on interested parties. In my view, this specific designation "ousts" the inclusion of "the summary of the grounds of the application" required on the face of Form 29B. The appropriate modifications contemplated in the proviso have nothing to do with the *ex facie* contents required by Form 29B but have everything to do with the different time frames or *dies induciae* within which the notices of opposition are required to be filed. The appropriate modifications are not a requirement for applications predicated on Form 29. Their absence or omission would not render the application for condonation and extension of time within which to file an appeal defective let alone fatally defective.

[1] *Zimbabwe Open University v Mazombwe* 2009 (1) ZLR 101 (H).

I am satisfied that while the notice does not comply with the requirements of Form 29B, it faithfully follows the prescript of Form 29 and fully complies with the practice generally prevailing in this Court. The first preliminary point is dismissed for lack of merit.

WHETHER THE APPLICANT'S LEGAL PRACTITIONER HAS AUTHORITY TO DEPOSE TO THE FOUNDING AFFIDAVIT

It was common cause that both the applicant and the respondent resided in the United Kingdom at the time the present application was instituted. It was common ground that the applicant's legal practitioner of record, Mr *Paul* deposed to the founding affidavit. It was further common cause that he could do so in terms of r 227 (4) of the High Court Rules as he could positively swear to the procedural facts upon which the application was premised and to which he confined himself.

The respondent, however, took issue with Mr Paul's avowed authority to institute the application for and on behalf of the applicant. He did not appreciate why the respondent could not personally depose to the founding affidavit in her own name or alternatively file a supporting affidavit of her instructions to Mr Paul, since, as the *dominus litis*, she had ample time to institute the present proceedings unlike the respondent who had the invidious position of filing his opposing affidavit within the prescribed 3-day period from the United Kingdom; a feat which he still managed to do.

Mr *Mhlanga* contended that Mr *Paul* failed to substantiate the bald averment of authorisation deposed to in para 2 of the founding affidavit once that deposition had been contested in the opposing affidavit. He did not file any answering affidavit and therefore deprived himself of the opportunity to demonstrate his agency. At the hearing, Mr *Mhlanga*

opposed Mr *Paul's* attempt to tender the notarised power of attorney he received from the applicant on 20 December 2019 from the bar.

The background facts of the matter show that Mr Paul has been the applicant's erstwhile legal practitioner in this dispute since assuming agency in 2018. He is a registered legal practitioner authorised to practice as such in terms of s 8 of the Legal Practitioners Act. [*Chapter 27:07*]. I am satisfied that the bald assertion in paragraph 2 of his founding affidavit adequately demonstrated his authority. That he was not on a frolic of his own was confirmed by the notarised power of attorney executed by the applicant in the United Kingdom on 20 December 2019. In any event, he is the one who signed the present application as the applicant's legal practitioner in compliance with the provisions of r 43 (1) and (3) of the Supreme Court Rules, 2018. The second preliminary point is unsustainable and must be dismissed.

WHETHER THE MATTER IS LIS PENDENS

It was common cause that as at the date of the present hearing, the question of *lis pendens* had long ceased to be a live issue before me by reason of the withdrawal on 27 January 2020 of the request for the rescission of SC 85/2019 previously sought by the applicant in terms of r 449(1) (b) of the High Court Rules. Accordingly, this point in *limine* is dismissed.

DEFECTIVE GROUNDS OF APPEAL IN THE DRAFT NOTICE OF APPEAL

The mandatory draft notice of appeal, in contrast to the one struck off the roll, which contained only 2 grounds of appeal, comprises of a whopping 9 grounds. The two grounds of appeal were worded as follows:

1. The learned judge erred in holding that the Appellant was bound by her apparent agreement that Respondent could acquire her half share in the property for $110 500 and should have held that her apparent agreement was induced by material non-disclosure made by Respondent's legal practitioner, on behalf of Respondent, and was therefore not binding on her. The material non-disclosures were:
    a) That an earlier valuation of the property had been received from Guest and Tanner for a substantially higher amount.
    b) That Respondent's legal practitioner had written to Guest and Tanner without copying that letter to Appellant's legal practitioners, querying the valuation;
    c) That the letter so written purported to have been on the instructions of both Appellant's and Respondent's legal practitioners when that was not the case;
    d) That Guest and Tanner had then produced the second valuation for a substantially reduced figure.
2. That in any event the learned judge should have held that the first valuation from Guest and Tanner was the correct applicable valuation in terms of the parties agreement and the order of the court and that Respondent had not exercised his option to purchase a half share based on that valuation.

The first ground was held to be "no doubt, prolix and argumentative" in the sense that it was unreasonable, tediously detailed, long winded, verbose and rambling. It did not attack the order granted *a quo* nor the legal basis, of estoppel, upon which that order was premised. The second not only failed to attack the order *a quo* but also constituted a recital of the appellant's prayer.

I reproduce the proposed nine grounds of appeal attached to the present application below.

"1. The learned judge erred in holding that the Appellant accepted Respondent's right to purchase the property for $110 500.00 by giving instructions as to where the money should be paid. He erred because at the time that she gave the instruction she was unaware of the existence of the earlier valuation from Guest and Tanner and she had been misled into believing that only two relevant documents were annexures 'G" and "I" to the Founding Affidavit.

2. The learned Judge erred in holding that Appellant should have exercised her right to require a third valuation. He erred because, since she was unaware of the earlier valuation from Guest and Tanner, she had no reason at the time not to accept the second valuation supplied to her. In any event she had the option of requiring that the property be sold and proceeds shared.

3. The learned Judge erred in holding that the Affidavit of Martin Chiyara (*sic)* was of no substance. He erred because Mr *Chigara*'s (*sic*) evidence was that he had not noticed that the valuation which he received on 26 July 2017 differed from the valuation which had been received by him almost 3 months previously, which fact was of substance and was most important.

4. The learned Judge erred in holding that the Appellant, having subsequently been informed that the first valuation had a typographical error, should have accepted this fact. He erred because:
   (a) Because the valuation was substantially lower that (*sic*) the valuation from Dawn Property Consultancy.
   (b) No explanation was given as to how the typographical error had been made in such an important document.
   (c) The valuation was obviously based on some mathematical calculations which were not furnished.
   (d) The letter explaining the error had missing figures which had not been inserted in the appropriate places.
   (e) The author of the valuation had died and could not be asked to clarify the above.

5. The learned Judge erred in holding that the Appellant and her then legal practitioner were obliged to accept the explanation that the figure given in the first valuation was a typographical error. He erred because the Consent Order entitled her to reject any valuation given.

6. Insofar as the learned Judge may have held that Appellant accepted Respondent's right to purchase the property because she personally was aware of the first valuation, he erred because there was no evidence which would support such a finding.

7. The learned Judge erred in holding that the principle of estoppel applied. He erred because estoppel can never operate against a person who has given his or her consent to the purchase of a property when such consent was obtained as a result of a material or possible fraudulent non-disclosure by the other party.

8. The learned Judge erred in holding that her then legal practitioner was practitioner were (*sic*) at fault for not noticing the discrepancy in the two valuations. He erred because a person who, on the face of it, sets out to mislead the other party should not be heard to complain when his purpose has been achieved.

9. The learned Judge erred in holding that the amended valuation given by Guest and Tanner on 23 June 2017 was one of the two valuations required by the Consent Order. He erred because the valuation given by Guest and Tanner on 30 March 2017 was the first valuation and it could not be amended without Applicant's knowledge and consent. In the circumstances Respondent had no right to purchase the property for a price which was not based on the first valuation, in conjunction with the valuation from Dawn Property Consultancy."

THE LAW

Rule 44 of the Supreme Court Rules requires in peremptory language that grounds of appeal must be set out "clearly and concisely". What constitutes concise grounds of appeal was enunciated by this Court in *Master of the High Court v Lilian Grace Turner* SC 77/93 thus:

> "It goes without saying that by concise is meant brief but comprehensive in expression… It is not for the court to sift through numerous grounds of appeal in search of a possible valid ground; or to page through several pages of 'grounds of appeal' in order to determine the real issues for determination by the court. The real issues for determination should be immediately ascertainable on perusal of the grounds of appeal."

See also *Chikura NO & Anor v Al Sham Global BVI Ltd* SC 17/17 at para 8.

These requirements were further clarified in *Kunonga v Church of the Province of Central Africa* SC 25/17 at p 15, in the following way:

> "Firstly, the notice must specify details of what is appealed against (i.e. the particular findings of fact and rulings of law that are to be criticized on appeal as being wrong) and secondly, the grounds of appeal must indicate why each finding of fact or ruling of law that is to be criticised as wrong is said to be wrong. For example, because the

finding of fact appealed against is inconsistent with some documentary evidence that shows to the contrary; or it is inconsistent with oral evidence of one or more witnesses; or because it is against the probabilities."

Mr *Mhlanga* argued that all the nine proposed grounds of appeal were prolix and argumentative.

The proposed grounds of appeal against factual findings are undoubtedly wordy and detailed and unnecessarily rambling and argumentative. They would not pass muster the "brief but comprehensive" standard in the *Grace Lilian Turner* case, *supra*, but pruned of these excesses appear to conform to the requirements set out in the *Kunonga* case, *supra*, in that they attack the specific findings of the court *a quo* and the basis thereof. In any event, it seems to me that the ground attacking the ruling of law on estoppel appears to meet the two tier test propounded in both these cases. It, therefore, constitutes the saving grace of the grounds of appeal. In the premises, I dismiss the fourth preliminary objection.

DEFECTIVE DRAFT ORDER

Mr *Paul* conceded that the draft order to the proposed notice of appeal did not comply with Practice Direction No. 1 of 2017 in that it did not seek condonation for the late noting of the appeal. Mr *Mhlanga* reluctantly conceded to the production at the hearing of an amended draft order, which effectively disposed of the fifth preliminary point.

THE MERITS

The broad factors to be taken into account in an application of this nature have been stated in a number of cases and are now well established. They are the extent of the delay, the reasonableness of the explanation for the delay and prospects of success. See *de Kuszaba-Dabrowski et Uxor v Steel NO* 1966 RLR 60 (A) at 62 and 64*;* 1966 (2) SA 277

(RA); *HB Farming Estate (Pty) Ltd & Anor v Legal and General Assurance Society Ltd* 1981 (3) SA 129 (T) at 134A-B; *Kombayi v Berkhout* 1988 (1) ZLR 53 (S) 57G-58A. Other additional but not exhaustive factors are the importance of the case, the respondent's interest in the finality of the case, the convenience of the court and the avoidance of unnecessary delays in the administration of justice. See *K.M. Auctions (Pvt) Ltd v Adenash Samuel & Anor* SC 15/12 at p 3. *Mutizhe v Ganda & Ors* SC 17/2009 at 7 and *Maheya v Independent African Church* S-58-07 at p 5.

THE EXTENT OF THE DELAY

In *Bishop Elson Madoda Jakazi & Anor v The Anglican Church of the Province of Central Africa & Ors* SC10/13 at p 2 of the cyclostyled judgment ZIYAMBI JA held that, the delay in filing an application for condonation for non-compliance with the rules was inordinate. In that case the impugned judgment was delivered on 19 May 2010. Two days later the fatally defective notice of appeal was filed. The appeal was heard on 22 October 2012 and struck off the roll on the ground that the notice of appeal was fatally defective. The appellant thereafter filed an application for condonation on 1 November 2012. The delay for filing condonation was reckoned from the date of the High Court judgment and adjudged inordinate.

In the present matter, the judgment appealed against was delivered on 14 November 2018. The initial notice of appeal, which was found to be fatally defective on appeal, was filed timeously on 28 November 2018. The appeal was heard on 30 June 2019 and struck off the roll on 24 October 2019 by reason of the defective notice. The present application was filed on 21 November 2019, and prosecuted in October 2020. On the

authority of the analogous *Bishop Jakazi* case, *supra*, I find that the delay in filing the present application was inordinate.

THE REASONABLENESS OF THE EXPLANATION FOR THE DELAY.

The applicant is required to state in her founding affidavit the reasons for the delay. This is because her application stands or falls on the averments deposed to in the founding affidavit. See *Fuyana v Moyo* SC 54/2006 at p 10. The applicant should not expect the court to ferret in cross reference files or to surmise from the circumstances of the case what the reasons for the delay are. This is for the simple reason that it is not the duty of the court to make up a case for a litigant but for litigant to make out her case and persuade the court on the propriety of granting the indulgence sought. This position is affirmed by UCHENA JA in *Nzara & Ors v Kashumba & Ors* SC 18/18 at p. 15 these words:

> "A court is not entitled to determine a dispute placed before it wholly based on its own discretion, which is not supported by the issues and facts of the case. It is required to apply the law to the facts and issues placed before it by the parties." (My emphasis)

See also *Kauesa v Minister of Home Affairs and Others* 1996 (4) 965 (NmS) at 973H to 974.

In the present application, despite the intimate and active involvement of Mr *Paul* in this case and the existence of all the relevant information in the cross reference files pertaining to this matter, Mr *Paul*, as the deponent to the founding affidavit, did not proffer any explanation for the delay in noting the appeal, seeking condonation and prosecuting this application. See *Saloojee and Anor, NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 138H. He conceded as much at the hearing. He, however, argued that as the applicant had reasonable prospects of success on appeal, the failure to provide the reasons for the delay in the application was not fatal. He was wrong. The contention is contrary to what

this court said the *Director of Civil Aviation v Hall* 1990(2) ZLR 354(S) at 358B-C where GUBBAY CJ cited with approval MULLER JA in *Bosman Transport Works Committee & Ors v Piet Bosman Transport (Pty) Ltd* 1980(4) SA 794(A) at 799D-E that:

> "Where there has been a flagrant breach of the Rules of this Court in more than one respect and where in addition there is no reasonable explanation for some periods of delay and indeed, in respect of other periods of delay, no explanation at all, the application should … not be granted whatever the prospects of success may be."

See also *Makonye v Barclays Bank Ltd* SC 10/2007 and *Marange v Chiroodza* SC 29/2012 where failure to give an explanation let alone a reasonable one was fatal to analogous applications. In *Zimslate Quartzize (Pvt) Ltd & Ors v CABS* SC 34/17 at para 17 it was held that:

> "An applicant, who has infringed the rules of the court before which he appears, must apply for condonation and in that application explain the reasons for the infraction. He must take the court into his confidence and give an honest account of his default in order to enable the court to arrive at a decision as to whether to grant the indulgence sought. An applicant who takes the attitude that indulgences, including that of condonation, are there for the asking does himself a disservice as he takes the risk of having his application dismissed.

I was inclined to dismiss the application for this fatal flaw but for the case of *Katsande v Katsande* SC 49/19 wherein this Court still considered the prospects of success, in the absence of an explanation for the delay in filing a similar application and actually granted the application. This court appears to have adopted a liberal approach to still consider the prospects of success in cases where the delay has been inordinate and the explanation thereof either lacking or unreasonable as underscored in *Viking Woodwork (Pvt) Ltd v Blue Bells Enterprises (Pvt) Ltd* 1998 (2) ZLR 249 (S) at 251, which stated that:

> "Where the explanation for the delay is far from satisfactory, the court will still exercise its discretion in favour of granting the indulgence of condonation provided the proposed appeal is arguable. The role of the judge in an application of this nature is to stand sentinel at the gates of the court guarding against those desirous of making a

> grand entrance into the court with unarguable appeals. In respect of those, the gate must be firmly shut."

The approach to follow was also delineated in *Mutizhe v Ganda & Ors* SC 17/2009 at 7, where it was stated that:

> "One looks at the founding affidavit for evidence of the facts stated as grounds of appeal. Considering these facts together with the reasons for the judgment appealed against and applying the relevant law, one can decide whether there are good prospects of success on appeal."

The facts upon which the applicant seeks to impugn the judgment of the court *a quo* were that the mean valuation of the immovable property upon which the applicant was bought out by the respondent was partly based on an inexplicable US$100 000 reduction of the initial valuation report prepared by one of the parties valuators of choice, Guest and Tanner. The first report of 30 March 2017, placed an open market value of the property at US$292 000. That report was received by the respective legal practitioners of the parties. The property consisted of the land, various outbuildings in a state of disrepair and a one storey incomplete brick and mortar and concrete unroofed superstructure.

The applicant's legal practitioners filed the report away without much ado. The respondent's legal practitioners scrutinized it and by letter of 26 May 2017, sought certain clarifications on the methodologies used to value the property. Even though they insinuated that the enquiry was from both parties, they did not copy the letter of enquiry to the applicant's legal practitioners. In the response of 23 June 2017, Guest and Tanner sincerely apologized "for the typographical error in the valuation certificate that erroneously reflected the open market value as US$292 000 instead of US$192 000." They enclosed the second valuation report with the corrected values and highlighted that they had used the composite method of valuation. Guest and Tanner further affirmed that the sum of US$192 000 would

continue to reflect the reasonable realisable open market value of the property in the upcoming 6 month periods contemplated in the consent orders of the High Court.

On 26 July 2017, the respondent's legal practitioners dispatched the corrected valuation report, without the related correspondence, and the valuation from Dawn Properties, to the applicant's legal practitioners. The applicant thereafter consented to the mean value of the property. She purported to have acted in blissful ignorance of the existence of the first Guest and Tanner report, which carried the higher value. She provided her legal practitioners with her bank account on or about 19 September 2017. The respondent deposited her half-share therein, within the prescribed 6 months, on 5 January 2018.

She did not voluntarily transfer her half-share to the respondent. The respondent sued her for transfer on 5 March 2018, and obtained judgment on 14 November 2018. It was in those proceedings that she disclosed the basis for her attempted repudiation of the agreement to transfer her half-share on payment of the agreed purchase price. She suspected that the respondent had, in the undisclosed letter of 26 May 2017, influenced Guest and Tanner to reduce the value of the property. The letter in question formed part of the attachments to the pleadings filed *a quo*.

The court *a quo* made certain findings of fact. These were that:

1. The contents of the letter could not have influenced Guest and Tanner to rectify the value of the property, as the seven questions sought explanations of how the valuation was done and was therefore not prejudicial to the applicant. The avowed typing error was genuine.
2. She had not established that the corrected value was incorrect.

3. The applicant's legal practitioner had received the initial and subsequent valuation reports from Guest and Tanner, which had noticeable differences in the market value of the property.
4. When the applicant became aware of the higher value, through her legal practitioner on 22 July 2017, she could have sought a third valuation and dispensed with the mean average value, but failed to do so.
5. She accepted a one off payment and not part payments with knowledge of the two Guest and Tanner valuations.
6. She was estopped from rejecting transfer after misleading the respondent that her acceptance was with full knowledge of the facts pertaining to the two Guest and Tanner valuations.
7. The consent court order upon which their respective actions were based had to be obeyed or enforced.

At the hearing, Mr *Paul* conceded that in the circumstances of this case, the failure by the respondent's legal practitioners to copy the letter of 26 May 2017 to the applicant's legal practitioners could not constitute fraudulent non-disclosure but argued that it constituted material non-disclosure. Mr *Mhlanga* strongly argued that it did not constitute either fraudulent or material non-disclosure as the contents of that letter did not question the initial value provided by Guest and Tanner but sought to understand the manner in which the valuation had been done. One of the pertinent questions pertained to whether the comparative method of valuation related to analogous incomplete superstructures in comparable localities or completed houses. This and the other questions were relevant in view of the *caveat* in both reports that there were insufficient comparable sales of analogous properties. The valuator

apparently applied the residual method estimate formula to cross check the value of the property against those of similar but completed houses.

The court *a quo* reasoned that as the seven questions were innocuous, banal and general, they could not conceivably have influenced Guest and Tanner to rectify the value of the immovable property. In my view, that finding is unimpeachable.

In *Attorney-General v Paweni Trade Corp (Pvt) Ltd & Ors* 1990 (1)ZLR 24 (S) at 27G, KORSAH JA defined fraud as follows:

> "Generally speaking, fraud consists in knowingly making a false representation of fact with the intention to defraud the party to whom it is made, and such false representation actually causes prejudice or is potentially prejudicial to another".

See also *Wamambo v General Accident Insurance Co of Zimbabwe Ltd* 1997 (1) ZLR 299 (H) at 309G and *S v Dzawo* 1999 (2) ZLR 303 (H) at 305H-306A.

The letter was clearly not calculated to induce Guest and Tanner to lower the value of the property. She also patently failed to establish that the conduct of the respondent's legal practitioner materially induced her to accept the purchase price offered by the respondent. In any event, the applicant's legal practitioner was served with both valuations from the same valuer, with different dates and values.

The duty of a legal practitioner to his client was articulated in *M M Pretorious (Pvt) Ltd & Anor v Mutyambizi* SC 39/12 at p. 4 in these words:

> "A legal practitioner is not engaged by his client to make omissions and to commit 'oversights'. He is paid for his professional advice and for the use of his skills in the representation of his client. He is not paid to make mistakes. These could be costly to his client. He is professionally, ethically and morally bound to exercise the utmost diligence in handling the affairs of his client."

The supporting affidavit of the applicant's legal practitioner at the time demonstrated that he acutely failed to handle his client's mandate with probity. A diligent legal practitioner would keep the documents pertaining to the applicant in one file from which he would constantly refer before acting on information received from other legal practitioners. He would also be expected to constantly appraise his client on the progress of her case. It is inconceivable that the applicant's legal practitioner would have failed to observe the initial valuation report and compared it with the rectified version. His main business at hand on receipt of the letter and attachments from the respondent's legal practitioner suggesting the amount of the applicant's half-share was to satisfy himself that the suggested amount was backed by the valuation reports and thereafter advise his client accordingly. In any event, as was pronounced by this Court in *Apostolic Faith Mission in Zimbabwe & Ors v Titus Innocent Murefu* SC28/03, which cited with approval the sentiments of STEYN CJ in *Saloojee & Anor NNO v Minister of Community Development* 1965 (2) 135 (A) at p141 C-E, there is a limit beyond which the client cannot escape the consequences of the conduct of his legal practitioner and where the limit has been exceeded, the sins of the legal practitioner will visit his client.

It was also common ground that the legal practitioner in question was not only the legal practitioner of the applicant but also her agent. It is trite that the actions of an agent in the exercise of his mandate are attributed to and bind his principal. In the present matter, the receipt of the two valuation reports by her legal practitioner *cum* agent and his sworn shortcomings are ascribed to and do bind her. See *Rhodes Motors (Pvt) Ltd v Pringle-Wood*, NO 1965 (4) SA 40 (SRA) at pp. 44-46, and the cases cited therein. It was on this twin basis that the court *a quo* correctly held at p 6 of the cyclostyled judgment that:

> "It is not enough for Chijara or indeed the respondent (applicant in the present application) to say that after receiving the 2 reports they did not scrutinize them in order

> to see that they were different. That is their fault and in the process the applicant (respondent in the present case) prejudicially acted on the strength of their actions."

In the light of the limitations to the power of an appeal court on the discretion exercised by a court of first instance on findings of fact, espoused in such cases as of *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S) at 670C-E, it is unlikely that the factual findings of the court a quo would be successfully impugned on appeal. I also do not find that the applicant would successfully impeach the add weight sentiments of the court *a quo* on estoppel and the inviolability of the principle of obedience of court orders, such as the consent orders of February 2017, upon which the payment of the applicant's half-share was based.

I am satisfied that the applicant does not have an arguable case based on either fraudulent misrepresentation or material non-disclosure upon which an appeal court could find that she was induced by the conduct of the respondent or his legal practitioner to accept the mean value of the property in question. There are, therefore, no reasonable prospects of success on appeal.

In the end, there must be finality to litigation and the concomitant protection of the interests of the respondent who has been unable to execute his judgment. Some 30 years ago, in *Ndebele v Ncube* 1992 (1) ZLR 288 (S) at 290 C- E, McNally JA remarked that:

> "It is the policy of the law that there should be finality in litigation. On the other hand one does not want to do injustice to litigants. But it must be observed that in recent years applications for rescission, for condonation, for leave to apply or appeal out of time, and for other relief arising out of delays either by the individual or his lawyer, have rocketed in numbers. We are bombarded with excuses for failure to act. We are beginning to hear more appeals for charity than for justice. Incompetence is becoming a growth industry. Petty disputes are argued and then re-argued until the costs far exceed the capital amount in dispute.

> The time has come to remind the legal profession of the old adage, *vigilantibus non dormientibus jura subveniunt*- roughly translated, the law will help the vigilant but not the sluggard."

These perceptive words ring true to the present matter.

I am satisfied that there are no reasonable prospects of success in the appeal envisioned by the applicant.

I agree with Mr *Mhlanga* that the applicant's persistence in flogging a dead horse is not only an abuse of the court system but unnecessarily put the respondent out of pocket in opposing the futile and ill-fated application. This is a proper case for mulcting the applicant with punitive costs.

Accordingly, the application is dismissed with costs on the scale of legal practitioner and client.

Wintertons, the appellant's legal practitioners

Chihambakwe Mutizwa & Partners, the respondent's legal practitioners