

TICHAONA GOVERE t/a GOVERE LAW CHAMBERS
LEGAL PRACTITIONERS
versus
BLESSING MASHANGWA
and
S. MZISA N.O.
In his capacity as Judicial Manager of McDowells
International (Private) Limited
and
MASTER OF THE HIGH COURT N.O.

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 28 November and 13 December 2017

Urgent Chamber Application

T Govere, for the applicant
A Marara, for the 1st respondent

TAGU J: The applicant approached this court on an urgent basis seeking a provisional interim order that the second respondent be interdicted from making any direct payment(s) to the first respondent and that all payments due to the first respondent should be made into Messrs Sande Legal Practice's Trust Account and to be retained therein pending the hearing and definitive determination of the action proceedings filed against the first respondent under Case No. HC 10934/2017.

The brief facts giving rise to this application as stated by the applicant are that the applicant is a legal practitioner of this Honourable Court, duly admitted to practice as a legal practitioner, under the Law Firm Govere Law Chambers where he is the Founding and Sole Managing Partner. On the 20th day of March 2013 at the first respondent's special instance and request the applicant, first respondent and Mrs Jemina Gumbo entered into an oral contingency fee agreement in terms of which applicant was entitled to ten percent (10%) of the recovered debt from a certain judgment debtor, namely, McDowells International (Private) Limited (under judicial management). To that end, and on the 20th day of March 2013 the first

respondent and Mrs Jemina Gumbo instructed the applicant to sue the said judgment debtor in the High Court for an order compelling the same to pay the sum of US\$1 628 704.24 (One Million Six Hundred & Twenty-Eight Thousand Seven Hundred & Four United States Dollars & Twenty Four Cents.) Of the stated gross amount upon recovery from the debtor, the parties agreed that 10% is payable to applicant as legal fees and thereafter the first respondent and Mrs Jemina Gumbo share the net amount at the ratio of 60:40 respectively. On the 2nd day of September 2013 TAKUVA J duly granted summary judgment in favour of the first respondent in the stated sum together with interest at the prescribed rate of 5% from the date of judgment to the date of payment in full and costs of suit on the higher scale of attorney and client. The judgment debtor appealed to the Supreme Court on the 23rd September 2013. The applicant successfully persuaded the Supreme Court to dismiss the appeal in its entirety with costs on the higher scale of attorney and client on the 7th day of March 2014. However, the matter could not proceed to attachment and sale in execution of judgment debtor's property due to the placement of the same under provisional judicial management on the 22nd day of November 2013 under the stewardship of Mr Winsley Militala of Petwin Executor and Trust Co. (Private) Limited. Thereafter on the 14th day of January 2014 the first respondent granted the applicant written power of attorney to lodge claims with the said erstwhile judicial manager and the Master of the High Court of Zimbabwe at Harare.

After the removal of the initial judicial Manager and the replacement by the second respondent RJC Executor Services (Private) Limited the first respondent mandated the applicant to negotiate palatable payment terms with the new judicial Manager which culminated in written agreed payment terms dated the 3rd of July 2017. From the beginning of August 2017 to date the applicant has been relentlessly checking with the second respondent to advise whether or not he was abiding by the payment terms but the judicial manager did not respond. The applicant also have been checking with the first respondent whether or not payments were being made into her bank account and the first respondent kept on alleging that no payment was made at all.

On the 20th day of November 2017 the applicant approached the Master of the High Court of Zimbabwe to check whether or not any payment was released into the first respondent's bank account. A written report compiled and filed with the third respondent by the second respondent dated 30th day of September 2017 showed that as at that date a humongous amount in the sum of US\$200 000.00 had actually been paid to the first respondent.

This showed that the first respondent had withheld pertinent information from the applicant and Mrs Jemina Gumbo thereby defrauding the applicant of what he thought is legally entitled to by way of 10% of the recovered debt. Following this discovery he drafted a final letter of demand from the first respondent dated 20th of November 2017. He wrote a second letter dated 21st November 2017 and he felt he had no other option other than to institute the present urgent chamber application seeking the relief above.

The first respondent opposed the application.

At the hearing of the matter the first respondent took two points in limine and threatened the applicant with notice of costs *de bonis propriis*. The first point in limine was that the matter was not urgent and the second preliminary point was that the purported contingency agreement was illegal and therefore unenforceable.

AD URGENCY

The first respondent submitted that this matter is not urgent because the applicant got judgment as far back as September 2013 but did not take any action to have his costs taxed. Further, the Supreme Court dismissed the debtor's appeal on the 7th of March 2014 and again the applicant did not take action to have his costs taxed. Even after discovery of the payments applicant took about five days without filing his case. The first respondent denied that it was the applicant who assisted her to get her money and alleged that the money was not paid as a lump sum hence he was not making follow ups.

The applicant submitted that the cause of action arose on the 20th November 2017 when he discovered that money totalling US\$200 000.00 had in fact been deposited into first respondent's account through the report he got from the Master of the High Court. After discovery he wrote two letters dated the 20th and 21st November 2017 one of which was replied by way of an email demanding his dues from the first respondent and after failing to get satisfactory responses he filed this application on the 24th November 2017.

In my view the applicant managed to prove that this matter was urgent. Had he not discovered the payments through the report from the Master he may not have even lodged this application because he genuinely believed, though first respondent had withheld vital information from him that money had been paid. He believed no money had been paid. I do not think it was prudent for applicant to have caused the taxation of his costs at the time

litigation had not yet been finalised. The requirements of urgency as stated in the case of *Kuvarega v Registrar General and Anor* 1998 (1) ZLR 188 (H) were met.

AD CONTINGENCY FEE AGREEMENT

The first respondent denied ever entering into a contingency fee agreement with the applicant. She however, said even if it may be found that there was such a contingency fee agreement it was illegal and not enforceable because it was not reduced into writing. The applicant conceded that the contingency fee agreement he entered into with the first respondent was orally made and done before the coming into operation of Statutory Instrument Number 154 of 2014 Legal Practitioners (Contingency Fee Agreement) Regulations, 2014. While it may be true that the agreement was illegal it follows that the first respondent and the applicant both executed an illegal agreement. The first respondent knowing that agreement to be illegal made the applicant to toil both in the lower Court and the Supreme Court for nothing. Having obtained what she wanted she now turns around and raise illegality. In my view the applicant is entitled to his costs which have so far not taxed. If he fails to get his 10 % contingency fee at list he is still entitled to his other costs. The matter cannot be dismissed or struck of the roll for this reason alone. I am not persuaded to so given the attached judgments which clearly show that the applicant performed some work and was not even paid a cent. I will dismiss this point *in limine*.

AD MERITS

I found the first respondent to be untruthful with the court. The summons dated the 20th March 2013 clearly shows that they were issued by Govere Law Chambers. It is not true that the applicant came midway. Even the judgment by TAKUVA J shows that it was Mr *T Govere* who appeared on behalf of the first respondent. Again the Supreme Court judgment dated the 20th March 2014 shows that Mr *T Govere* appeared on behalf of the first respondent. It was stated by the applicant that the first respondent did not even pay a cent. Now that her claim is successful she does not what to pay the lawyers' dues. She is hiding the information that she had received so far an amount of US200 000.00. As I said earlier even if it may be found that the applicant is not entitled to 10% on the basis of an illegality, at least he is entitled to what is lawfully due to him. The order he is seeking is reasonable in that he wants all payments to be kept in a trust account pending the determination of his claim. No one will be prejudiced by

such an order. In fact if this money is not safe guarded it is the applicant who would be prejudiced because a search has since shown that she does not own any other properties.

AD COSTS

The applicant asked for costs of suit to be in the cause. On the other hand the respondent asked for costs *de bonis propriis*. I found no justification for ordering the applicant to pay costs *de bonis propriis*. The issue of costs and the appropriate scale will be determined on the return date.

In the result I will grant the following Provisional Order-

A. TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. That the provisional order and the interim relief granted to the Applicant be and is hereby confirmed.
2. Messrs Sande Legal Practice be and are hereby directed to transfer 10% of the amount remitted to her by the 2nd Respondent to the Applicant.
3. The 1st Respondent be and is hereby ordered to pay costs of this application on attorney and client scale.

B. INTERIM RELIEF GRANTED

Pending determination and finalization of this matter, Applicant is granted the following relief:

1. The Second Respondent be and is hereby interdicted from effecting any direct payment to the First Respondent.
2. The Second Respondent be and is hereby directed to effect the payments due in terms of the agreed payment terms by and between the parties dated 3rd July 2017 to Messrs Sande Legal Practice's Trust Account and the said money is to be retained therein pending the hearing and definitive determination of the action proceedings instituted by the Applicant against the 1st Respondent under Case No. HC 10934/17.
3. The cost of suit to be in the cause.

SERVICE OF PROVISIONAL ORDER

- (a) The provisional order shall be served on all the Respondents, and leave be and is hereby given for the order to be served by the Applicant's Legal practitioners.

Govere Law Chambers, applicant's legal practitioners.

Mutamangira and Associates, 1st respondent's legal practitioners.