SELECTED JUDGMENT No. 36 OF 2015
P. 890

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

Appeal No. 122/2012
SCZ/8/135/2012

B E T W E E N :

KUTA CHAMBERS (SUED AS A FIRM) **APPELLANT**

AND

CONCILLIA SIBULO (SUING AS ADMINISTRATRIX OF THE ESTATE OF THE LATE FRANCIS SIBULO) **RESPONDENT**

Coram: **Mambilima CJ, Wood and Malila, JJS**
On 1st October, 2015 and 12th November, 2015

For the Appellant: Mr. C. Tafeni, Messrs Kuta Chambers
For the Respondent: Mr. G. Locha, Messrs Mak Chambers

J U D G M E N T

MALILA, JS delivered the Judgment of the Court.

Cases referred to:

1. *Mutale v. Zambia Consolidated Copper Mines Ltd, SCZ No. 12 1994*
2. *Y. B and F Transport Limited v. Supersonic Motors Limited, 2000 ZR 22*
3. *Collet v. Van Zyl Brothers Ltd (1966) ZR 65*
4. *Musamba v. Simpemba (1978) ZR 175*
5. *General Nursing Council of Zambia v. Mbangweta (2008) ZR (Vol.2) 105.*

6. *The Legal Practitioners' Act, Ex-Parte Legal Practitioners' Committee of the Law Association of Zambia 2002/HP/0202*

Legislations referred to:

1. *Legal Practitioners' Act, Chapter 30 of the Laws of Zambia*
2. *Order 40 Rule 1 and Order 50 of the High Court Rules, Chapter 27 of the Laws of Zambia*
3. *Statutory Instrument No. 8 of 2001*
4. *Statutory Instrument No. 9 of 2001*
5. *Statutory Instrument No. 15 of 2002*
6. *Rule 8(1) and (2) of the Legal Practitioners' Practice Rules*
7. *Rule 17(1) of the Legal Practitioners' Practice Rules*
8. *Section 53(ii) of the Legal Practitioners' Act*

This appeal raises the recondite issue of a legal practitioner's entitlement to legal costs and legal fees where he represents the successful party in whose favour costs are ordered. It impeaches the judgment of the High Court given on the 3rd of March, 2012 in which an award of the sum of K49,917,707.00 was made in favour of the respondent on the basis that the appellant was not entitled to claim legal costs from the respondent as the successful party in litigation, but from the defeated litigant in that action.

The undisputed facts were these. In 1996 Mr. Francis Sibulo, now deceased, underwent an operation at the Livingstone General Hospital following which a metal spatula was left in his stomach.

Using the appellant law firm as his advocates, he sued the Attorney-General for negligence and subsequently obtained a judgment in his favour by consent on the 23rd November, 1999. In that judgment he was awarded damages, interest and costs. These damages were duly assessed at K20,000,000.00 with interest at the average bank deposit rate, resulting in the Attorney-General making a payment as damages in the sum of K49,917,707.00 to the estate of the late Mr. Sibulo. This payment was made through the appellant advocates' law firm. The issue of costs remained outstanding. The appellant then in turn sent a cheque for K29,958,853.50, being 50% of the total sum received from the Attorney-General, and retained the other 50%, claiming that it was security for the appellant's costs which were still pending payment by the Attorney-General.

The respondent as administratrix of the estate of the deceased Francis Sibulo, declined to receive the cheque, insisting that the full damages as recovered from the Attorney-General be paid. She then commenced an action in the High Court at Livingstone against the

appellant for the full payment of the amount awarded in damages and received by the appellant from the Attorney-General. The respondent also sought interest and costs.

The learned High Court judge, in his reasoned opinion, was of the view that the appellant was not entitled to withhold the 50% of the damages awarded to the respondent considering that costs had also been awarded against the Attorney-General, and, therefore, that the appellant was in effect claiming costs from the respondent, rather than from the Attorney-General who was liable to pay them. The court further found from the undisputed evidence, that the appellant was in the process of negotiating the payment of those costs with the Attorney-General, and hence, there was no justifiable reason to withhold the amount due to the respondent under the pretext of securing the appellant's costs. The learned judge accordingly, ordered payment of the entire amount received by the appellant from the Attorney-General as claimed by the respondent with costs. It is from that judgment of the High Court that the appellant has appealed on five grounds structured as here below:

1. **The honourable court below erred in law and fact when it held that the defendants are not claiming costs from the plaintiff when such holding is contrary to its defence as well as the *viva voce* evidence adduced during trial.**

2. **The honourable court below erred in law and fact when it held that the party that was to pay the defendant's costs is the Attorney-General.**
3. **The honourable court below erred in law and fact when it held that the plaintiff is entitled to a payment of the total amount of money paid by the Attorney-General to the deceased client.**

4. **The honoruable court below erred in law and fact when it ordered that the defendant pays the legal costs of the plaintiff without taking into account the fact that there was no prior demand of the payment and the fact that it is in fact the Plaintiff that rejected the earlier amount of money paid to her.**

5. **The honourable court below had no basis whatsoever for arriving at the conclusion that the appellant herein did not seriously pursue payment of legal fees with the Attorney-General.**

The respective advocates for the parties filed in written heads of arguments in support of their positions.

At the hearing of the appeal on the 1st of October 2015, Mr. Tafeni, learned counsel for the appellant, indicated that he was placing reliance on the written heads of argument. In those written heads of arguments it was indicated that all the grounds, except ground four, would be argued compositely.

The main point taken by the learned counsel on grounds one, two, three and five was that it was undisputed that the deceased's estate was obliged to pay the legal fees to the appellant at the end of the litigation in which the late Francis Sibulo was successfully represented. According to the appellant, since there was an advocate-client relationship between the late Francis Sibulo and the appellant, the latter was entitled to legal fees from the respondent and not the Attorney-General. We were referred to paragraph 2 of the defence which appears at page 30 of the record of appeal and states as follows:

> "The contents of paragraph 5 thereof are admitted save to add that upon receipt of payment the plaintiff was invited and thereafter written to through a letter dated 17th December, 2004 and was availed all the necessary information and records pertaining to the payment and thereafter informed the plaintiff that the law firm

> would retain 50% of the amount to be appropriated towards the legal fees and consequential expenses while 50% would be given to her whereupon the plaintiff fell into a feet of temper and informed the defendants that they were not entitled to any fees whatsoever and the plaintiff will thereby be put to strict proof."

It was argued that by that paragraph there was an agreement with the respondent that the appellant should retain 50% of the money paid to the respondent by the Attorney-General which would be appropriated towards the legal fees.

It was the further contention of the learned counsel for the appellant that the trial court arrived at a wrong conclusion when it held that the appellant did not pursue the recovery of costs seriously in the face of evidence on record showing that the matter from which this dispute arose was determined in 1999 and that as of 2011, some 18 years later when the present proceedings were instituted by the respondent, the costs had not yet been paid. We were invited to take judicial notice of the fact that the Government pays judgment debts at its own time and that it was a notorious fact that payments due to litigants or fees to advocates are sometimes never made at all. To buttress this submission we were

referred to page 75 of the record of appeal on which is set out a letter dated 30th September, 2004 addressed to the appellant from the Attorney-General, relaying the final payment for the settlement of the matter. We were on this basis urged to uphold grounds one, two, three and five of the appeal.

In regard to ground four, the learned counsel for the appellant contended that the award of costs to the respondent by the High Court was erroneous in that in exercising its discretion, the court did not take into account the conduct of the respondent, mainly the failure or neglect on the respondent's part to issue a demand letter to the appellant and the rejection by the respondent of the part payment that was offered to her by the appellant, and also failure to make a demand on a bill to the Attorney-General. According to the learned counsel for the appellant, had the respondent done these things all her claims would have been addressed without recourse to litigation.

In support of this submission, the learned counsel cited and relied on the case of **Mutale v. Zambia Consolidated Copper Mines Ltd**[1]. It was argued that in the circumstances of the present case each party should bear its own costs both in the court below and here.

In countering the arguments put forward by the appellant's learned counsel, Mr. Locha, learned counsel for the respondent, equally relied on the heads of argument filed on the 29th of April, 2015. He recounted the facts giving rise to the controversy. Our attention was called to Order 40 Rule 1 and Order 50 of the High Court Rules, Chapter 27 of the Laws of Zambia, and Statutory Instrument No. 9 of 2001, as they relate to the recovery of costs. It was argued that the liability of the client to pay costs to the advocate shifts to the party liable to pay costs when judgment is delivered with costs, unless, such a party is impecunious. In the same vain, the party who has been awarded costs is entitled to indemnity for all the expenses incurred, and that party's advocates is also entitled to recover the fees from the party against whom the costs have been awarded.

According to the learned counsel for the respondent, the lower court was on firm ground in holding as it did that the appellant was to be remunerated from the costs that were awarded to the respondent. The learned counsel further impugned the contention by the appellant that there was evidence on record to show that the respondent had agreed to pay the legal fees, or even that the appellant and the respondent had agreed to share the judgment sum on equal basis.

The learned counsel further asserted that the court, having awarded costs to the respondent, the appellant was entitled to recover from the Attorney-General by issuing a bill and failing agreement, proceeding to taxation. We were referred to page 227 of the record of appeal where during trial a witness for the appellant stated that the bill of costs had not been filed with the Attorney-General but that there were on going negotiations regarding costs.

The learned counsel for the respondent stressed that to pursue in 2011 costs that were awarded in 1999, displayed a high level of lack

of seriousness. We were urged to dismiss ground one, two, three and five on this basis.

In response to ground four, it was Mr. Locha's contention that there was no need for a demand letter from the respondent because the whole dispute arose at the time the cheque reflecting half the amount was given to the respondent, who immediately made her decision known to the appellant. Relying on the case of **Y. B and F Transport Limited v. Supersonic Motors Limited**[2] the learned counsel submitted that costs should follow the event and that the only time a successful party can be denied costs is when that party does something wrong in the action or in the conduct of such action. We were urged to dismiss ground four of the appeal as well.

We have carefully considered the documents on the record of appeal as well as the rival submissions made on behalf of the parties. To us, the crux of this appeal is firstly, who is liable to pay the costs between the successful litigant and his own lawyer where costs are ordered in favour of such litigant, and secondly, whether a lawyer has any general lien for purposes of securing payment of his fees

over clients' monies in his custody which he holds on behalf of his client. We believe that the crucial question in the present case is whether costs and legal fees are one and the same thing. We hasten to add that the issue of lawyers' fees and costs has caused considerable anguish to many a litigant and has been a source of pervasive criticism against legal practitioners in this jurisdiction. We think it well that one must always bear in mind the distinction between legal fees and legal costs, nuanced though it may be.

A legal practitioner engaged by a party to represent that party is entitled to charge for services provided and for expenses that he incurs for such representation. The charges for legal services are called legal fees while the case costs, that is to say the expenses that the legal practitioners incurs on behalf of the instructing party (which include court filing fees, witnesses' travel expenses, photocopy charges, courier payments etc.), are called disbursements. The legal fees and disbursements together are what we understand as costs. Costs, therefore, are not confined to legal fees alone. This is consistent with the definition of the term costs

given in section 2 of the Legal Practitioners' Act, Chapter 30 of the Laws of Zambia.

It is now settled that costs for any legal proceedings shall be awarded in the discretion of the court. This position has been repeatedly asserted by this court in various cases including those of **Collet v. Van Zyl Brothers Ltd**[3], **Musamba v. Simpemba**[4] and **General Nursing Council of Zambia v. Mbangweta**[5].

A wealth of case law has crystallized the parameters for the exercise of that discretion. Among the considerations to be had in exercising the discretion to award costs is one that we articulated in **Y.B and F Transport v. Supersonic Motors Limited**[2] which was cited by the learned counsel for the respondent. There we stated as follows:

> **"The general principle is that costs should follow the event, in other words, a successful party should normally not be deprived of his costs, unless the successful party did something wrong in the action or in the conduct of it."**

We explained the same principle in **Mutale v. Zambia Consolidated Copper Mines Limited**[1] which the learned counsel for the appellant referred to.

It emerges from this that at the end of a proceeding, the unsuccessful party pays the costs (i.e. the lawyer's fees and disbursements) of the successful party. The winner, in other words, is relieved from the burden of incurring expenses and recovers his costs from the loser. This is very much the position that confronted the parties here. The respondent was successful against the Attorney-General. He was, accordingly, entitled to recover his costs. This much is clear. Those costs could be recoverable either on a standard basis or on the indemnity basis. In the present case, the consent judgment of the 23rd November, 1999 does not state the basis upon which costs were awarded to the plaintiff, nor is this clear from the ruling on assessment. Clearly, failing agreement on these costs, taxation was open to the parties.

To turn to the dispute before us, we ask the question whether the appellant was justified to refuse to remit the full amount collected as damages from the Attorney-General on the basis that the 50% of those monies withheld represented some form of lien or security on the costs expected from the Attorney-General.

Legal Practitioners are obliged by the Legal Practitioners' Act, Chapter 30 of the Laws of Zambia, to charge in accordance with the scale of fees set out in the Legal Practitioners' (Conveyancing and Non-Contention Matters)(Costs) Order 2001 (Statutory Instrument No. 8 of 2001), in the case of non-contentious matters, and the Legal Practitioners' (Costs) Order (Statutory Instrument No. 9 of 2001), in the case of all other matters. Both Statutory Instruments expressly oblige a legal practitioner to agree with the client on the scale to be applied. Legal Practitioners, therefore, have a duty on taking instructions to inform their clients of their charges or fees and agree on the basis of such charges. This requirement is echoed in Rule 17(1) of the Legal Practitioners' Practice Rules (Statutory Instrument No. 15 of 2002. In terms of Rule 41 of those Rules, non-compliance, failure, evasion or disregard of the Rules without reasonable cause, constitutes professional misconduct, or conduct unbefitting a practitioner in terms of section 53(ii) of the Legal Practitioners' Act, Chapter 30 of the Laws of Zambia.

In the court below the appellant argued that there was an agreement between the appellant and the late Francis Sibulo to the effect that the proceeds of any favourable judgment to the late Sibulo would be shared and therefore that the deceased did not pay any fees as a result of this agreement. In other words the appellant entered into a contingency fee arrangement, or a damages-based agreement under which the appellant agreed to represent the late Francis Sibulo on the understanding that it would claim a percentage of any monetary award that the late Sibulo would receive in damages.

Contingency fees were long barred in this jurisdiction as in the United Kingdom from which we borrow much of our legal professional conduct and ethics. It is unnecessary for us in the present case to undertake the difficult task of explaining the justification for this position given the rather tangle way in which the rules of professional conduct and ethics have developed in this area, save to say that such fees have been frowned upon owing to their tendency to facilitate corrupt and unethical practices in legal

proceedings. In England, it is only since April, 2013 that the prohibition on contingency fee agreements was lifted.

In this jurisdiction "contingency fees" are defined in the Legal Practitioners' Practice Rules, 2002, Statutory Instrument No. 51 of 2002 as:

> **"Any sum whether fixed or calculated either as a percentage of the proceeds or otherwise howsoever, payable only in the event of success in prosecution or defence of any action, suit or other contentious proceedings."**

Under Rule 8(1) of the Legal Practitioners' Practice Rules, contingency fees are, in this country, proscribed. That Rule proves that:

> **"(1) subject to sub-rule (2) a practitioner who is retained or employed to prosecute or defend any action, suit or other contentious proceedings shall not enter into any arrangement to receive a contingency fee in respect of that proceeding."**

Sub-rule (2) exempts the application of sub-rule (1) to a legal practitioner who acts in another country other than Zambia provided he would, in that other country, be permitted to receive a contingency fee in respect of that proceeding.

Applying the position as we have set it out to the present situation, apart from the appellant's own *ipse dixit* we are unable to see any evidence on the record that there was agreement allowing the appellant to retain 50% of the damages received. Even assuming that such an agreement existed, it would contravene the provisions of the Legal Practitioners' Practice Rules.

It does not seem to us from the record though that there was any prior agreement between the appellant and the deceased as to the fees and costs payable by the client for the legal representation received, as required by the Rules to which we have referred, nor is it clear whether or not the appellant explained to the deceased what its fees and costs would be at the time of the instructions.

Of note, however, is that the appellants' instructions to represent the late Francis Sibulo were given way back in June, 1997, long before the coming into force of the Legal Practitioners' (Costs) Order, 2001 and the Legal Practitioners' Practice Rules, 2002. Technically, therefore, these provisions do not apply as they do not have retrospective effect. Yet, we must state that the position obtaining

in this jurisdiction before those Rules were promulgated, is the same as obtained in the England before April, 2013. The Rules served the role of codify the unwritten rules of ethics. Contingency fees were not allowed. It was unprofessional to charge them.

The party and party costs, that is to say all the costs necessary to enable the adverse party to conduct or defend the litigation, excluding luxuries, will generally be awarded to the successful party. The object of these costs is to indemnity the successful party against the expenses to which he has been put by the unsuccessful party. We must also stress that the effect of this is to give the successful litigant a full indemnity for all costs reasonably incurred by him in relation to the action, except Advocate and client costs, where these are applicable.

To us, therefore, it is clear that the Attorney-General was to cover the costs that were incurred by the deceased. This means that any fees paid by the deceased at the time instructions were given, or at any other time thereafter, together with the case costs (i.e. disbursements) were payable by the losing party, i.e. the Attorney-

General. What this translates to in practice is that the deceased's estate was to receive the damages for the wrongful act against him, net of any costs whether in the form of fees or disbursements. This imported a duty on the part of the appellant to ensure that the full legal costs, and for the avoidance of doubt we stress, the fees, disbursement and profit costs, were recovered from the Attorney-General through taxation if agreement could not be reached. Once all these costs were collected, the appellant was obliged to refund the legal fees, if any, paid to it by way of reimbursement of costs and disbursements, but no more. We must also point out that the respondent, as the party that succeeded, should not be seen to have incurred expenses in the process of vindicating his rights. The full expenses ought to be recouped from the losing party, unless circumstances were such that costs could only be awarded on a standard, rather than an indemnity basis.

We hasten to add that when the court awards costs to a party to litigation, such party will only be entitled to the actual costs he incurred and no more. Profit costs are for the lawyer to collect and

keep. In this regard, we endorse the advisory opinion given by the High Court In Re: **The Legal Practitioners' Act, *Ex-Parte* Legal Practitioners' Committee of the Law Association of Zambia**[6]. That matter was a reference by the Law Association of Zambia to the High Court for interpretation of the provisions of the Legal Practitioners' Act as they relate to costs. The ruling by Nyangulu J, was that a successful litigant is not entitled to share with his lawyer, or indeed receive part of the legal costs comprised in the profit costs. Out of pocket expenses are, however, recoverable by the instructing client from the costs. We agree with that interpretation. We can only add that the fees paid by the instructing client ought to be treated as a recoverable expense. In claiming the costs awarded to the successful party, therefore, the legal practitioner ought to factor in the fees paid by the instructing party to him.

Reverting to the grounds of appeal as structured by the appellant, we have no hesitation in holding that grounds one, two, three and five must fail. The learned judge in the court below did not err

when he held that the appellant was not claiming costs from the respondent. The precise wording of the portion of the judgment being assailed under these grounds of the appeal reads as follows:

> **"As the defendants are claiming no costs from the plaintiff their successful client against the Attorney-General, there is no reason for the defendants to refuse to pay or continue to withhold the money due to the plaintiff."**

As we have stated earlier, in the circumstances of the present case, the appellant's costs were recoverable from the losing party, the Attorney-General. The appellant has no legitimate claim for costs against the respondent, let alone legal fees after costs were awarded. The learned trial judge was, therefore, correct in his holding.

We have already explained what an order for costs against a party entails. In the present case, the fees and the out of pocket expenses incurred by the late Francis Sibulo are properly recoverable from the costs which the appellant is obliged to collect from the Attorney-General as the losing party. This, by all logical and necessary implications, means that the appellant had no basis

to withhold any portion of the respondent's payment. The appellant is bound to pursue with tenacity and vigour the payment of the costs from the Attorney-General. It is for these reasons that we hold that grounds one, two, three and five are bound to fail.

Under ground four, as we have already stated, the appellant is aggrieved by the lower court's grant of costs to the respondent in the action taken out by the respondent against the appellant principally because of the respondent's conduct.

We have earlier on in this judgment stated that the award of costs should normally be guided by the principle that costs follow the event, the effect being that the party who calls forth the event by instituting suit, will bear the costs if the action fails; but if this party shows legitimate cause by successful suit, then the losing party will bear the costs. However, the vital factor in settling the preference is the judicious exercise of discretion by the court, accommodating special circumstances of the case while being guided always by the ends of justice.