

LAW SOCIETY OF ZIMBABWE
versus
TAFADZWA CALVIN SENGWE

HIGH COURT OF ZIMBABWE
PHIRI J
HARARE, 26 September 2018 and 18 December 2019

Urgent chamber application

S. Gahadzikwa, for the applicant
E. Mubaiwa, for the respondent

PHIRI J: This was an urgent application wherein the applicants sought, “an order to declare the respondent incapable of managing his own affairs and for an order to place the respondent under curatorship as well as authorising the applicant to nominate a curator for the period of the curatorship.

The applicant is the Law Society of Zimbabwe an organisation regulating legal practitioners in terms of the Legal Practitioners Act [*Chapter 27:07*].

The respondent is Tafadzwa Calvin Sengwe a legal practitioner practicing under the style of “Sengwe Law Chambers”. The application was premised on two grounds chiefly;

- (a) An application for an order of sequestration which was filed against the respondent under case number HC 5662/18 for an order of sequestration in terms of s 12 (1) and section 11 (b) of the section 12 (1) and section 11 (b) of the Insolvency Act [*Chapter 6:04*].
- (b) That respondent failed to account for funds received and held in trust. This allegation arose as a result of three complaints, the applicant received, against the respondent.

Applicants submitted that the respondent failed to tender any explanation to the allegations levelled against him despite having been requested to do so applicants also contended that in all cases being investigated the respondent failed to properly account for clients funds in terms of the applicants bookkeeping by laws.

Applicants averred that;

“The complaints above, which the applicant is investigating are pointing to possible misappropriation of trust funds and possible contravention of the Bank use promotion and suppression of the Money Laundering Act” [*Chapter 24:24*].

Applicants concluded that;

“It is submitted that the respondents conduct is unworthy, dishonourable, unprofessional and not in the best interests of the profession. It also disturbing that the respondent mishandled funds and engaged in activities of money laundering and this brings the entire legal profession in Zimbabwe into disrepute.”

Respondent’s opposing papers

The respondent opposed this application and raised numerous preliminary points. It was however agreed that all these points his submissions on the merits would be heard at the same time.

In limine

Respondent raised various procedural points in opposition to the application. These were as follows;

- (a) That this court has no jurisdiction to hear this application?
- (b) That the matter is not urgent.

He averred that the application in case number HC 5562, which premised this application, was served on him on the 20th June, 2016 (the present application was issued on the 13th July, 2018)

This court found it not necessary to deal with the other preliminary points raised by the applicants, such as, constitutional issues, etc in view of its consideration and findings on the merits of this application (b) intertwined with this fact was that respondent averred that applicant had previously brought a similar action before the Law Society Disciplinary Tribunal in case number LPDT 12-17. Respondent alleged that the aforesaid application was based on similar allegations, namely that investigations into possible money laundering activities were being carried out.

Respondent averred that applicant withdrew this matter after finding by the Hon Justice Chatukuta that the matter was not urgent.

This court is of the considered view that on the aforesaid factors alone, the applicant has mounted a strong case that this matter is not urgent. Substantially the facts brought before the present application are similar in nature to the matter that was brought before the Law Society Tribunal in case number LPD 12-17.

The court is also of the considered view that the application for sequestration proceedings should be left to take its course and in addition, that, the issues raised should be the subject to be considered by Disciplinary Tribunal.

Applicant's supplementary affidavit

A supplementary affidavit was also filed for and on behalf of the applicant.

It was submitted that a compliance visit was conducted on the 28th August, 2018 and it established the following;

- (a) There were other complaints apparent. Respondent had still not paid the sums of \$115 000.00 and US\$93 000-00 which he still owed. This was an indicator that respondent was struggling to manage his own affairs and was therefore a potential and immediate danger to the profession and the public.
- (b) Respondent had defaulted in payments due to the National Social Security Authority for a period in excess of nine (9) months.
- (c) Respondent is not registered for Value Added Tax (VAT) and accordingly this means that since he registered his law firm he had not been paying VAT and is in arrears with the Zimbabwe Revenue Authority.
- (d) Other taxes such as Income Tax and Pay As You Earn (P.A.Y.E.).

All this the applicant maintained was indicative of the fact that the applicant was failing to manage his affairs.

In essence the applicants persisted with its application and maintained proceedings in its case No. LPDT 12/13 sought suspension of the respondent from practice as a legal practitioner.

Applicant also maintained that the execution proceedings did indicate that respondent had no executable assets and was in financial distress.

Urgency

This court is of the view that the applicant was entitled to launch this application on the basis of urgency.

The applicant is charged with the specific mandate to regulate the affairs of the legal profession once certain factors come to its attention it is duty bounds to protect the profession and members of the public.

This Court is therefore satisfied that the applicants were enjoined to investigate the nature of complaints raised against the respondent as a matter of urgency. The issues referred to paragraphs (a) to g call for prompt action by the applicants.

This was the basis of setting this matter down for hearing.

Jurisdiction

The issue of jurisdiction was also brought into play for and on behalf of the respondent. Respondent argued that the nature of the relief sought in this application ousted the jurisdiction of this court. Section 25 A of the Legal practitioners Act [*Chapter 27:07*] was invoked, by the respondent as the basis for making this submission.

It was also argued that the disciplinary Tribunal of the Law Society is the one empowered to grant the relief sought by the applicant.

This Court does not agree with this view and holds that this court has jurisdiction to deliberate on this kind of application in the nature of the relief sought.

Whether or not such relief would be granted would depend on the merits of the cause of complaint brought in the application.

This court is in agreement with the submissions made on behalf of the applicants, that basically jurisdiction of this court is found in respect of two factors.

Firstly the in terms of s 171 (a) of the Constitution of Zimbabwe.

This court has original Jurisdiction in all civil matters.

Similarly s 13 of the High Court Act confirms this position.

Secondly this court accepts the position postulated on behalf of the applicant to the extent that there is no legislation dealing with issue of urgent applications in matters as have been raised herein. And also to the extent that in between the sittings of the Law Society Tribunal, there is no remedy available to the applicant in dealing with matters such as the present one, the High Court, as a court of inherent jurisdiction has a right to deal with and entertain such interlocutory or urgent applications brought to regulate the affairs of the legal profession.

Clearly the law Society Tribunal does not deal with such urgent matters.

This court is persuaded with the finding in the case of *Law Society v Mujeyi* HH 21/2015 wherein the applicant approached the High Court for similar relief, as in the present case. The application was granted.

As aforesaid whether or not such application is granted depends on the merits of the application.

THE MERITS OF THE APPLICATION

As already alluded to in this case this court has, after perusing the papers in this case, and hearing counsel, this court came to the conclusion that there was no merit in the application case.

In this case it was established that an application had been made in case number HC 5662/18 for an order for sequestration in terms of the insolvency Act [*Chapter 6:04*].

Similarly the respondent submitted that the applicants bought a similar action before the Law Society Tribunal in case number LPDT 12/17 and the matter was withdrawn on the 2nd day of July, 2018.

In addition the applicant submitted that forming the basis of this application occurred between 2016 -2017 (see page 2 of record).

No cogent reason has been advanced to this court to explain why these complaints were not dealt with by the Law Society Tribunal?

It is this courts view, and finding that this is an appropriate matter to be deliberated upon by the Law Society Tribunal after a fair hearing by the Tribunal.

Granting the relief sought by the applicant, in the present circumstances, would be akin to “Convicting an accused person before an accused presents his case-In a Criminal Case.”

Clearly there is an alternative remedy available to the application.

Issues Raised in the Supplementary Affidavit

The applicants contended that it carried a compliance visit, as aforementioned and this uncovered other issues relating to non-payments to the National Social Security (NASSA), Zimbabwe Revenue Authority (ZMRA) (for Vat, and Income Tax).

The respondent submitted that such issues have to be brought before the legal practitioner concerned before proceedings are activated. In this record the respondent cited Statutory Instrument 580/81.

The respondent contended that no findings have been so made by NASSA or ZIMRA. I was submitted on behalf of the respondent that he made certain arrangements with NASSA.

It was also submitted that no complaints have been raised by NASSA and or ZIMRA.

This court considers that ordinarily an application should rise or fall on the applicant’s founding affidavit.

Subsequent investigations such as occurred in the present matter would, in the court’s view, constitute a new cause of action altogether. Similarly this has the danger of

misinterpretation that the applicant was seeking to holster its case that it had already placed before the court.

In conclusion this court finds that the applicants have, on a balance of probability, failed to prove its case.

However this court finds no malice, on the part of the applicant, in instituting the present application. It was duty bound to do so and no punitive costs should be imposed on it.

Accordingly this application is dismissed with costs to be met by the applicant on a party to party scale.

Law Society of Zimbabwe, applicant's legal practitioners
Mutuso Taruvinga & Mhiribidi Attorneys, respondent's legal practitioners