

INDECO ESTATES DEVELOPMENT COMPANY LIMITED AND MARSHAL CHAMBERS

SUPREME COURT
NGULUBE, CJ, SAKALA, JS AND MAMBILIMA, AJS.
6TH NOVEMBER, 2001 AND 20TH FEBRUARY, 2002.
(SCZ JUDGMENT No. 4 OF 2002)

Flynote:

Contract – Payment for work done. Professional work – liability.
Court Practice – duty of counsel

Headnote:

The respondents, a firm of lawyers had been retained by the appellants to do some professional work. They had to do the needful to procure the issuance of 140 separate title deeds to a number of houses belonging to Zambia Clay Industries Limited which were previously held on block title deeds. The action was launched by the lawyers to recover the sum of K182 million as the amount due for professional services rendered. The Zambia Privatisation Agency took over the responsibilities previously exercised over the Zambia Clay Properties by the appellants and Zambia Privatisation Agency. On appeal to the Supreme Court;

Held:

- (i) That counsel are not entitled to inconvenience the court with untrue stories.
- (ii) That the instructing client is the one primarily liable to pay the lawyer's fees as the person who retained the lawyers services.
- (iii) That this is frequently so even if the beneficial client, that to the person to actually benefit from the services is a different person.

Cases referred to:-

1. Drew –v–Nunn (1879) 4 QB 661.

For the Appellant: I.C. Ng'onga, of I.C. Ng'onga and Company

For the Respondent: H.H. Ndhlovu, of H.H. Ndhlovu and Company.

Judgment

Ngulube, CJ, delivered the judgment of the Court.

The respondents are a firm of lawyers who had been retained by the appellants to do some professional work. They had to do the needful to procure the issuance of 140 separate title deeds to a number of houses belonging to Zambia Clay Industries Limited which were previously held on block title deeds. The action was launched by the lawyers to recover the sum of K182 million as the amount due for professional services rendered. When Zambia Privatization Agency came on the scene, they took over the Zambia Clay Properties by the appellant. They even tried to renegotiate the fees with the lawyers. The lawyers sued both the appellants and the Zambia Privatization Agency.

The issues before the learned Judge were whether the lawyers had truly been instructed to

procure the 140 title deeds and if they had successfully done so; also whether the lawyers were entitled to be paid fees and if so by whom. After hearing the evidence, the Judge found as a fact that the work required of the lawyers had been done as it had been carried up to the stage where all that remained was for the separate title deeds already applied for to be uplifted that both defendants were liable to the plaintiff lawyers who had earned their fees and who could not be deprived of them just because the Zambia Privatization Agency had appointed a new firm of lawyers who would simply uplift the documents based on the work already done by the plaintiffs.

There was a ground of appeal complaining that the Judge had prematurely closed the trial and turned down an adjournment for the defendant to call one more vital witness. It was argued that a retrial should be ordered since the trial was closed on account of the absence of the Counsel for the defendants who had gone to attend a funeral. The record shows that Counsel for the defendants had tried to explain his absence to his opponent on an untrue story that he was appearing before the Industrial Relations Court when that Court was not even sitting that morning. When contacted by telephone, that is when he told his opponent that he was going to a funeral. This was narrated to the Court. The court (before whom nobody applied for any adjournment) was not impressed and decided to treat the absence as unexplained and the defence case as closed. The truth of the matter is that Counsel are not entitled to inconvenience the Court with untrue stories. The truth is further that the witnesses who had already testified had covered all the issues that fell to be considered. The vital unspecified evidence of the further witness allegedly not called would not have taken the matter any further. The position of the appellants and their co-defendants had been that the lawyers had acted without instructions; and that in any case they had not earned the fees because they had delivered the separate title deeds. The learned trial Judge had more than ample oral and documentary evidence already before him to come to the conclusions already discussed. No retrial can be warranted or necessary in this case.

There was a ground of appeal complaining about the size of the bill. When Mr. Ndhlovu Counsel for the lawyers pointed out that having regard to the value of the property (which was some K2 billion) the bill was well within the range of 5% to 10% scale fees fixed for conveyancing matters, Mr. Ng'onga conceded that at the very least the 5% minimum scale fee would have been payable in any event and he would have advised his clients to pay this. In truth, there is no justification for interfering with the amount of the professional bill in this case.

The major ground of appeal by the appellant was quite novel. The gist of the argument was that when the Zambia Privatization Agency stepped into the picture and took over the conduct of winding up the affairs of the Zambia Clay Industries, any instructions which the appellant gave to the lawyers were superceded and the direct relationship of lawyer and client overreached. That being the case, it was argued, the appellant's role was reduced to that of a mere manager on behalf of the Zambia Privatization Agency (ZPA) and so simply an agent of the latter. Because the ZPA had taken over instructions and began to deal directly with the lawyers, judgment should have been entered against ZPA only since they became the appellant's principals and the direct clients of the lawyers. It was Mr. Ng'onga's submissions that the relationship between the appellants and the respondents ceased so that automatically any liability was extinguished. Only ZPA should be liable. He likened the situation to that in *DREW -v- NUNN (1)* where a husband held out his wife as having authority to pledge his credit. Unbeknown to the tradesman who was supplying the goods, the husband became insane (so that her authority terminated) but she continued to take goods and to pledge his credit. On recovery, the husband was sued for the price of the goods supplied during his insanity and it was held that he was liable. We admit to having great difficulty to see the parallel between that case and the case at hand; between the insane husband and the ZPA and between any one else. In any event, even if the ZPA had taken over the instructions as contended for, that in our view may entitle the appellant to an indemnity but this has nothing to do with the respondent lawyers whom they had instructed. We have no doubt in our minds - and this has long been the accepted position - that the instructing client is the one primarily liable to pay the lawyer's fees as the person who retained the lawyer's services. This is frequently so even if the beneficial client, that is the person to actually benefit from the

services (e.g. to be represented in a case) is a different person.

We uphold the learned trial Judge and dismiss this appeal, with costs to be taxed if not agreed.
