

IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA  
(Civil Jurisdiction)

2015/HP/0315

IN THE MATTER OF : STATUTORY INSTRUMENTS NO. 8  
OF 26<sup>TH</sup> JANUARY, 2001

IN THE MATTER OF : COLLECTION OF DEBTS

**BETWEEN:**



MONICA MUMBA

APPLICANT

AND

INVESTTRUST BANK (ZAMBIA) PLC

RESPONDENT

**BEFORE THE HONOURABLE LADY JUSTICE M. CHANDA THIS 2<sup>ND</sup> DAY OF  
FEBRUARY, 2018**

**APPEARANCES**

FOR THE APPLICANT : MR H. MBUSHI OF HBM ADVOCATES

FOR THE RESPONDENT : MR B. MSIDI IN HOUSE COUNSEL

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**J U D G M E N T**

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**LEGISLATION REFERRED TO:**

STATUTORY INSTRUMENT NO. 8 OF 2001 OF THE LAWS OF ZAMBIA

**CASES REFERRED TO:**

1. IN THE MATTER OF THE LEGAL PRACTITIONERS ACT AND IN THE MATTER OF THE LEGAL PRACTITIONERS LEGAL (COSTS) ORDER, 2001 IN THE MATTER OF THE LEGAL PRACTITIONERS COMMITTEE OF THE LAW ASSOCIATION OF ZAMBIA, 2002/HP/0202
2. PERMANENT CHAMBERS (SUIVING AS A FIRM) V GADI ICHAKI, GOVIN GUPTA, KAGEM MINING LIMITED AND HAGURA MINING LIMITED SCA NO. 97/2011
3. DAVID MWANZA V FINANCE BUILDING SOCIETY (2010) ZR 299

On 2<sup>nd</sup> March 2015 **Monica Mumba**, the Applicant herein filed Originating Notice of Motion under *Statutory Instrument No. 8 of 2001 of the Laws of Zambia against Investrust Bank (Zambia) Plc*, the respondent.

The summons was supported by an affidavit deposed by the applicant. The relief sought by the applicant was for an order for the respondent to pay the sum of K261,161.70 being debt collection charges in the matter of Monica Mumba of Bank account number 062100143342013 and cost.

The respondent filed an affidavit in opposition sworn by Tiza Kapembwa on 22<sup>nd</sup> September, 2015.

Hearing of the matter was set for 29<sup>th</sup> October, 2015. The applicant in her affidavit evidence averred that she held a bank account number 0621001433422013 with the respondent bank. That between 17<sup>th</sup> October, 2014 and 25<sup>th</sup> October, 2014 a sum of K261,617.70 was stolen from her bank account by an employee of the respondent. The applicant further averred that by a letter of demand dated 5<sup>th</sup> November, 2014 the respondent was accordingly informed of the loss of the said K261,617.70 due to their negligence or carelessness and requested for a refund as per exhibit "**MM1**" produced in the affidavit in support of the originating process. The applicant asserted that by 6<sup>th</sup> January, 2015 the respondent had refunded part of the money but there was still a sum of K37,772.70 and 10% collection charges still outstanding as shown in exhibit "**MM2**" produced in her affidavit.

In his *viva voce* submission before Court **Mr. H. Mbushi**, counsel for the applicant, reiterated that the respondent caused the applicant to incur unnecessary expenses through their negligence. Counsel asserted that since the matter was not prosecuted before the Courts of law it fell under debt collection and did not qualify for litigation costs.

In opposing the applicant's claim the respondent stated in its affidavit that upon receipt of the applicant's advocates letter of demand on 6<sup>th</sup> June, 2014 it obliged with the demand and by January, 2015 all of the erroneous entries on the applicant's account were reversed as per exhibit "**TK1**" produced in the respondent's affidavit.

The respondent averred that the applicant was not legally entitled to recover legal costs from it on account of her not being a registered legal practitioner with the Law Association of Zambia.

To augment the foregoing proposition counsel for the respondent, **Mr. B. Msidi** cited the case of, **in the Matter of the Legal Practitioners Act and in the Matter of the Legal Practitioners Legal (costs) order, 2001 and in the Matter of the Legal Practitioners Committee of the Law Association of Zambia<sup>1</sup>**, wherein Nyangulu J stated thus;

*"Statutory Instrument made pursuant to Section 70 of the Legal Practitioners Act, is for purposes of taxation or agreed costs to be paid*



*to the advocate (who is practicing law) acting for the party to the action.”*

On the strength of the foregoing Mr. Msidi submitted that the applicant had no *locus standi* to commence an action for recovery of legal costs or debt collection commission as provided for in Statutory Instrument No.8 of 2001. He contended that the said Statutory Instrument is only applicable to legal practitioners having in force a valid practicing certificate.

Further and in the alternative, Mr. Msidi contended that if this Court finds that the applicant was entitled to be indemnified for the legal expenses incurred, then the question of arbitrary imposition of the collection commission would have to be resolved. It was counsel's assertion that *Section 11 of Statutory Instrument No.8 of 2001, in part provides that the commission chargeable on collection of debts shall not be more than ten per centum of the amount recovered.* Mr Msidi went on to argue that the Statutory Instrument does not set 10% as the default or the standard debt collection commission. He submitted that the only way to avoid arbitrary imposition of the collection commission, was to ensure that the said commission was made a subject of an agreement as provided for by the Statutory Instrument. The attention of the Court was drawn to *Section 3 of Statutory Instrument No. 8 of 2001* which is couched in the following terms:

*“ ..... On taking instruction, a practitioner shall agree with the client the fee scale to be applied in accordance with the scales set out in the schedule to this order.”*

Counsel submitted that the afore cited provision of the law was equally echoed in the case of **Permanent Chambers (suing as a firm) v Gadi Ichaki, Govin Gupta, Kagem Mining Limited and Hagura Mining Limited**<sup>2</sup>, where the Court, *inter alia*, refused to award costs to the appellant law firm on the ground that the appellant did not have an agreement with the respondent.

Furthermore, it was counsel's contention that there was no evidence on record to support the applicant's claim for a 10% collection commission. It was submitted that the applicant was not entitled to unilaterally determine the amount of fees recoverable by her without a Court order. To buttress his proposition Mr. Msidi referred the Court to the case of **David Mwanza v Finance Building Society**<sup>3</sup> where Mutuna J held thus:-

**“A party cannot therefore arbitrarily determine how much costs he is entitled to because such determination is left to the discretion of the Court. In the current case there was no order by the Court under cause number 2009/HPC/0291 awarding the defendant because the undisputed facts are that the action was discontinued prior to an order to that effect being made.”**

Mr Msidi wound up his submission by stating that there was no legal basis for the applicant's claim of K26,161.77 as it was

arbitrarily and unilaterally determined without any order of the Court. He urged the Court to accordingly dismiss the matter with costs to the respondent.

In reply, Mr. Mbushi submitted that the respondent was unable to distinguish between litigation and debt collection. He argued that the issue of costs in matters litigated upon in Court would be determined by the Court and not arbitrary decided by counsel. It was Mr. Mbushi's further argument that the applicant was within her rights to engage the services of counsel and that the respondent should bear the blame for their negligent conduct which resulted in loss of the applicant's funds.

I have carefully considered the submissions by both parties in the light of the evidence. It is apparent to me that the evidence adduced on record clearly shows the applicant engaged services of the lawyer who rendered professional services on her behalf. This is evident from the letter of demand addressed to the respondent's Managing Director which was produced as exhibit "**MM1**" in the applicant's affidavit in support of originating notice of motion. It is not in dispute in this case that the applicant had been put to expense in retaining a lawyer to deal with the erroneous debits on her bank account. On the strength of the foregoing it is clear to me that although the applicant is not entitled to invoke the provisions of Statutory Instrument No. 8 of 2001 which provide for the remuneration of legal practitioners, the justice of this case demands that she cannot be disallowed to recoup the legal costs incurred in recovering her money from the



respondent. With regard to the representation from counsel for the respondent that the 10% collection commission claimed by the applicant was unilaterally as well as arbitrarily imposed and sought the indulgence of this Court to have the issue resolved. It is my immediate affirmation that the *Practitioner's (Conveyancing and Non-Contentions Matters) (Costs) Order of 2001*, only places an obligations on counsel in non-contentions matters to agree on fees with the client before an assignment is undertaken. It is worthy of mention that on taking instructions there is no requirement under *Section 3 of Statutory Instrument No. 8 of 2001*, for counsel to obtain a Court order on the fee scale to be applied.

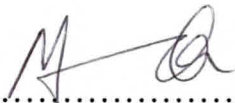
In the matter before me it is apparent from the evidence adduced on record that the applicant and her lawyers had agreed for the collection charges to be pegged at 10%. Thus, I see no justification for interfering with the amount of the professional bill in this case. This is so because the 10% is in accordance and within the scales set out in the schedule to the Statutory Instrument.

I have great difficulty to see the parallel between the case of **David Mwanza and Finance Building Society** cited by counsel for the respondent and the case at hand; between a matter that was withdrawn after litigation had commenced and a matter that was not a subject of litigation but debt collection.

Similarly, the principle espoused in the case of **Permanent Chambers (suing as a firm) v Gadi Ichaki and others** cannot aid the respondent in any way, as the issue in that case involved the lack of agreement between the lawyers and their client on the professional bill rendered.

All in all it is my firm holding that notwithstanding the legal technicality raised by the respondent, the applicant should be entitled to be indemnified the legal costs she incurred in recovering the money she was deprived of by them. The costs in this matter are awarded to the applicant to be taxed in default of agreement.

Dated at Lusaka this *2<sup>nd</sup>* day of *February*, 2018



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**M. CHANDA**  
**HIGH COURT JUDGE**