REPORTABLE ZLR (68)

Judgment No. S.C. 122/99
Civil Appeal No. 593/95

(1) AUGUSTINE MBALEKELWA TANAYE DUBE

(2) MOTORING ACCIDENTS LIFE CONSULTANTS (PRIVATE) LIMITED

vs THE LAW SOCIETY OF ZIMBABWE

SUPREME COURT OF ZIMBABWE
GUBBAY CJ, EBRAHIM JA & SANDURA JA
BULAWAYO, NOVEMBER 29 & DECEMBER 8, 1999

T Cherry, for the appellants

A Brooks, for the respondent

GUBBAY CJ: The first appellant is the managing director of the second appellant which, as its name suggests, has as its stated objects:

> "(i) To advise and assist victims or relatives to victims of road traffic accidents to claim from insurance companies in terms of the Road Traffic Act of Zimbabwe.
>
> (ii) Assist same to institute action against the insurance company for compensation where appropriate.
>
> (iii) Assist and advise policy holders in respect of their policies, benefits and rights and obligations arising from such insurance policies.
>
> (iv) Assist dependants or beneficiaries of a policy holder to claim in case the holder and/or breadwinner is deceased."

Neither the first appellant nor the other director of the second appellant is a registered legal practitioner.

Arising from complaints received from several insurance companies, the respondent formed the opinion that the first appellant, in the conduct of the business of the second appellant, was in breach of s 9(2)(b) of the Legal Practitioners Act [*Chapter 27:07*] ("the Act"). It sought from the High Court an interdict preventing the appellants from "communicating in any way with insurance companies and/or their legal representatives in connection with accident damages claims on behalf of members of the public".

After a close examination of the relevant correspondence placed before him, the learned judge *a quo* held that the appellants were in contravention of s 9(2)(b) of the Act to the extent that, in consideration of the payment of a fee or a commission, they were assisting persons by threatening to sue out a summons or process in a court of civil jurisdiction. Accordingly, he granted an interdict prohibiting the appellants from so conducting themselves, with costs awarded against them jointly and severally.

Aggrieved at the outcome of the proceedings the appellants now advance the contention before this Court that the correspondence relied upon by the learned judge for his conclusion did not disclose the making of a threat; and, in any event, did not indicate that any summons or process would be issued by themselves, rather than by registered legal practitioners acting in accordance with their instructions.

Section 9(2)(b) of the Act provides that:

> "Subject to any other law, no person other than a registered legal practitioner who is in possession of a valid practising certificate issued to him shall -
>
> (a) …
>
> (b) for or in expectation of any fee, commission, gain or reward in any way instruct or assist any other person to sue out or threaten to sue out any summons or process or to commence, carry on or defend any action, suit or other proceeding in any court of civil or criminal jurisdiction."

It was not in dispute that the first appellant, in the letters he wrote on behalf of the second appellant, offered to assist the addressees "for or in expectation of a fee or commission". The letters say so. See, for instance those dated 10 May 1991, 20 May 1991, and 10 June 1991. And in an interview reported in the *Sunday News* the first appellant stated that "when the case has been won … the claimant is required to pay a commission to the company".

The word "threaten" is not defined in the Act. Its import has been considered in a number of cases. In both *R v Joel* 1962 R & N 851 (SR) at 853 A-B, 1963 (2) SA 205 (SR) at 206 C-G and *R v Chad & Ors* 1972 (2) RLR (GD) at 44 B-C, the meaning most apposite was considered to be that referred to by PETERSON J in *Hodges v Webb (1)* [1920] 2 Ch.D 70 at 89, namely:

> "… an intimation by one to another that unless the latter does or does not do something the former will do something which the latter will not like".

In the context of s 9(2)(b) of the Act I am satisfied that no different meaning should be attributed.

Thus, the first obstacle the respondent was obliged to overcome was whether the correspondence revealed that the recipients, mainly insurance companies, were being threatened with the commencement of legal proceedings.

A variety of phraseology was used by the first appellant: "We would like to point out that we would prefer handling this matter on an 'out of court settlement' basis unless there is a need to go to court" (letter of 5 July 1990); "We would not brush aside an *ex gratia* payment but otherwise the whole matter is a court matter …" (letter of 15 August 1990); "Going back to the sum ($30 000) claimed should you induce us to go to court this figure might be much higher as there is no limit as the client was not doing any act related to him as a passenger" (letter of 5 November 1990); "An out of court settlement is preferred bearing in mind that legal costs will not arise if this is settled on a mutual basis" (letter of 12 December 1990); "We prefer an out of court settlement on mutual trust and understand this can be agreed" (letter of 24 April 1991); "It is in our interest through mutual understanding and trust that we believe all hurdles shall be overcome without difficulty as we prefer an out of court settlement unless otherwise necessary for court action" (letter date obliterated); "As we stated in our letter of 23/11/92 this claim can be reassessed and might warrant over $200 000 claimable and we ask you as insurance experts to consider the immediate settlement of $68 560,50 or as per agreeable after you submit a counter-offer or settlement through the courts where $200 000 plus will be claimed" (letter of 4 May 1993).

The overall thrust is clear, though perhaps more explicit in some letters than in others. It was that unless the claims were compromised legal proceedings

would follow - a fact which necessarily involves the issue of civil process. I agree entirely therefore with the observation of the learned judge that the recipients of the letters were given the alternative of an out of court settlement or face the prospect of court action.

None of the letters referred to, however, contained the express intimation that the appellants intended to institute the threatened proceedings themselves. Hence the crucial question before the lower court was whether such an understanding was the only reasonable inference to be drawn therefrom.

It was of no assistance to the appellants to proclaim that what it was sought to convey to the recipients of the letters was that, if litigation became necessary, legal practitioners would be engaged. The appellants were to be judged objectively by what was written and not allowed to take refuge in any unexpressed mental reservation or unstated intent. Their situation was rightly viewed as being analogous to quasi-mutual consent. See such cases as, *Pieters & Co v Salomon* 1911 AD 121 at 137; *South African Railways & Harbours v National Bank of South Africa Ltd* 1924 AD 704 at 715-716; *Levy v Banket Holdings (Pvt) Ltd* 1956 R & N 98 (FSC) at 105 B-F, 1956 (3) SA 558 (FC) at 561 *in fine* - 562B; *Springvale Ltd v Edwards* 1968 (2) RLR 141 (GD) at 147I-148C.

Significantly no letter mentioned the involvement of lawyers. Each letter made it clear that the matter in issue was one solely between the second appellant, acting on behalf of its client, and the addressee concerned; and that any necessary legal action would be resorted to by the second appellant.

I do not think the ordinary reasonable reader would scrutinise the letters for possible ambiguities. He or she would take what was written at face value. In doing so, it seems to me that they would inevitably infer that it was the second appellant itself which would sue out the requisite summons or process and thus commence the proceedings.

It follows that I respectfully share the conclusion of the learned judge that the appellants acted in breach of s 9(2)(b) of the Act.

Counsel for the appellants submitted that the learned judge had erred in not depriving the respondent of part of the costs. He claimed a special order was justified because the interdict granted was not in the wide terms sought by the respondent.

There are two reasons why at this stage the order should not be altered. First, this Court will only interfere with the exercise of a judicial discretion upon well established grounds, none of which have been shown to be present. Second, and in any event, the notice of appeal did not cover the contention advanced.

I would accordingly dismiss the appeal with costs.

EBRAHIM JA: I agree.

SANDURA JA: I agree.

S K M Sibanda & Partners, appellants' legal practitioners

Coghlan & Welsh, respondent's legal practitioners