SAHAWI INTERNATIONAL (PTY) LIMITED
and
YAKUB IBRAHIM MAHOMED
versus
JOHN ARNOLD BREDENKAMP
and
BRECO INTERNATIONAL (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MAKARAU J
Harare 19, 20 and 23 October 2009 and 10 February 2010.

CIVIL CAUSE

Advocate A Bava and *Advocate Uriri* for plaintiffs
Advocate A P deBourbon for defendants.

MAKARAU JP: On 25 August 2008, the plaintiffs issued summons out of this court claiming from the defendants the sum of US$3 872 123-00 together interest thereon at the rate of 6% p.a. capitalized monthly and calculated from 1 February 2001 to date of payment in full. It was alleged in the plaintiffs' declaration that the debt claimed arose from certain advances and loans made to the defendants by the plaintiffs at the defendants' special instance and request during the period 1 February to 9 November 2001. It was further alleged that the total sum advanced and lent to the defendants amounted to $4 272 123-00 and that the defendants had repaid the sum of $400 000-00 leaving the balance claimed. It was also alleged that at one stage, the defendants deposited the sum of $3 508 000-00 into the account of the plaintiffs after selling off a mine in the Democratic Republic of Congo, which deposit was however reversed by the plaintiffs' bank leaving the defendants indebted to the plaintiff in the amount of the claim.

The claim was resisted.

After being furnished with further and further and better particulars to the plaintiffs' claim, the defendants filed their pleas.

In the main, the first defendant denied the contract and averred that such a contract would have required the approval of the exchange control authority which the plaintiffs did not have. The first defendant further averred that he was however aware of certain monies that were advanced by plaintiff to a company that is registered and domiciled in the Democratic Republic of Congo and in which he has some interests.

In its plea, the second defendant denied the contract *in toto* and put the plaintiff to the proof thereof.

The matter proceeded to a pre-trial conference where four issues were settled for trial. I will paraphrase the issues as follows:

1. Whether the second plaintiff should be a party to the proceedings?
2. Whether the contract of the loan was between the plaintiffs and KMC Limited (a company registered and domiciled in the Democratic republic of Congo)?
3. What amount if any is due to the defendants? and,
4. Whether the lending of money by the plaintiffs required the approval of the exchange control authorities.

The trial of the matter was initially set down before me during the week commencing 18 May 2009. The trial was aborted by consent and for cogent reasons given. The matter was then postponed to the 19th of September 2009.

During the brief hearing conducted to deal with the postponement, the terse and unusually stiff exchanges between counsel did not assume the significance that they did when the hearing of the matter resumed.

Five days prior to the resumed hearing of the matter, the plaintiffs' legal practitioners wrote to the Secretary of the Law Society and copied the letter directly to me and to a number of other addressees. In the letter, the plaintiffs expressed their concerns over the fact that Advocate de Bourbon had been issued with a practicing certificate for the year 2009 on the strength of the misrepresentation that he was a partner in the law firm Costa and Madzonga and that in their view, Advocate de Bourbon had no right of audience in the courts of this country. The plaintiffs' legal practitioners also highlighted their view that Advocate de Bourbon no longer satisfied the residence requirement stipulated in section 5 of the Legal practitioners Act' [Chapter 27.07], ("the Act"). The letter concludes by requesting the Law Society to approach the courts in terms of section 6 (2) of the Act for Advocate de Bourbon to be deleted from the register of legal practitioners.

On the same day, the plaintiffs' legal practitioners addressed a letter to the Minister of Justice and Legal Affairs, enclosing to him a copy of their letter to the Law Society and raising the same concerns with him. The letter ends by inquiring from the Minister whether he had issued defendants' counsel with a Residence Exemption Certificate in terms of the Act. Again the letter was copied directly to me.

At the hearing of the matter, *Advocate Uriri* objected to the presence of *Advocate de Bourbon* at the bar and as representing the defendants. At the time he raised the objection, he had not yet handed over to me the written objection that the plaintiffs had filed earlier on in the morning. Taken by surprise not by the objection itself but by the fact that it was being raised before me as an issue in view of the approaches that had been made to the Law Society and to the Minister, I briefly adjourned the matter and summonsed counsel to chambers. It was then that I was furnished with the written objection that had been filed with the court. A copy of same was also served upon *Advocate de Bourbon*.

In the objection, the plaintiffs contended that Advocate de Bourbon had ceased to be resident within Zimbabwe and in terms of the provisions of the Legal Practitioners Act, he should not have been issued with a practising certificate for the year 2009 unless he was in possession of a residence exemption certificate issued to him by the Minister.

In view of the importance of the matter being raised by the plaintiffs, the hearing of the objection resumed in open court. Again in view of the issues that the plaintiffs were raising, the hearing had to be adjourned to enable Advocate de Bourbon to respond in writing to the allegations leveled against him. *Mero motu*, I directed that the objection
be served upon the Law Society with an invitation that the Society appear at the hearing of the matter.

Advocate de Bourbon filed an affidavit, prompting the plaintiffs to file an answering affidavit. The Law Society in turn filed a document in which it laid out its position in the matter.

I shall return to deal in detail with the nature and manner of filing of documents in this matter when I deal with issues of procedure.

The issue raised by the plaintiffs is very easy to understand and in my view equally easy to determine. It is whether *Advocate de Bourbon* continues to enjoy the right of audience before these courts in view of his assumption of residence in Cape Town, South Africa. Put this way, the answer almost suggests itself and one would assume that this is a matter that is capable of resolution outside a formal hearing and without the unnecessary acrimony that accompanied the hearing of the objection.

Before I proceed to determine the objection on the merits, I wish to express my disquiet at the manner in which the objection was brought up and the heated arguments that

have been characteristic of the hearing. It is my hope that the conduct of the parties herein will not set any precedent for future conduct in this court.

Firstly, I was disconcerted by the practice of the plaintiffs to write directly to me in connection with the matter. It is a trite rule of professional ethics that the parties to litigation do not enter into any correspondence with the presiding judge. All correspondence to and from the court is through the office of the Registrar.

Secondly, while the plaintiffs had every right to write to the Minister in connection with the matter, the fact that such a letter was copied to the presiding judge acted as an open invitation to the Minister to enter into direct correspondence with the court. I must however commend the Honourable Minister for at least addressing his letter to the Registrar and not directly to me. However, the contents of the letter, which were meant for my attention, in my view ought to have been placed before the court in the form of an affidavit and not an unsworn statement. The letter gave an opinion on the
applicable law and the interpretation to be placed on that law. It concluded by requesting the Registrar to advise me to be guided accordingly.

Such in my view is the danger of requesting parties to correspond with the court outside the parameters set by the rules of court.

Further, it was clear to the plaintiffs prior to the hearing of the matter that the Law Society had issued a practising certificate to advocate de Bourbon for the year 2009. The plaintiffs were challenging the validity of that certificate, alleging that that it had been issued at best erroneously and at worst fraudulently. Despite such knowledge, no formal application was filed to have the practicing certificate struck down.

The correct manner to approach the court to set aside the decision of the Law Society to issue Advocate de Bourbon with a practicing certificate was clearly by way of review. That this was not done in this matter is now common cause. The net effect however of not following the correct procedures was the filing of an objection to which no founding affidavit was attached, the filing of a voluminous opposing affidavit by *Advocate de Bourbon* in which he attempted to answer the objection both factually and on points of law and a hastily filed statement by the Law Society which is neither an affidavit nor heads of argument. I further have a floating letter from the Minister, not attached to any affidavit and whose status in the proceedings is not clear to me and to which no one made specific reference as to its probative value or binding nature.

Be that as it may, I proceeded to hear the objection on its merits in view of the fact that the parties were desirous that I hear and determine the matter despite my earlier misgivings as to the state of the papers filed of record.

As indicated above, the plaintiffs objected to Advocate de Bourbon having the right of audience in the matter before me. The plaintiffs were quite clear even in the oral submissions by *Advocate Bava* that they do not seek the deletion of *Advocate de Bourbon* from the register of legal practitioners.

In taking the objection, the plaintiffs contended that Advocate de Bourbon had ceased to be resident within Zimbabwe and in terms of the provisions of the Legal Practitioners Act, he should not have been issued with a practicing certificate for the year 2009 unless he was in possession of a residence exemption certificate issued to him by the Minister.

It is clear to me that the plaintiffs have in their objection co-joined two issues that are separate and distinct. These are the issues of normal residency and of possession of a valid practicing certificate. In my view, the issue of normal residency goes towards the registration and de-registration of a legal practitioner whilst the issue of a valid practicing certificate goes towards who, of the registered legal practitioners can have the right of audience before the courts.

I will explain.

Advocate Bava for the plaintiffs submitted that I should seek guidance from the provisions of section 5 (1) of the Legal Practitioners Act [Chapter 27.07], ("the Act"). In his submission, *Advocate Bava* was quite passionate about the need for re-establishing the rule of law in this jurisdiction and how no one should be above the law.

Section 5 (1) of the Act provides for the registration of legal practitioners in this jurisdiction. Before the court can register a legal practitioner, it must be satisfied that the applicant

(a) has complied with the formalities laid down in the regulations; and

(b) possesses the requisite qualifications prescribed in the rules made by the Council for Legal Education and has had such practical experience if any, as may be prescribed in the rules; and

(c) is normally resident in Zimbabwe or a reciprocating country or has been granted a residential exemption certificate and

(d) is of or above the age of majority; and

(e) is not an unrehabilitated in solvent or has not assigned his estate for the benefit of his creditors and

(f) is a fit and proper person to be so registered.

(The emphasis is mine).

The issue before me does not however concern the registration of Advocate de Bourbon as a legal practitioner. That was done in 1981.In my view, the issue that arises in this matter is the admitted fact by Advocate de Bourbon that at the time of the hearing, he was residing in Cape Town where he is leasing a flat in Kenilworth Cape Town. In his opposing affidavit, he deposed that in November 2003, he relocated to Cape Town but always with the wish that one day he would return to Zimbabwe and rejoin the Bar. That he is no longer normally resident in Zimbabwe for the purposes of the Act appears to me to be beyond dispute. The issue is the legal effect if any of his loss of normal residency in Zimbabwe.

The plaintiffs contend that the loss of normal residency in Zimbabwe by Advocate de Bourbon means that he automatically loses his right of audience before the courts in Zimbabwe and that any person can approach the courts for an order denying him such right.

I fear that I do not agree.

There is no specific provision in the Act that bears out the contentions by the plaintiffs. The provision of the law that appears to me to cover the situation that Advocate de Bourbon finds himself in is to be found in section 6 (2) and (3) of the Act. It provides:

"(2) The council of the Law Society may, where there is reason to believe that a registered legal practitioner has ceased to be normally resident in Zimbabwe or a reciprocating country and that such legal practitioner has not been granted a residential exemption certificate, apply to the High Court for an order calling upon the registered legal practitioner concerned to show cause why his name should not be deleted from the register.

(3) Upon the return day of an order granted in terms of subsection (2), the High Court may, if satisfied that the registered legal practitioner concerned has ceased to be ordinarily resident in Zimbabwe or a reciprocating country or has not been granted a residential exemption certificate, direct the registrar to make the appropriate deletion from the Register."

It further appears to me that in terms of the law, when a legal practitioner ceases to be ordinarily resident in Zimbabwe or a reciprocating country and has not been issued with a residence exemption certificate, he or she may be deleted from the register of practitioners and that such de-registration can be at the instance of the practitioner himself or herself or of the Law Society. The letter from the plaintiffs' legal practitioners to the Law Society

correctly captures the legal position when it requests the Law Society to approach the court for *Advocate de Bourbon* to be deleted from the register of legal practitioners.

The issue as to whether any person, including person such as the plaintiffs before me can bring an application to this court under section 6(2) of the Act for the de- registration of a legal practitioner is an interesting one and calls for the examination of the rights of the public to bring in applications at common law in the public interest.

The issue does not arise before me and I do not have to determine the *locus standi* of the plaintiffs to bring an application in terms of section 6 (2) of the Act or at common law for de-registration of *Advocate de Bourbon*. As I have emphasized above, the plaintiffs do not seek such de-registration. They simply object to him having a right of audience before me in the trial of their matter.

This then brings me to the next issue raised by the plaintiffs.

It appears trite to me that a registered legal practitioner to whom the Law Society has issued a practicing certificate enjoys the right of audience in our courts until the practicing certificate lapses by effluxion of time, is lawfully withdrawn or is set aside on review.

It is further trite that the issuance of practising certificates is a matter that is in the exclusive administrative domain of the Law Society. Where the Society has acted irregularly in issuing a certificate, the court can play the role of oversight that it plays with regards to all inferior courts and other quasi judicial tribunals. It is not the ordinary role of the court in this jurisdiction to administer the issue of practising certificates to legal practitioners even though these are registered as officers of this court.

I have above indicated that in my view, the correct procedure to adopt in approaching the court for an order setting aside a practicing certificate is by way of review proceedings. This will enable the applicants in that matter to allege the ground upon which the decision to issue the certificate can be impugned. I have already observed that this has not been done in *casu.*

Having been persuaded to deal with the matter on its merits, I have examined the papers filed of record by the plaintiffs to see if there is a minimum basis upon which I can regard the objection before me as an application for review. I have taken the contentions by the plaintiffs that the practicing certificate issued to *Advocate de Bourbon* for 2009 was issued on the false premise that he was practicing as a partner in Costa & Madzonga, yet he

has continued to openly practice as an advocate as a basis upon which I can interfere with the administrative discretion of the Law Society on review.

In my view, the above may have constituted a recognizable ground for reviewing the decision of the Law Society to set aside the practicing certificate issued to Advocate de Bourbon as being grossly unreasonable. I may have been sufficiently moved to set aside the practicing certificate on the basis that the decision to do so on the basis of the application filed was grossly unreasonable.

I deem it unnecessary that I embark on the exercise of condoning all the departures from the rules that will be necessary in this matter to enable me to convert the objection by the plaintiff into a review application as the practicing certificate under probe has now lapsed by effluxion of time. Practicing certificates in this jurisdiction are issued on a yearly basis. The practicing certificate for 2009 is now invalid for other reasons and cannot be used to enforce the right of audience before this court.

In the result, I make the following order;

The objection is dismissed with costs.

Mhiribidi & Ngarava, plaintiffs' legal practitioners.
Athersotne & Cook, defendants' legal practitioners.