

NIGHERT PARWEEN SAVANIA
and
ESTATE MAHENDIRA-KUMAR JIVAN SAVANIA N.O
versus
NATHAN MNABA
and
NORWICH TRADING (PVT) LIMITED
and
REGISTRAR OF COMPANIES
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABAWE
TAGU J
HARARE, 8 and 23 November 2016

Urgent Chamber Application

Advocate *T Zhuwarara*, for the applicants
N Mashizha, for the 1st respondent
B Ngwenya, for the 2nd respondent

TAGU J: The applicants filed this urgent chamber application seeking the following relief-

“TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court, if any why a final order should not be made in the following terms,

1. That the First Respondent be and is hereby interdicted from disposing and transferring title in land registered under Deed of Transfer 6224/94 until rights and obligations of the parties are determined in HC 9654/13.
2. First Respondent bear costs of this application on the scale of legal practitioner and client.

INTERIM RELIEF GRANTED

1. Pending the determination of this matter on the return date, the following interim relief is granted;
 - (i) The 4th Respondent be and is hereby directed to place a caveat over Deed of Transfer 6224/94, pending confirmation or discharge of this order.

SERVICE OF PROVISIONAL ORDER

1. Service of this Provisional Order shall be effected by the Sheriff of Zimbabwe, or an Additional Sheriff or by the Applicant’s legal practitioners upon the Respondents.”

The application was opposed by the first and second respondents who filed opposing affidavits.

At the hearing of the matter the first and second respondents raised some points *in limine*. The chief point *in limine* which the parties asked the court to determine before delving into the merits was that applicants' legal practitioners ought to be disqualified from representing the applicants on the basis of conflict of interest.

In his founding affidavit Nathan Mnaba, the first respondent told the court that Messrs. Rubaya and Chatambudza have acted in an unethical manner in continuing to represent the applicants in the same matter in which they had previously recused themselves. He said one Admire Rubaya who is the Senior Partner of Messrs. Rubaya and Chatambudza was once his lawyer and that he had disclosed to him about the present dispute. When the first applicant was arraigned before the Rotten Row Magistrates Court on a charge of fraud in this matter, she was represented by Mr Admire Rubaya. The prosecutor in the matter applied for the disqualification of Mr Rubaya and his law firm as counsel for the first applicant on the basis of conflict of interest. Mr Rubaya then recused himself from the matter and the first applicant was represented by Mr M.D. Hungwe of Kadzere, Hungwe and Partners. He therefore submitted that the continued representation of the applicants by Messrs Rubaya and Chatambudza is therefore improper. He applied that Mr Admire Rubaya and or Messrs Rubaya and Chatambudza Legal practitioners be disqualified as counsel for the applicants on the basis of conflict of interest and prayed that this application be removed from the roll. Mr B Ngwenya further submitted that though the applicants were represented by Advocate *Zhuwarara* in the present matter, that did not change the position of the law as Advocate *Zhuwarara* was instructed by the firm of legal practitioners and not the applicants themselves. As it stood it was Messrs Rubaya who represented the applicants.

For the position of the law the court was referred to the cases of *Base Minerals Zimbabwe (Private) Limited and Peter Valentine v Chiroswa Minerals (Pvt) Ltd and two Others* HH 21/16 and *Crowhill Company (Pvt) Ltd v Cynthia Maadza and Another* HH 85/15.

In support of the first respondent's submissions Nyasha Muzawazi the second respondent's director said in his opposing affidavit that the representation of the applicants by Messrs Rubaya and Chatambudza is challenged on the basis that the same lawyers once represented the second respondent in this matter and had to recuse themselves when the same

objection was raised in the criminal matter CRB 2636/16. He too said that the legal representation suffer from a conflict of interest and the application emanating from their firm cannot stand or be heard as it offends established ethical principles. To support his contention the second respondent referred to his earlier letter of complaint dated 1 September 2016 to the chief Magistrate who responded as follows-

“Reference is made to the above matter and your letter dated 1 September 2016.

Please note that the magistrate dealing with the case has recused herself.

We are also made to believe that the lawyer in question, Mr Rubaya has also recused himself from dealing with the matter.

We believe the issue has been resolved.”

Advocate *Zhuwarara* submitted on behalf of the applicants that the respondents failed to produce proof that the applicants were once represented by Messrs Rubaya. According to him what the respondents raised are mere technical objections as there is no proof that the second respondent Norwich Trading (Pvt) Ltd was represented by Mr Rubaya. He said no information has been placed as to what information Messrs Rubaya is said to be in possession of that makes him conflicted. He challenged the respondents to provide authorities that a matter can be removed from the roll on the basis of conflict of interests. He denied that his instructing attorney was Mr Rubaya. Advocated *Zhuwarara* suggested that Mr Rubaya should file an affidavit to show whether or not he is conflicted.

In his supporting affidavit Mr Rubaya submitted among other things that he knew the first respondent as his former client in a criminal case where he was alleged to have smuggled gold in Plumtree. He said when an application for his disqualification was made he responded, and whilst awaiting the ruling relating to the application in question there was a fracas one night involving one Deen Savania and Nathan Mnaba after they had clashed at the Chief Magistrate’s office. During the same night before the ruling he started to receive anonymous calls from individuals who were threatening to harm him and his family if he did not recuse himself. Consequent to those threats he then recused himself the next day without giving any reasons for he wanted to protect his family which definitely came first. He said his recusal had nothing to do with conflict of interest but with threats to his person and his family which he had received. He further denied ever representing the first or second respondent in any matter relating to what is before the court now. He conceded that the first respondent only briefed him to be his lead counsel in a criminal matter which had nothing to do with this

case. He further stated that he knows for a fact that he took the first defendant from the jaws of prison after he had lost faith in his trusted lieutenant Mr Nelson Mashizha when he had to repair the damage he had done both before the commencement of trial and also during trial. Mr Rubaya further said that he suspected that the first respondent is probably afraid that he Mr Rubaya will raise issues relating to the impropriety in the manner the shares were handled and that he can pick up such problematic issues so he wants to have them removed from the case. Mr Rubaya felt that the first respondent is aggrieved by the fact that he has since issued summons against the first respondent for his legal fees. According to him the first respondent being his former client does not own him otherwise he would die a pauper. He felt that the respondents are making bald allegations intending to tarnish his image.

Mr B Ngwenya insisted that the mere fact that Messrs Rubaya recused themselves from the criminal matter and Mr M. D. Hungwe of Kadzere, Hungwe and Mandevere took over clearly showed conflict of interests.

A similar issue was discussed in a number of cases. In the case of *Crowhill Company (Pvt) Ltd v Cynthia Maadza (supra)*, Mr Dzvetero was alleged to have represented the respondent before in a matter involving the same parties. He later jumped the ship and represented the applicant in a matter involving the same parties. Mr Dzvetero was alleged to have been conflicted. However, the judge found that Mr Dzvetero had in fact been working in the same law firm that represented the respondent but had never personally taken instructions from the respondent. It was his colleague a Mr Mlotshwa who used to receive instructions from the respondent. Further the court found that at the time Mr Dzvetero received instructions from the applicant he had left the previous law firm and as such was no longer working with Mr Mlotshwa. The judge found that Mr Dzvetero was not conflicted.

In the case of *Base Minerals Zimbabwe (Private) Ltd and Peter Valentine v Chiroswa Minerals (Pvt) Ltd and two Others (supra)*, Mr Katsande and the instructing attorney Mr Mushoriwa were found to have been conflicted because they initially represented one of the parties but later jumped ship and represented the other party in a case that involved the same parties and the same issues. In coming to that conclusion the judge relied on the case of *Pertsilis v Calcaterra & Anor 1999 (1) ZLR 70* where SMITH J (as he then was) had occasion to examine a long line of authorities dealing with the issue of the ethical conduct of a legal practitioner and conflict of interest at page 74 B-G where he had this to say-

“B. Legal practitioners owe their clients a duty of loyalty. They are duty bound to advance and defend their client’s interests. A legal practitioner is expected to devote his or her energy, intelligence, skill and personal commitment to the single goal of furthering the client’s interests as those are ultimately defined by the client.”

See *Modern Law Ethics* by Charles W Wolfram, 1986 C. ed p 578 at 10.3.1. A legal practitioner who represents the adversary of his own client in litigation would clearly be violating his or her duty of loyalty and the common law rules against conflict of interests. Nearly 150 years ago, in the American case of *Stockton v Ford* 52 US (11 How) 232, 247; 13 L Ed 676 (1850) the fundamental and important point of the place and role of legal practitioners was made in the following words:

“there are few of the business relations of life involving a higher trust and confidence than that of attorney and client, or, generally speaking, one more honourably and faithfully discharged; few more anxiously guarded by the law, or governed by sterner principles of morality and justice and it is the duty of the court to administer them in a corresponding spirit, and to be watch of and industrious, to see that confidence thus reposed shall not be used to the detriment or prejudice of the rights of the party bestowing it”

The same point is made slightly differently by Julian Disney et al in *Layers* (Sweet and Maxwell, London) at p. 616 as follows:

“Representation of one whose interests diverge from those of a former client is generally recognised to be improper. The divergence might inhibit the lawyer’s exercise of judgment on behalf of his current client. It might also impair the obligation of loyalty owed by the lawyer to his former client. Thus the lawyer might divulge or utilise the secrets and confidence of his former client for the benefit of the current client.”

The Guide to The Professional Conduct of Solicitors issued by the Council of the Law Society of England states at p 9:

“.....where a solicitor acts for one client and is asked to act for another client whose interests conflict or appear likely to conflict with those of the first client, he must refuse to act for the second client. On the basis of the principle that “justice should not only be done, but should manifestly and undoubtedly be seen to be done”, a solicitor must decline or cease to act not only where the interests of a client are prejudiced if the solicitor continues to act for the other client but also where that client’s interests might appear to be prejudiced.”

He then went on to consider whether an employee of a law firm could act for a former client where the partner would have withdrawn from the matter for ethical reasons. He concluded by stating the following at p 77 G-H and 78 A.

“In this case, the position adopted by Mr Venturas is entirely proper and ethical. As he rightly point out, he could not act for and of the parties in litigation inter se. furthermore, I consider that the position he adopted must extend to any partners or employee of his. Justice must not only be done; it must manifestly and undoubtedly be seen to be done. It would be no consolation, in my opinion, for a litigant to be told that the legal practitioner who is appearing for his opponent is not the legal practitioner who formerly acted for him, it is only his partner

or his employee. If one member or employee of a legal firm has appeared for a litigant, the litigant would be fully justified. I feel, in fearing that his interest would be prejudiced if another member or employee of the same firm acted for an opponent of his in any litigation.”

The same point was reiterated in *Mutanga v Mutanga* 2004 (1) ZLR 488 (H). In that case a legal practitioner in a divorce action had taken instructions from the defendant first and then abandoned the defendant and went on to represent the plaintiff. It was held that a legal practitioner must at all costs avoid acting against a former client where there is a likelihood or danger of him disclosing confidential information to the prejudice of the former client. It was emphasised that it was a question of justice not only being done but being seen to be done. At page 490 it was said that most professions in general, and legal practitioners in particular, walk a tightrope in their daily practices in as far as their ethical conduct in relation to their clients is concerned. As a general rule, a legal practitioner is entitled to accept or refuse work except where he feels that there will be a conflict of interest.

Further, E AL Lewis in his book *Legal Ethics* dealt with this principle extensively and at pp 291-292 the learned author stated:

“The confidence of the client is absolute and must be preserved by his attorney except to the extent that disclosure may be rendered necessary or permissible... This confidence embraces all oral and documentary information respecting the client’s affairs gained in acting for him where from the client himself or from any other source whatever. This preservation of confidence is so important that it becomes a part of the management of the attorney’s practice and requires him to do his best to curb breach of confidence on the part of staff who must in the course of their work inevitably receive confidential information.”

In casu it is not in dispute that Mr Rubaya was the attorney for the first respondent Nathan Mnaba. In his opposing affidavit Mr Nathan Mnaba stated that he disclosed to Mr Rubaya about the present dispute involving him and the applicants. While admitting that he represented the first respondent in respect of a criminal matter where he later recused himself after allegations of conflict of interest were raised against him by the first respondent, Mr Rubaya disputed that he was briefed about the current dispute involving the applicants and the respondents. He denied having received any information from the second respondent. Further, it is not in dispute that Messrs Rubaya and Chatambudza are currently the legal practitioners for the applicants. This has created the potential conflict of interests raised by the first and second respondents. While it was Mr *Zhuwarara* who appeared on behalf of the applicants, the undisputed facts are that Mr *Zhuwarara* was briefed either by Mr Rubaya himself or by another practitioner from the same law firm.

The sole question to be decided is whether or not Messrs Rubaya and Chatambudaza are conflicted. In the case of *Mutanga v Mutanga (supra)* an attempt was made to define what constitutes conflict of interest. It was said the definition of “conflict of interest” was ably laid down in Chapter V of the *Code of Professional Conduct* published by the Canadian Bar Association (25 August 1974), which stated:-

“A conflicting interest is one which would likely to affect adversely the judgment of the lawyer on behalf of or his loyalty to a client or prospective client or which the lawyer might be prompted to prefer to the interest of the client or prospective client.”

In the present matter I am convinced that one way or the other Mr Nathan Mnaba must have briefed Mr Rubaya about the current dispute between him and the applicants. I say so because in his supporting opposing affidavit Mr Rubaya said the following:

“It is always said that the guilty are afraid. I am now convinced that they are afraid because they did not transfer the shares from First Applicant and Second Applicant to First Respondent lawfully. There was evasion of payment of due capital gains tax as nobody ever went to Zimra for interviews including the First Applicant as the seller in terms of the agreement.

I suspect that the First Respondent is probably afraid that I will raise issues relating to the impropriety in the manner the shares were handled. The First Respondent is definitely afraid that I can pick up such problematic issues so he wants to have us removed from the case....”
(underlining is mine.)

Such a statement speaks volumes about what Mr Rubaya knows before-hand *vis-a-vis* the dispute between the applicants and the respondents. If indeed the first respondent is afraid that Mr Rubaya may spill the beans, it is because the first respondent is afraid that Mr Rubaya may say what he was told in confidence by the first respondent. I therefore find merit in the point *in limine* raised by the first and second respondents. In my view Mr Rubaya personally or Rubaya and Chatambudza law firm is conflicted and cannot be allowed to represent the applicants in this matter since there is potential conflict of interests which will be prejudicial to the respondents. I will therefore uphold the *point in limine*.

In the result the application is struck off the roll.

Rubaya and Chatambudza, applicants’ legal practitioners
Nelson Mashizha, 1st respondent’s legal practitioners
Chinawa Law Chambers, 2nd respondent’s legal practitioners