

MYDAL INTERNATIONAL MARKETING (PVT) LTD
versus
KATSANDE LEGAL PRACTITIONERS
and
FRANCIS KATSANDE

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 8 & 13 June 2016

Urgent Chamber Application

S T Mutema, for the applicant
F Katsande, for the respondents

CHAREWA J: The applicant filed an urgent chamber application for a provisional order seeking the following interim relief:

- a. The 1st and 2nd respondents be and are hereby ordered to release the sum of US\$28 500.00 they have received in Trust into the Trust account of Messrs Stansilous and Associates within 48 hours of this order.
- b. Costs of suit shall be costs in the cause.”

The final relief sought was a declaration that the withholding of the applicant’s trust funds by the respondents was illegal and costs on an attorney client scale.

The undisputed facts were that the respondents were the legal practitioners of record for the applicant in HC 1049/09. They successfully sued for the payment of the sum of \$28 500 which was released by the Registrar into the respondents trust account. The applicant sought release of the trust funds which the respondents refused or neglected to do.

The applicant averred that the matter was urgent firstly because ordinarily trust funds must be remitted upon demand. Failure to do so creates urgency. Secondly, since upon reporting the respondent’s failure to remit the funds to the Law Society on 17 May 2016, that body allowed for at least 25 days to have the matter resolved, that response further exacerbated the urgency. This was more so because the funds were necessary for the daily operational requirements of the applicant which had already been jeopardised by the late release of the money to the Registrar. Finally, from 4 May 2016, until the filing of this

application on 3 June 2016, the applicant had diligently sought the remittal of its funds and had not delayed in seeking a remedy.

On the merits, the applicant reiterated that the respondents were, in terms of the requirements governing trust accounts, obliged to release the money upon demand. The order awarding those funds directed that the money should be paid to the applicant. Therefore, once the applicant demanded the remittal of the funds, the respondents ought not to have refused to do so without reasonable justification. And in that regard, the only reasonable justification would have been unpaid legal fees. However, despite being requested to submit their fee note or bill, the respondents did not do so. Therefore, respondents were not entitled to retain the funds, particularly since the applicant had requested them to renounce urgency on the matter and had appointed other legal practitioners which had assumed urgency.

On the other hand, the respondents claimed that the need to act arose on 3 May 2016 when applicant became aware of the transfer. And since there is no explanation for the delay apart from the referral of the matter to the Law Society, the matter is not urgent.

On the merits, the respondents averred that they could not release the money because their fees, amounting to \$360 000 granted in a subsequent case HH 557/14 remained unpaid by applicant (see paragraph 3.2 of their opposing affidavit). Further, they claim they could not possibly pay out the Trust funds because they were barred by the Court in HC 2470/13 from acting for the applicant until the issue of the directorship of its Mr Valentine was resolved.

At the conclusion of the parties' submissions I delivered an *ex tempore* judgment granting the applicant the interim relief sought. The respondents requested that I reduce my reasons for the judgment to writing and these are they.

It is trite that a litigant is not entitled as of right to have his matter heard on an urgent basis, the test being that the matter must be so urgent and the risk of irreparable damage so great that the matter cannot proceed within the normal time frames provided in the Rules.

Our jurisprudence has therefore established that what constitutes urgency is not only the imminent arrival of the day of reckoning, but that a matter is urgent if, at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules. (See *Kuvarega v Registrar General and Anor* 1998 (1) ZLR 189).

A party must therefore show that:

“(a) The matter cannot wait at the time when the need to act arises.

- (b) Irreparable prejudice will result, if the matter is not dealt with straight away without delay.
- (c) There is *prima facie* evidence that the applicant treated the matter as urgent.
- (d) Applicant gives a sensible, rational and realistic explanation for any delay in taking action.
- (e) There is no satisfactory alternative remedy.”

See *Oscar Kurasha v Tsitsi Chipendo & 6 Ors* HH 538-15 at p 3.

It is trite that Trust Funds do not belong to the party holding those funds in trust. They remain the property of the proven owner of those funds. In that regard a party holding funds in trust has no right to deal with them as he pleases, or to refuse to hand them over upon demand by the rightful owner or party entitled to deal with them without reasonable cause. It is for this reason that it is the norm in the practice of law in this country that trust funds held by legal practitioners are payable upon demand. Failure to do so, in my view creates urgency to recover those monies, as such failure raises apprehension of misappropriation of trust funds.

On the record, it is clear that the trust funds were to the account of the applicant, which therefore had a clear right to them. It is also clear on the record that the respondents received the trust funds on 3 May 2016, but did not inform the applicant of this fact. Contrary to respondents’ assertion that the need to act arose on 3 May 2016, the record shows that it was on 4 May 2016, that the applicant discovered that the respondents had received the funds and called them to confirm, whereupon respondents denied having received the money. The need to act therefore arose then, and applicant did act, by demanding the remittal of the funds from respondents immediately.

I do not think that it was unreasonable of the applicant not to have filed an application there and then without first giving respondents the opportunity to remit the money. I find it quite proper that applicant approached other legal practitioners to represent it and formally write to respondents, on 5 May 2015, requesting them to remit the trust funds to the trust account of Stansilous and Associates. The tenor of communications between the parties up until 9 May 2016 seems to me to have been quite civil and courteous as is expected between legal practitioners with no indication at all that the respondents had no intention of remitting the funds. In its letter dated 9 May 2016, the respondents gave a non-committal reply, merely saying the matter was receiving attention, and requiring Stansilous and Associates to file an assumption of agency in the matter which could have been interpreted to mean that they were processing the remittance.

It was only upon receipt of the respondents' undated letter delivered to the applicant's legal practitioners on 11 May 2016, categorically refusing to transfer the money without giving any reasonable justification (paragraph 2) that matters took a nasty turn. Clearly, in the current circumstances in Zimbabwe where corruption and misappropriation of funds is rampant in Zimbabwe, I do not find that applicant's apprehension was misplaced, thus necessitating swift action on its part. It was, in my view, only at this stage that applicant ought to have resorted to the court on an urgent basis.

I do not consider the time lapse between 11 May 2016 and 3 June 2016, to be so unreasonable as to detract from the urgency of the matter, in the circumstances of this case, where reporting a legal practitioner to the Law Society would normally be expected to obviate the need to pursue litigation by encouraging parties to settle their differences. Thus, I find it quite proper that applicant wrote to respondents in response on 16 May 2016, advising that they would report the matter to the Law Society for unethical conduct, which it did on 20 May 2016, and perhaps prefer criminal charges.

Taking all these factors into account, I was therefore of the firm view that non-release of trust funds upon demand, and without reasonable justification, creates and maintains urgency as long as a party continues to diligently pursue such release. In any event, urgency is not measured merely by the lapse of time, but also by the circumstances of each case. I therefore found that given the attitude of the respondents, the applicant was left with no other remedy but to bring this application on an urgent basis.

On the merits, the respondents claimed during the hearing and in the opposing affidavit that they were entitled to withhold the trust funds in lieu of their fees. However, I noted that there was no fee note or bill of costs attached to the opposing affidavit to prove the claim for outstanding fees. In fact as I have already noted, despite being specifically requested to submit their fee note, the respondents failed to do so.

In para 4, of their undated letter aforesaid, the respondents referred to HC 2470/13 and HC 2453/16 as further reasons for refusing to release the trust funds. Clearly HC 2470 is not helpful to the respondents as, apart from interdicting Mr Valentine from holding himself as a representative of the applicant, it also interdicted the respondents from acting for applicant. To my mind, the fact that the Registrar did pay out the \$28 500 respondents' Trust Account obviously meant that he had ascertained that Mr Valentine properly represented the applicant and also that respondents were the duly authorised legal practitioners of the applicant in HC1049/09 duly empowered to receive the money. In any event, if the

respondents were barred from representing the applicant, on what basis did they receive the trust funds from the Registrar?

As for HC 2453/16, this is mere summons without any interdict or order to it, and it cannot ground any refusal to remit the trust funds in question.

Further, the respondents claim that their fees were ordered in terms of HH 557/14. However, apart from the fact that this is an entirely different matter which did not involve the applicant *in casu* at all, there is no such order, directing payment of fees against trust funds obtained under HC 1049/09. In fact, the judge in HH557/14 clearly stated at p.9 of her judgment that issues of legal fees were not before her, and in any event, it was her opinion that it was only fair that the defendants in that matter (who are different from the applicant in this matter), should pay those fees.

The respondents claimed that they are still legal practitioners for applicant in other matters and further that they have not renounced urgency in HC1049/09 and are therefore entitled not to release trust funds to applicant's new legal practitioners. Clearly, this is irrelevant as firstly, there is nothing to prevent a party from having a multiplicity of legal practitioners for different matters. In any event, refusal to renounce urgency by a legal practitioner does not entitle him to represent someone who wishes to dispense with that legal practitioner's services for a particular matter. Always, the choice is with the party who appoints the lawyer, as a legal practitioner cannot impose himself on a party.

Finally, I noted that throughout the exchanges over the remittal of these trust funds, there is nowhere that the respondents claimed a lien over them in lieu of their fees.

For these reasons, I granted an order in terms of the draft.

Stansilous and Associates, applicant's legal practitioners
FM Katsande & Partners, 1st and 2nd respondent's legal practitioners