

THE PARTNERS FOR THE TIME BEING OF MTETWA & NYAMBIRAI LEGAL
PRACTITIONERS

versus

MARIAN CHOMBO

HIGH COURT OF ZIMBABWE

MAMBARA J

HARARE 18, 19 November 2024 and 15 January 2025

Summons Commencing Action

H. Nkomo, for the plaintiff

J. Dondo, for the defendant

MAMBARA J:

BACKGROUND

This matter concerns a claim for unpaid legal fees by the plaintiff, a prominent law firm, represented by Mrs. Beatrice Mtetwa. The defendant, Ms. Marian Chombo, engaged the plaintiff to represent her during acrimonious divorce proceedings that spanned several years. Despite receiving extensive legal services, the defendant failed to settle the agreed legal fees, leading to this action.

The plaintiff's claim is for the sum of USD100,000, which the defendant acknowledged in writing but has not paid. The defendant challenges the claim on various grounds, including excessive fees, the absence of an itemized bill of costs, and prescription. The matter, therefore, turns on whether the plaintiff has proven its case on a balance of probabilities and whether the defences raised by the defendant have merit.

FACTUAL BACKGROUND

The defendant engaged the plaintiff in June 2011 to represent her in divorce proceedings that were already before the High Court under case number HC 4409/09. The plaintiff, through Mrs. Mtetwa, took over the matter and filed a notice of assumption of agency with the court.

The plaintiff provided extensive legal services, including attending numerous pre-trial conferences and filing various interlocutory applications. One such application was for the rescission of an order striking out the defendant's plea and dismissing her counterclaim in the

divorce action. The plaintiff also successfully applied for the removal of the matter from the roll to allow for the determination of the rescission application. These applications resulted in positive outcomes for the defendant.

Negotiations between the defendant and her then-husband led to a partial settlement of proprietary issues, which culminated in a consent order granted by the court on 31 August 2012. However, outstanding issues were referred to trial, and the defendant continued to receive legal representation from the plaintiff.

Despite the extensive work done by the plaintiff, the defendant did not make any payments toward the legal fees. On 2 September 2014, the defendant signed an acknowledgment of debt, agreeing to pay USD100, 000 in two instalments of USD50, 000 each. The first instalment was due on 31 September 2014, and the balance was to be paid by mid-December 2014.

The defendant, however, failed to honour this acknowledgment, prompting the plaintiff to issue summons in January 2024, seeking payment of the agreed amount.

PLAINTIFF'S CASE

The plaintiff's case was presented through the testimony of Mrs. Beatrice Mtetwa, a senior legal practitioner with over four decades of experience. She is a well-known champion of women and human rights. Mrs. Mtetwa outlined the steps taken to protect the defendant's interests, including sourcing pleadings from the defendant's previous legal practitioners and the High Court Registrar when the former refused to release her file.

Mrs. Mtetwa testified to attending several pre-trial conferences on behalf of the defendant, sometimes in her absence, and handling numerous interlocutory applications throughout the divorce proceedings. The litigation was characterized by its complexity and toxicity, necessitating the engagement of an advocate to ensure impartiality during settlement negotiations.

The plaintiff's evidence highlighted the extent of the legal services provided, which included defending against applications brought by the defendant's former husband, successfully opposing his application for execution pending appeal, and preparing for the trial.

Mrs. Mtetwa testified that the defendant's appeal was delayed due to the disappearance of the High Court file, which required the plaintiff to apply for the determination of the appeal on the available record. The plaintiff's efforts ensured that the appeal was eventually heard and determined by the Supreme Court.

The plaintiff argued that the acknowledgment of debt signed by the defendant on 2 September 2014 was clear and binding. The plaintiff further contended that the agreed fee of USD100, 000 was reasonable, considering the complexity of the matter, the experience and expertise of the attending legal practitioners, and the value of the matrimonial estate involved.

Mrs. Mtetwa testified that the defendant made numerous promises to settle the debt but failed to make any substantial payments. The only payment received was a partial payment of USD2, 360 in January 2024, after the issuance of summons.

Mrs Mtetwa was very composed when she gave her evidence. However, her disappointment and feeling of betrayal was palpable. You could feel her frustration when each time, during cross examination, some defence was proffered. She would repeatedly retort that such a defence would not be raised by the defendant herself as in all their interactions over the payment of the fees and also in her defendant's plea such a defence was never raised.

DEFENDANT'S CASE

The defendant, in her testimony, confirmed engaging the plaintiff and acknowledged receiving legal services from Mrs. Mtetwa. However, she contested the amount claimed by the plaintiff, arguing that it was excessive and that there was no agreement on the USD100, 000 fee.

The defendant denied that Mr. Jamu, who the plaintiff regarded as her agent, had the authority to negotiate the fee on her behalf. She also denied undertaking to pay the USD100, 000 in September 2023, as alleged by the plaintiff.

The defendant raised the defence of prescription, arguing that the claim was time-barred. She further argued that, following the promulgation of SI 33/19, the debt should be payable in RTGS dollars rather than USD.

Under cross-examination, the defendant admitted to signing the acknowledgment of debt but claimed she did not recall the circumstances under which she did so. She acknowledged that the plaintiff had represented her diligently and that she had benefited from the legal services provided. However, she insisted that the fee claimed was unreasonable and suggested a reduced amount of USD50, 000 as fair compensation.

The defendant testified that she made efforts to settle the debt by offering stands received from the divorce settlement. However, when the plaintiff attempted to verify the existence and value of the stands, it was discovered that the stand numbers provided did not correspond to any existing stands.

The defendant also referred the plaintiff to Mr. Jamu, who was developing a piece of land on her behalf near Lake Chivero. However, no payment materialized from this arrangement, as Mr. Jamu later informed the plaintiff that a loan application to CBZ Bank had been declined.

The defendant's son was also instructed to make payments on her behalf. In January 2024, a payment of USD2,360 was made into the plaintiff's legal practitioner's account. The defendant testified that this payment was made to open negotiations for a reduced fee.

ANALYSIS OF THE FACTS AND LAW

Liability for Legal Fees

The central issue in this case is whether the defendant is liable to pay the plaintiff the agreed sum of USD100,000. The acknowledgment of debt signed by the defendant on 2 September 2014 is pivotal. The *caveat subscriptor* rule holds that a party who signs a document is bound by its contents unless there is evidence of fraud, misrepresentation, or undue influence.

In *Muza v Agricultural Bank of Zimbabwe Limited* SC 138/2004, the court held that a party cannot evade liability by claiming ignorance of the contents of a document they signed. The defendant in this case did not allege any coercion or misrepresentation. Her signature on the acknowledgment of debt makes her liable for the agreed amount.

The defendant's argument that the fee was excessive is unsupported. The plaintiff provided detailed evidence of the legal services rendered, which included attending numerous pre-trial conferences, filing interlocutory applications, negotiating settlements, and handling appeals. The agreed fee was negotiated down from an initial USD200,000 to USD100,000 at the defendant's request.

The court in *Standard Chartered Bank Zimbabwe Ltd v China Shougang International* SC 76/2019 emphasized that parties are bound by their agreements unless proven otherwise. The defendant's acknowledgment of the debt is a binding contract, and the plaintiff is entitled to enforce it.

Presentation of a Defence Not Pleaded

A significant issue in this case is the defendant's attempt to raise defences in her closing submissions that were not pleaded in her initial plea. It is trite law that parties are bound by their pleadings, and a party cannot depart from the issues defined in the pleadings without seeking leave of the court. The purpose of pleadings is to delineate the issues for determination and ensure that both parties know the case they must meet.

In *Stanbic Bank Zimbabwe Limited v Thalgy Investments (Pvt) Ltd* HH 311/23, the court defined a plea as follows;

“a plea is not defined in the rules but a basic understanding of it is that it is a formal response by the defendant to the allegations stated by the plaintiff in his summons and declaration. In it the defendant sets out the reasons why the judgment should not be granted in favour of the plaintiff on the claim made.”

In *Medlog Zimbabwe (Pvt) Ltd v Cost Benefit Holdings (Pvt) Ltd* SC 24/18, the Supreme Court emphasized that parties cannot introduce new issues in closing submissions that were not part of their original pleadings. Similarly, in *Minister of Agriculture and Land Affairs v De Klerk* 2014 (1) SA 158, it was held that closing submissions should not be used to build a new case but to sum up the evidence led at trial.

In this case, the defendant abandoned her initial plea during the trial and attempted to introduce new defences through her closing submissions. Notably, the defences of prescription and SI 33/19 were not raised in the plea but were forcefully argued in closing submissions. This conduct is undesirable as it prejudices the plaintiff, who prepared its case based on the pleadings.

The purpose of closing submissions is to provide a summary of the evidence presented during the trial and persuade the court to rule in a party’s favour based on that evidence. As outlined in *Kedison Mutswakatira v Primrose Munanga* HH 381/23, closing submissions should focus on analysing the evidence and applying the relevant legal principles. The court wrote;

“The purpose of closing submissions which are to be submitted after all evidence has been heard and whose form is to be directed by a judge as per r 56(26) of the High Court Rules, 2021, is to persuade the court to rule in a party’s favour. Such closing submissions generally contain;

1. An analysis of the evidence produced to the court at trial, including arguments on why the court should believe in that party’s case or rule in his/her favour on an issue in dispute.
2. A party’s arguments on how the law shall apply to the case based on the evidence produced to the court.
3. The order that the court is invited to make”

Similarly, the court in *S v Chiramba* HH 869/22 further clarified that closing submissions are not an opportunity to introduce new evidence or arguments that were not part of the trial. It remarked that, “... *the purpose of closing submissions is to sum up the evidence led at trial. It is not to lead fresh evidence. Summing up is carried out after both the state and the defence would have closed the leading of evidence. Seeking to attack the admission of the*

statement during summing up only serves to expose the folly the choice o maintain silence during the entire trial.”

Introducing new defences at this stage undermines the integrity of the trial process and can result in unfair prejudice to the opposing party.

The defendant’s attempt to introduce new defences through her closing submissions is untenable. The defences of prescription and SI 33/19 were not part of the initial plea, and the defendant did not seek leave to amend her pleadings to include these defences. Consequently, these defences cannot be considered by the court.

The defendant’s conduct highlights the importance of adhering to the procedural rules governing pleadings and submissions. The court cannot allow a party to approbate and reprobate by shifting their position at different stages of the proceedings. Such conduct undermines the administration of justice and the fair resolution of disputes.

CONCLUSION

The plaintiff has proven its case on a balance of probabilities. The defendant’s defences lack merit and are inconsistent with her own admissions and actions. The acknowledgment of debt remains binding, and the court disregards the belatedly raised defences.

Costs were claimed on the legal practitioner and client scale. However, during her oral testimony, the defendant was very honest and really remorseful that she failed to pay for the services rendered. Despite the spurious defences raised in her papers she made an undertaking to pay for the excellent legal services rendered by the defendant once she was in a position to pay.

In the result, it is ordered as follows:

1. The defendant is ordered to pay the plaintiff the sum of USD100, 000 or its equivalent in Zimbabwean dollars at the prevailing exchange rate on the date of payment.
2. The defendant is ordered to pay interest at the prescribed rate from the date of summons to the date of full payment.
3. The defendant shall pay the costs of suit.

MAMBARA J:

Mhishi Nkomo Legal Practice, plaintiff’s legal practitioners
Dondo and Partners, defendant’s legal practitioners

