

CHARLES MABHENA

Versus

JOB SIBANDA AND ASSOCIATES

And

THE TAXING OFFICER N.O

**HIGH COURT OF ZIMBABWE
SIZIBA J
BULAWAYO 3 & 5 SEPTEMBER 2024**

OPPOSED APPLICATION

Applicant in person
Mr J. Sibanda for the 1st respondent
No appearance for the 2nd respondent

SIZIBA J

INTRODUCTION AND ISSUES

The applicant seeks a declarator by this court that the 1st respondent's taxed bill of legal fees in the tune of US\$14 714.25 is unprocedural, unlawful and null and void and that it should therefore be set aside. The application was filed on the 23rd of April 2024 when the applicant was represented by Messrs Mehluli Ndlovu and Partners. The notice of taxation was for the 8th of May 2019 while the taxed bill was stamped on the 9th of May 2019 by the 2nd respondent. It is common cause that the 1st respondent's fee note is dated the 17th of December 2019. It is also common cause that on the 22nd of July 2019, the applicant paid a sum of RTGS 14 922.00 to the 1st respondent by way of a bank transfer and he was issued with a receipt. It is also common cause, as was confirmed by both parties in their oral submissions before the court, that there is a pending case between the parties under HCB 1897/19 wherein the applicant was sued by the 1st respondent for payment of the sum of money which is reflected on the taxed bill of legal fees. In the said pending action, the applicant has denied liability to pay the same amount on the same basis as contended herein and also raised a counterclaim which is worded exactly as his alternative relief in seeking a declaratory order that the taxed bill of legal fees is

null and void and that the amount of money that he paid in RTGS dollars was sufficient to meet his financial obligations to the 1st respondent. The applicant's challenge of the bill of taxed costs is mainly twofold in saying that he was not notified of the set down date for taxation and also that it contravenes Statutory Instrument 33 of 2019. The 2nd respondent has not opposed the proceedings and rightly so as he or she is a nominal defendant who must abide the decision of this court. The 1st respondent raised two points in *limine*. The first one is that by making a payment of what the applicant accepted as due to it, he perempted his right to challenge the taxed bill of legal fees. The second point in *limine* was that the matter is *lis pendens* as it is pending under HCB 1897/19. At the hearing of the matter, I asked the parties to address me on the points in *limine* and also on the merits so that if the points in *limine* are to succeed, the matter would end there but if, on the other hand, the points in *limine* are dismissed, the merits will be considered.

DECISION OF THE COURT

This court holds that the applicant has not perempted his right to challenge the 1st respondent's taxed bill of legal fees since his payment in RTGS was not an unequivocal acceptance that he was liable to the 1st respondent to the same amount in the United States dollar currency. The applicant's stance has always been that his payment was a complete discharge of his obligations to the 1st respondent. Furthermore, the court holds that the matter at hand is *lis pendens* as it is pending before this court under HCB 1897/19. The issues for determination in the pending case are so similar to the extent that this court should exercise its discretion to uphold the 1st respondent's point *in limine* so as to avoid contradictory judgments, among other inconveniences.

THE APPLICABLE LAW

For a party to be held to have perempted his or her right or recourse against another party, there must be an unequivocal intention to preempt, compromise or abandon such claim or right which can even be by way of inference. See *Zimbabwe Consolidated Diamond Company (Pvt) Ltd v Adelcraft Investments (Pvt) Ltd* CCZ-2-24 at page 15 of the cyclostyled judgment. The position of the law regarding the doctrine of preemption is that a party who acquiesces to a judgment cannot subsequently seek to challenge it as such will be an act of approbation and

reprobation which cannot be permitted at law. See *Mining Commissioner – Masvingo N.O and Others v Finer Diamond (Pvt) Ltd* SC–38–22, *Dhliwayo v Warman Zimbabwe (Pvt) Ltd* HB–12-22.

The requirements of *lis pendens* are well settled in this jurisdiction. In *Manyika v Leabridge Investments (Pvt) Ltd* HH–305–22, the court held that there must be another pending matter, between the same parties, on the same cause of action, in respect of the same subject matter. The court has a discretion on whether or not to uphold the special plea of *lis pendens*. In exercising such discretion, the court must consider whether the matter that is already pending will offer an efficacious remedy to the applicant or plaintiff, as the case may be, whether the end result will be similar in both matters and most importantly the possibility of contradicting judgments if both matters are to be dealt with by different judges. The factors to be considered are endless depending on the nature of the case.

APPLICATION OF THE LAW

In the present matter, applicant has never made a clear indication that he is willing to pay the taxed bill in the United States dollar currency. That is exactly what he is contesting both in this application and in the pending case. He cannot therefore be said to have perempted his right to challenge the taxed bill of legal fees. On the other hand, it is clear that since the applicant has been sued over the same legal fees that were taxed by the 2nd respondent. He retains a chance to advance all his defenses that he wishes to take thereon and he has in fact raised a counterclaim which is worded in the terms similar to the alternative relief that is sought herein. Even though the 2nd respondent is not a party to those proceedings that does not change the complexion of the pending case. What is material is that the applicant is challenging the taxed bill of legal fees and it is desirable that that issue should be decided in one case which has already been filed and which is awaiting a set down date after the trial was postponed. If the applicant desired to withdraw that pending matter for whatever reasons, he should have done so prior to the filing of this application and even thereafter but up to the time when the present matter was argued he had not yet done so. The court should exercise its discretion to uphold the special plea of *lis pendens* so as to discourage such practice whereby a party files another matter when there is pending litigation of a similar nature before the court especially without disclosing such.

CONCLUSION

In the result, it is for the above reasons that the 1st respondent's point in *limine* on peremption is dismissed whilst the 1st respondent's point in *limine* on *lis pendens* is upheld. I am not persuaded that the applicant should be punished with punitive costs as a self - actor. The application is accordingly dismissed with costs on an ordinary scale.

Job Sibanda & Associates, 1st respondent's legal practitioners