LAW SOCIETY OF ZIMBABWE
and
CEPHAS MADYANYOKA
versus
WELLCASH DEBT COLLECTORS (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 11 October 2018 and 28 November 2018

Opposed Matter

T T G Musarurwa, for the applicants
T Mpofu, for the respondent

DUBE J: The applicants brought an application for a declaratory order on the legality of the respondent's debt collection activities. The first applicant is a body corporate established to regulate and protect the legal profession and all activities that fall under the legal profession's mandate in Zimbabwe. The second applicant is a ratepayer in Harare who was served with a letter of demand from the respondent. The first respondent is a debt collector.

The applicants' application is premised on the following brief facts. It has received reports of persons who are unlawfully carrying out duties that fall under its purview in their conduct of carrying out debt collection activities. The respondent has been identified as one such debt collector. The respondent is being hired as a debt collector for the City of Harare. On 23 October 2017, the respondent sent a letter of demand to the second applicant demanding payment of a debt owed to the City of Harare. In its letter of demand, the respondent threatened to take legal action against the second applicant should he fail to settle his indebtedness with the City of Harare. Another complaint was filed in a case involving Sheila Chibika which was subsequently dismissed. The applicants' case is based on a complaint brought by second applicant.

Correspondence threatening legal action on behalf of a third party for gain is reserved for registered and practising legal practitioners who possess valid practising certificates in terms of s 9 (2)(b). The respondent cannot conduct reserved legal work on behalf of litigants as if it were a legal firm. The respondent is unlawfully carrying out duties that fall under its purview. The first applicant has an interest in matters affecting professional interests of legal

practitioners. It has a duty in ensuring maintenance of the dictates of the Legal Practitioners Act [*Chapter 27; 07*], hereinafter referred to as the Act. Applicants' prayer is for an order declaring the respondent's conduct of threatening legal action unlawful and barring the respondent from sending further letters threatening legal action.

The respondent defended the application. It raised preliminary points. It submitted as follows. The first applicant purports to have brought this application in its name and also as a legal representative of the second applicant. The application by the second applicant is brought in breach of statue and is therefore a nullity. For the reason that the first applicant found its cause on the second applicant's circumstances, its own application cannot stand and must be struck off the roll with costs. The application is a nullity because it has been brought in breach of statute. It submitted further that this application ought to have been brought by the Council of the first applicant in terms of Act. The deponent to the founding affidavit, Mr Mapara is the Secretary for the Law Society. In an affidavit deposed in support of this application he misrepresents and states that he is a counsellor of the applicant. Minutes attached show that he is in fact the Executive Secretary of the Law Society of Zimbabwe. There is no explanation given for this variance and no apology has been tendered. The impression created by the founding affidavit is that it is Council that has brought this litigation. First applicant's probity has been brought into issue.

The second point taken relates to issue estoppel. The respondent submitted that prior to this application, a matter in which the first applicant had registered an interest was brought before the courts and dismissed. The assertions now made were made in that case. The dismissal is a judgment in favour of the respondent and there is now an issue estoppel. The judgment has not been appealed and applicants are estopped from raising the same issues for as long as the judgment remains extant. The matter cannot be entertained on the merits and ought to be dismissed.

On the merits, the respondent submitted as follows. It is not clear to it what the application is about and what case it is required to meet. The founding affidavit does not make it clear whether the complaint is about the general conduct of debt collectors or particular conduct of the respondent. It is not clear whether it is being accused of conducting debt collection unlawfully or that the practice of debt collection is unlawful. The respondent is a member of the Association of Debt Recovery Agents (ARDA) which governs the activities of debt collectors. There is nothing unlawful about its debt collection activities. The respondent respects the provisions of s 9 (2) (b) of the Act and does not violate them. There is nothing

unlawful about the respondent's activities to the extent that it conducts debt collection operations. The respondent does not conduct any reserved work as contemplated by the Act. It does not purport to be nor does it have people licensed as legal practitioners in its ranks. It yields to legal practitioners who issue summons and superintend over execution. The practice of debt collection exists in many countries of the world. The respondent operates as an agent of whoever its client may be when it indicates that litigation will be instituted. It speaks as a mouthpiece of its clients. The City of Harare is entitled to tell its debtor that it will bring proceedings against the debtor. The threat to litigation is one made by the client and does not mean that the debt collector is instituting proceedings. The respondent does not institute legal proceedings on behalf of its clients. A person who threatens legal action is not collecting a debt.

At the hearing of the matter the second applicant withdrew from the application. The respondent's challenge related to first applicant's legal representation of the second applicant falls away. The first applicant will for convenience henceforth be referred to as 'the applicant'. The case the respondent was required to meet is clear. The founding affidavit speaks to alleged threats of legal action and does not challenge the authority of debt collectors to engage in debt collection or its lawfulness. The applicant also takes issue with the fact that the respondent threatens legal action on behalf of a third party for a gain or reward contrary to s 9(2)(b). The applicant complains about particular conduct of the respondent. It avers that such practice is limited to legal practitioners with valid practising certificates. A reading of the order sought shows that the applicant targets the respondent only and seeks to stop its conduct of threatening legal action on behalf of third parties for gain. The applicant sought to amend its order to include an order to the effect that the respondent's practice of collecting debts is unlawful. The application was incompetent and was abandoned midway.

A party whose *locus standi* has been challenged must show that it has a direct and substantial interest in the subject matter of the case, see *Munn Publishing (Pvt) Ltd* v *ZBC* 1994 (1) ZLR 337, *Milani & Anor* v *South African Medical & Dental Council* 1990 (1) SA 899 (T). The applicant avers that the respondent is conducting work which is the preserve of registered legal practitioners and further that it is the regulator of the practice of legal practitioners and has an interest in the practice of law and has the responsibility to enforce the provisions of the Act. The applicant relies on s 53 3 (b) and (f) of the Act which reads as follows,

> "53 **Objects and powers**
> The objects and powers of the Society shall be—
> (a) to cause to be kept—
> (i) registers of the names and addresses of registered legal practitioners; and

(ii) any other registers which may be necessary;
(b) to represent the views of the legal profession and to maintain its integrity and status;
(c) …….
(d)……..
(e) …….
(f) to consider and deal with all matters affecting the professional interests of legal practitioners;''

The terms of reference of the applicant are set out in s 53 of the Act. The section empowers the applicant to consider and deal with all matters affecting the professional interests of legal practitioners. The effect of this section is to give a mandate to the applicant to maintain the integrity and interest of the legal profession and to institute any proceedings that seek to enforce and protect the interests of the legal profession. The applicant has the mandate to represent the views of the legal profession. Whether or not the conduct complained of is the preserve of registered legal practitioners and is unlawful is a question the applicant has an interest in. The first applicant has a direct and substantial interest in this litigation. In fact, it has sufficient interest in the subject matter of the case entitling it to bring this application in its own right. The applicant did not have to ride on the second applicant in order for it to be able to bring litigation challenging the legality of the conduct of the applicant. The first applicant's application is properly before the court.

Having found that the applicant has *locus standi* to institute these proceedings, the next consideration is whether this is a proper case for the exercise of the discretion conferred on the court to grant a declaratur. Section 14 of the High Court Act, empowers the court to issue a declaratur. The section reads as follows:

"The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequent upon such determination."

In *Johnson* v *AFC* 1995 (1) ZLR 65 (H) the court remarked that an applicant for a declaratur must be an "interested person in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. The interest must concern an existing, future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated thereto. But the presence of an actual dispute or controversy between the parties interested is not a prerequisite to the exercise of jurisdiction"

The applicant seeks to impugn the conduct of the respondent in threatening legal action on behalf of a third party for gain. As already stated, the applicant being the regulator of the

practice of law has an interest to ensure that the public is not subjected to illegal practice of law as well as to safeguard the interests of legal practitioners that fall under its ambit. This is a legal issue and is accordingly a good case for a declaratur. The relief sought is not abstract or identical, its purpose being to safeguard the interests of the legal profession. A real dispute exists between the parties. The applicant is entitled to seek the remedy of a declaratur.

In matters affecting the legal profession, The Law Society of Zimbabwe is required to act through Council and not through its Secretariat. The Secretariat can only act on behalf of council when it is authorised to do so by Council. Where the applicant wishes to institute proceedings, there must be a resolution of Council dealing with the matter and instructions given over how the matter is to be handled. At a meeting held at the Law Society of Zimbabwe on 31 July 2017, Council resolved that Mr Edward Mapara, the Executive Secretary of the applicant be authorised to sign the application on its behalf. He deposed to the founding affidavit in this application .He has authority to institute these proceedings. The discrepancy with the founding affidavit is that he gives out that he is a counsellor of the applicant when he is not. It is factually incorrect that Mr Mapara is a counsellor of the applicant. The respondent's counsel, Mr Musarurwa, sought to explain this mistake from the bar. This fact was brought to the attention of the applicant in respondent's opposition papers. The applicant failed to rectify. What the applicant ought to have done is to address this point in an answering affidavit. However, the court takes judicial notice of the fact that Mr Mapara is the Executive Secretary of the Law Society and is not a counsellor. It is also clear from the resolution of Council that he is the Executive Secretary of the applicant. The respondent has not shown any prejudice that it will suffer arising from that erroneously stated position. This error in no way suggests that the application has been brought by the Secretariat and on its own behalf. Mr Mapara is clearly acting on the basis of a resolution that gives him authority to bring proceedings on behalf of the Law Society. The fact that he states that he is a counsellor is clearly erroneous and is not of any consequence. I am not convinced that the applicant deliberately meant to falsify information. I have in the exercise of my discretion decided to allow the application to stand.

The doctrine of estoppel was defined in *Mills* v *Cooper* @ 468 as follows:

> "A party to civil proceedings is not entitled to make, as against the other party, an assertion whether of fact of legal consequences of fact, the correctness of which is an essential element in his cause of action or defence, if the same assertion was an essential element in his previous cause of action or defence in previous civil proceedings between the same parties or their predecessors in title and was found by a court of competent jurisdiction in such previous civil proceedings to be incorrect, unless further material which is referred to the correctness or

> incorrectness of the assertion and could not by reasonable diligence have been adduced by that party in the previous proceedings has since became available to him."

In the case of *Royal Sechaba Holdings (Pty) Ltd* v *Grant William Coote and Anor (*366/2013) [2014] ZASCA 85 @ 7 the court said the following of issue estoppel:

> "The expression issue estoppel is a convenient description of instances where a party may succeed despite the fact that the classic requirements for *res judicata* have not been complied with because the same relief is not claimed, or the cause of action differs in the two cases in question."

The defence of issue estoppel is an English law concept and bars issues that have already been litigated and decided from being tried again. The principle of estoppel prevents a litigant from arguing an issue arising out of an earlier adjudication and estops him from making the same assertions. The requirements for estoppel are the same as those for the defence of *res judicata* which are as follows:

(a) the litigation must be between the same parties.

(b) there must already be a final judgment on the merits on the same cause of action.

(c) there must be identical claims, see *Voet, Commentorius and Pandectas 44.23, Bertram* v *Wood* 1893 (10) SC 177 .

The doctrine of *res judicata* bars the jurisdiction of the court in claims that have already been conclusively decided from being brought to court yet again with the same parties, subject matter and under the same title. In the *Sechaba case,* the court held that the doctrine of estoppel is applicable "where the plea of res judicata is raised in the absence of commonality of cause of action, same parties and relief claimed". The court went on to remark that this should not be construed as implying that the defence of res judicata has been abandoned in favour of issue estoppel. The doctrine of *res judicata* is said to be included in the doctrine of estoppel. The difference between the two defences lies in the fact that the defence of *res judicata* is based on public policy considerations and the notion that there must be finality in litigation. It bars the jurisdiction of the court. Estoppel on the other hand is a doctrine in evidence and estopps a party from making the same assertions. The requirement for the cause of action to be between the same, as well as the parties is dispensed with. It prevents future judgments from contradicting judgments issued earlier and multiplicity of matters thereby avoiding confusion.

On 19 January 2017 Sheilla Chibika brought an application for a declaratory order under HC466/17 against the respondent. The allegations were that the respondent had sent a letter of demand to her on behalf of the City of Harare for recovery of a debt. She challenged

the fact that the respondent, not being a registered legal practitioner could make the demand it made coupled with the threats to sue made. She sought an order declaring the activities of the respondent of engaging in debt collection through threatening letters and issuance of summons or any legal document on behalf of third parties unlawful. The respondent filed opposing papers. The applicant failed to file an answering affidavit and to set down the matter for hearing. The respondent filed an application for dismissal of Sheilla Chibika's application for want of prosecution in terms of Order 32 r 236 (3) (b) of the rules under HC 2953/17. On the 2nd day of May 2017 the application was dismissed for want of prosecution. Following this and on 3 May 2017, the current applicant filed an application for joinder seeking to be joined to the application. The applicant was not joined to the proceedings as intended. The applicant was not a party to the proceedings. The decision made to dismiss the application was made on a procedural point and was not one made on the merits of the matter and is not final. It has no effect of disposing of the matter on the merits. The assertions made in that application were not found by the court to be incorrect because there was no determination on the merits of the matter. I am unable to find that the applicant is estopped from instituting these proceedings.

Debt collection is a process of pursuing a debtor to pay debts owed .There are two main forms of debt collection. The first is where a creditor on his own behalf collects a debt. The other is where an agent is employed to collect a debt for a fee. Debt collection is a practice that arose and has existed since time immemorial. It has existed for as long as there has been a debt. Debt collection involving third parties who are not the creditors themselves and registered legal practitioners has its origins under English and American common law. These countries have developed legislation that governs both the practice and conduct of debt collection on behalf of third parties. There is no legislation in this country regulating debt collection. A practice has developed, where third parties known as debt collectors, who are not parties to debt are assigned the role by creditors to collect their debts for gain or reward. Our law recognizes registered legal practitioners as the only agents entitled at law to sue or threaten to sue for a fee. This position is enunciated in s9 (2) (b) of the Act which reads as follows,

> "(2) Subject to any other law, no person other than a registered legal practitioner who is in possession of a valid practising certificate issued to him shall-
> (a) …….; or
> (b) For or in expectation of any fee, commission, gain or reward in any way instruct or assist any other person to sue out or threaten to sue out any summons or process or to commence carry on or defend any action, suit or other proceeding in any court of civil or criminal jurisdiction; or…"

This provision proscribes persons who are not licenced or registered legal practitioners in possession of a valid practising certificate from,

a) instructing or assisting any other person to sue out
b) or threatening to sue out any summons or process
c) or commence, carry on or defend any action, suit or other proceeding
d) in any court of civil or criminal jurisdictions for a fee, commission, gain or reward.

These activities constitute part of the practice of law which is reserved work. Only a registered legal practitioner in possession of a valid practising certificate may practice law, see *Khuzwayo* v *Assistant Master of the High Court& Ors* 2007 (1) ZLR 34 (H), *Mateko & Anor* v *Wood and Ors* 1994 (1) ZLR 102 (H). In *S* v *Takaendesa* 1972 (1) RLR 162 the court relied on Maxwell on Interpretation of Statutes for the following sentiments,

> "Where, by the use of clear unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced however harsh or absurd or contrary to common sense''

The wording of this section is clear and unequivocal. The mischief behind s 9(2) (b) this section is to confine the function of suing or threatening to sue out any summons or process in any court of civil or criminal jurisdiction for a fee, gain or reward to registered legal practitioners with valid practising certificates. Section 9(2)(b) does not permit a person who is not a registered legal practitioner to threaten to sue out or threaten to sue out any summons or process against another person for a fee. A debt collector is not permitted in terms of s9 to threaten that property will be seized or that it will take further legal action should the debtor fail to satisfy the debt. It cannot threaten to take action that it does not intend to take or it cannot take. A debt collector may not send a document that appears as if it is from a court or legal practitioner or is part of a legal process. The section also prohibits any person from instructing or assisting any other person to sue out or threaten to sue out any summons or process for a fee, commission or gain or reward. This means that a third party as in a debt collector is not permitted to assist a creditor to sue out or threaten to sue out for a fee. A third party may not commence, carry on or defend any action, suit or other proceeding for a fee if he is not a registered legal practitioner without a valid practising certificate. The law bars debt collectors from carrying out work reserved for legal practitioners.

On 23 October 2017 the respondent issued a final notice on Cephas Madyanyoka on behalf of the City of Harare. It reads in part as follows,

> "WE NOTIFY OF OUR INTENTION TO RPOCEED TO THE COURTS OF CIVIL JUSTICE TO GET AN ORDER FOR THE RECOVERY OF THE $1540, 00 being amount owed to CITY OF HARARE which is long OVERDUE.
> Despite correspondence from our client you did not pay the debt in time. You are therefore, given a FINAL URGENT NOTICE OF 48 HOURS to pay in full the amount in question. A penalty fee based at the prevailing rate will be charged if you do not pay within the stipulated period. Note that you shall pay the OVERDUE AMOUNT PLUS SUMMONS COST AS COURT FEES AND INTEREST THEREOF as well as further legal costs incurred by engaging the Messenger of Court in pursuant of the debt."

The respondent admits that it is an agent of the City of Harare, acts as its mouth piece and has been issuing letters of demand on its behalf. The letter of demand gives directions regarding all payment or communications which must be directed to the respondent. The respondent assists the City of Harare to sue out process by issuing a letter of demand for a fee and acts as its agent. The respondent seeks to collect the debt on behalf of the City of Harare. The conduct of the respondent violates s 9(2) (b) which bars persons who are not registered legal practitioners with valid practising certificates from assisting other persons to sue out any summons or process or suing on behalf of other persons for gain or reward.

The respondent charges for work carried out on behalf of the City of Harare. The amounts required to be paid are tabulated and include an administrative cost, a transfer fee and PCD all to be deposited in a given account belonging to the respondent. The story told by this notice is that the respondent is a debt collector who charges for work done on behalf of a third party for a fee and therefore assists a third party to sue out and threatens to sue out summons for a fee, gain, commission or reward This s conduct of violates s 9(2) (b) of the Act.

A legal threat is a statement by a party that it intends to take some form of action of a legal nature against another person. It is usually accompanied by a statement that the other party take specified action or desists from doing something or action objected to. The respondent threatens to take legal action against the second applicant should he fail to settle the debt and all amounts due. The letter of demand served on the debtor constitutes a legal threat to sue issued on behalf of a third party. The letter of demand notifies the debtor of its intention to proceed to courts of law to get an order for recovery of the debt. The letter also threatens the debtor with imposition of a penalty fee in the event of a failure to comply with the notice and failuire to pay within the stipulated time. By stating that if the debtor fails to pay, he shall pay the overdue amount plus summons cost, the respondent threatens to sue the debtor. The letter of demand gives the impression that the respondent will issue summons and that execution will follow after simply failing to pay the debt. This clearly is a threat to execute. The respondent uses intimidatory and deceptive tactics in its quest to recover debts. The letter of demand does

not afford the debtor an opportunity to challenge the debt which is simply imposed on him. The debtor is not told that he has an option to defend the claim. The debtor is pressured to pay out of fear of litigation expenses alluded to in the letter of demand. The impression it creates is that if the debtor fails to comply, summons will be issued and the debtor will be required to pay summons costs. The respondent used illegal tactics to collect the debt.

The explanation that the respondent gives in its opposing papers regarding the role it plays in debt collection is not what it gives out in the letter of demand. The letter of demand does not give the impression that, it is the City of Harare that will sue him should he fail to pay. It does not imply that the respondent will have nothing to do with that process. The notice or letter of demand does not categorically state who between the respondent and the City of Harare will sue him and who will engage the messenger of court. I do not agree with the respondent that the letter of demand advises the second respondent that he is going to be sued by the City of Harare.

By threatening legal action on behalf of a third party and charging for the collection of a debt , the respondent performs work reserved for legal practitioners. The threats issued by the applicant in this case are unlawful. The respondent sought to argue that its conduct is permissible in terms of the Association of Debt Recovery Agent Constitution. This is a document that regulates the conduct of debt collectors and is not sanctioned by law. The fact that the respondent is a member of an association of debt collectors does not clothe the respondent's activities with legality. The document is akin to a code of conduct of its members and is not an excuse to contravene the law. The conduct of the respondent remains unlawful. The fact that other jurisdictions recognise debt collectors is irrelevant.

The conduct of the respondent of threatening legal action on behalf of third parties for a fee, commission ,reward or gain is the preserve of the legal profession and seriously violates s 9(2) (b) of the Legal Practitioners Act, [*Chapter 27:07*]. The respondent effectively practices law and conducts work reserved for the legal profession without complying with the requirements of the law. The respondent is not at law entitled to threaten to sue debtors on behalf of the City of Harare for a fee, commission or reward. The applicant has shown an entitlement to the relief of a sought.

In the result it is ordered as follows,

1. It is hereby declared that the respondent's conduct in threatening legal action on behalf of the City of Harare is in violation of section 9 (2) (b) of the Legal Practitioners' Act [*Chapter 27:07*]

2. Consequently, the respondent be and is hereby ordered to cease and desist from sending any further letters threatening legal action.
3. The respondent shall pay the costs of this application.

Law Society of Zimbabwe, applicant's legal practitioners
Zinyengerere Rupapa, 1st respondent's legal practitioners