HUZODI INVESTMENTS (PVT) LTD
and
KENI CLEMENT MUTOMBO
and
GIVEUS MUTOMBO
and
ZHANG QING
and
LIU SKENG KENG
and
JONATHAN MAGORIMBO
and
BINGA KUNORUBUTSA
and
OFFICER COMMANDING-ZIMBABWE REPUBLIC POLICE MAZOE DISTRICT
and
PROVINCIAL MINING DIRECTOR-MASHONALAND CENTRAL PROVINCE
and
MINISTER OF MINES AND MINING DEVELOPMENT

HIGH COURT OF ZIMBABWE
MANDAZA J
HARARE; 25 September 2024

Urgent Chamber Application

Advocate *Kachambwa* with *T Kangira*, for the applicant.
Advocate *Sithole* with Mr *Madlabe* for the 1st to 6th respondents.
No appearance for the 7th, 8th and 9th respondents.

MANDAZA J: This matter came before me as an urgent chamber application. When I met the parties for the first time in my chambers they requested time to find each other. However, the parties failed to find each other on several occasions.

At the commencement of the proceedings, Mr *Madlabe* raised a point *in limine*. He strongly objected to Mr Mudimu representing the applicant in this matter. Mr Mudimu has instructed Adv Hashiti and Adv *Kachambwa* to argue the matter. His objection is based on the fact that at some point Mr Mudimu, had acted for the second respondent in a criminal matter that was heard at Bindura magistrates court under CRB BNR375/23, The basis of the point in limine is that the criminal case occurred at the mining location where the case before the court originated from.

At all material times, the second respondent had confided certain information regarding the mine to Mr Mudimu when he was a client of his. His client is apprehensive that the information he shared with Mr Mudimu might be used to his detriment in the present proceedings. According to Mr Madlabe, his client was shocked to learn that the lawyer who had represented him in a criminal matter is now on the opposite side representing the applicant.

He further submitted that, when the parties in this matter appeared in my chambers on 23 August 2024, the second respondent was attending court in Bindura and the lawyers representing him were from Mudimu Law Chambers. His argument was that he was conflicted in this matter. As has already indicated above, his client's fear is that information he might have discussed in confidence with Mr Mudimu might be used to his disadvantage.

He also submitted that should the court find that the applicant's lawyers are conflicted, then every pleading filed by them should fall away. He referred this court to the case of *Longhurst N.O.* v *Lee and Others* HB 29/06. Let me hasten to state that issues of conflict of interest are at the core of the legal profession.

In his response, Advocate *Kachambwa* for the applicant urged the court to exercise its discretion in the matter. Mr *Madlambe* had simply stated the facts and not the law. He referred this court to the case of *Benmac Manufacturing Co (Pvt) Ltd* v *Angelique Enterprises (Pvt) Ltd* 1988 (2) ZLR 52 (H). The court held that there is nothing inherently improper in a legal practitioner representing opposing parties in different matters, provided that no conflict of interest arises in any matter. The onus rests on the defendant to establish that (a) counsel became acquainted with information that could be used to the defendant's disadvantage and (b) real mischief and real prejudice would in all probability result if counsel were allowed to continue to act.

REYNOLDS J in Benmac (supra) held that the only exception to this general rule should be in the most unusual of cases in which the parties themselves have expressly and in writing fully, freely and understandingly consented to that course. It would be a concomitant requirement that full disclosure of the practitioner's role and the possible implications should be made before such consent is even mooted. That was not done in this case.

The court will restrain a solicitor in whom confidences have been reposed by a client from acting against such client where it is made clear to the Court that real mischief and real prejudice will in all human probability result if the solicitor is allowed to act. As a general rule, the court will not interfere unless there is a case where mischief is rightly anticipated. In *casu*,

Mr *Madlabe* has submitted that adequately that mischief is anticipated due to the past acquaintances of Mr Mudimu and his client.

The court in Benmac (supra) held that, the only exception to the general rule should be in the most unusual of cases in which the parties themselves have expressly and in writing fully, freely and understandingly consented to that course. It would be a concomitant requirement that full disclosure of the practitioner's role and the possible implications should be made before such a consent is even mooted. The exception distinguishes the case that is before the court. In *casu*, that was not done. Thus, it is undesirable that any practitioner should put himself in a position where he may find himself acting both for and against a client in the same or different matters.

Advocate *Kachambwa* also referred this court to the case of *Pertsilis* v *Calcaterra and Another* 1999(1) ZLR 70 (H). In that case, a partner in a law firm had acted at different times for all three persons involved in the matter before the court. However, a legal practitioner employed by the partner's law firm was engaged to act for the respondents. The applicant's legal practitioner objected to the employee of the same firm as the partner who had recused himself from representing the respondents.

The court per SMITH J, held that a legal practitioner who represents the adversary of his own client or former client in litigation clearly violates his duty of loyalty to his client or former client and the common law rules against conflict of interests. Such conflict of interest may inhibit the legal practitioner's exercise of judgement on behalf of his client or may lead to the legal practitioner divulging or utilizing the secrets and confidences of his client. A legal practitioner must decline or cease to act where the client's interests might appear to be prejudiced.

The above case is distinguishable from this one in that the legal practitioner was allowed to continue to act because there was no allegation of prejudice and there was no objection to the opposing papers and heads of argument prepared by the respondents being accepted.

Advocate *Kachambwa* submitted that Mr *Madlabe* did not yet identify any information that is privileged. The represented matter is far removed from the issue before the court. The matter that is before the court is of possession. With respect, the court does not agree with Adv *Kachambwa.* The matter at Bindura and the one before the court are closely related in that they both emanate from the same mine. They are closely related. The dispute that saw the second

respondent being arraigned before Bindura magistrates' court emanated from the mine which is the same subject matter of these proceedings.

He also stated that the court in Perstsilis (supra) the lawyer was allowed to act despite being conflicted. However, in that case, the lawyer was allowed to act because there was no conflict of interest and there was no objection from the other party. That aspect makes that case distinguishable from this one. In this case, the second respondent did not give the greenlight for his erstwhile legal practitioner to appear for the applicant. He was actually surprised to notice that his former lawyer is acting for the applicant.

He further submitted that there had been renunciation of agency in that matter on the 23rd of August 2024. However, in the view of the court, the renunciation was done when the horses had already bolted. The renunciation happened after he had been briefed by his client.

The point *in limine* is anchored on the purported conflict of interest of Mr Mudimu. It is prudent therefore that this court explores the issue of conflict of interest. A conflict of interest occurs when the representation of one client will be directly adverse to another client. An attorney cannot represent two parties to a dispute and there must not be any appearance of conflict.

A conflict of interest is a situation in which a person or entity has competing interests or loyalties that could compromise their ability to act impartially or in the best interests of their clients. The case of Markram Jan Kellerman and The Legal Practice Council, Western Cape Office and Others case no 16305/22 provides extensive insights into conflict of interest. It held as follows:

> "Conflicts of interest are taken very seriously in the legal profession, as they should be. They can undermine the integrity of the legal system and erode public trust in the profession. Legal practitioners have a fiduciary duty to act in the best interests of their clients and to avoid any conflicts that could compromise their ability to do so. Legal practitioners must diligently identify and manage conflicts of interest to maintain the integrity of the legal profession and ensure the highest level of representation for their clients."

In the seminal judgement of the *House of Lords in Prince Jefri Bolkiah* v *KPMG* (a firm) [1999] 1 All ER 517, Lord Millet summarized the position as follows: Accordingly, it is incumbent on a Plaintiff who seeks to restrain his former solicitor from acting in a matter for another client to establish that the solicitor is in possession of information which is confidential to him and to the disclosure of which he has not consented and that the information is or maybe adverse to his own. The former may readily be inferred; the latter will often be obvious.

As such, counsel raised an objection *in limine* highlighting that Mr Mudimu is conflicted and should not be allowed to represent the applicant. As indicated above, Mr Mudimu had represented the second respondent in a criminal matter at Bindura magistrates' court. The criminal case originated at the same mine from where the dispute before the court originated from.

Mr *Madlabe* submitted that as such, Mr Mudimu holds privileged information pertaining to the case. Having discovered that they then wrote a letter to Mudimu Law Chambers highlighting their concerns. However, that letter was not responded to save to say when Advocate Hashiti met Mr Madlabe at the High Court he had verbally remonstrated with him for failure to have the matter solved amicably instead of rushing to court.

The applicant had submitted in its heads of argument very briefly that the involvement of Mudimu is improperly raised and as such a litigant cannot address such to a Judge. For that, the Applicant referred the court to the case of *Sahawi International (Pty) Ltd and Another* v *Bredenkamp and Another* HC4221/08. That matter involved the question of whether Adv de Bourdon still had the right of audience in Zimbabwe having relocated to South Africa. In that matter, the plaintiffs had written a letter to the presiding judge directly questioning Mr de Bourbon's eligibility to sit on the bar. The judge held that parties to litigation do not enter into correspondence with the presiding judge. All correspondence to and from court is through the office of the Registrar.

In *casu*, the letter in question was addressed to Mr Jivias Mudimu in his personal capacity but then was uploaded on the IECMS platform. To me, it appears the letter is more of a courtesy letter and indeed it is. The gist of the letter was that Mr Mudimu had represented the respondent in the matter before the court and court proceedings under case number BNR375/23. The fear of the respondents was that their interests would be prejudiced since he had drafted and prepared the court application for the present case HCH3531/24. He had thus acted for the applicant and the defendants in a matter that is anchored on the same facts. The letter went on to state that, if he persisted with the case, the respondents would be approaching the Law Society of Zimbabwe with a formal complaint against him.

The letter was supposed to have been directed to Mudimu Law Chambers directly. However, by being uploaded on the IECMS platform the court ended up having sight of it. I agree with Advocate Hashiti that the procedure adopted by the respondents was wrong. Having had sight of the letter, I cannot pretend to ignore it. The paramount issue as things stand is the

interests of justice. Can justice be served if Mr Mudimu continues to act for the applicant? That is a paramount question which the court has to grapple with.

It is trite that lawyers have an ethical duty towards their clients. A legal practitioner must ensure that he does not have any interest (material or moral) which is adverse to his client's interest. However, a legal practitioner may continue to act for a client despite a conflict of interest if he has disclosed the interest to the client and the client, with full understanding of the disclosure and its implications, has consented to the practitioner's acting in the matter.[1] Practitioners must ensure that when acting for one client they do not prejudice the interests of another.[2] . For example, a practitioner who has acted for a debtor cannot normally act for a creditor who wishes to obtain a sequestration order against the debtor.[3] And a practitioner who has taken instructions from one party to divorce proceedings cannot thereafter act for the other party.[4]

According to Crozier (supra), if a new client asks him to institute proceedings against the former client the practitioner must ask the new client to instruct another practitioner. In casu, having acted for the second respondent, it was incumbent upon Mr Mudimu to advise the applicant to look for another lawyer. Conflicting interests include the interests of an existing client or the need to preserve a former client's confidences. Mr Mudimu had an obligation to preserve his former client's confidences.

Mr Mudimu may no longer be on the bar but it is trite that, when considering whether there is a conflict of interests, a practitioner's partners are to be equated with him.[5] Where there is a dispute between parties, the same legal practitioner or firm cannot act for both parties.

It is not in dispute that Mr Mudimu acted for the second respondent at some point when he was appearing at Bindura magistrates' court in a criminal matter. He may have gained some access to confidential information pertaining to this matter.

Justice must not only be done but must manifestly be seen to be done. As such, a legal practitioner must decline or cease to act, not only where the interests of a client are prejudiced if the legal practitioner continues to act for the other client, but also where the client's interests might appear to be prejudiced. See *R* v *Chisvo and Others* 1968 (2) RLR 54 (A).

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[1] Crozier Legal Ethics: A Handbook for Zimbabwean Lawyers p38.
[2] Crozier (ibid)
[3] Kikwood Garage (Pty) Ltd v Lategan and Another 1961 (2) SA 75 (E)
[4] Mutanga v Mutanga 2004 (1) ZLR 487 (H).
[5] Crozier Note 1 p39

The second respondent is fully justified in fearing that his interests would be prejudiced by their prior acquaintance with Mr Mudimu. This is so because when the legal practitioner represented him in a criminal matter, certain confidential information may or is likely to have been shared because the criminal case and the civil case emanate from the same mine.

Courts of law have expressed a disdain for lawyers who represent both litigants. The courts have held that, the decision of the lawyer to take instructions from both litigants is reprehensible. The courts have emphasized that such conduct should be discouraged. A legal practitioner who represents the adversary of his own client in litigation would be clearly violating his or her duty of loyalty and the common law rules against conflict of interests. See Pertsilis (supra). In the American case of *Stockton* v *Ford 52 US* (11 How) 232,247; 13 L Ed 676 (1850) the fundamental and important 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…the court must see to it that confidence thus reposed shall not be used to the detriment or prejudice of the rights of the party bestowing it". See *Base Minerals Zimbabwe (Pvt) Ltd and Another* v *Chiroswa Minerals (Pvt) Ltd and Others* HH21-16 per MAKONI J (As she then was).

The same point is raised differently by Julian Disney et al in Lawyers (Sweet and Maxwell, London) at p 616 as follows:

Representation of one whose interest diverge from those of a former client is generally recognized to be improper. The divergence might inhibit the lawyer's exercise of judgement 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 utilize the secrets and confidences of his former client for the benefit of the current client.

In *casu*, Mr Mudimu does not dispute that he once acted for the second respondent in a matter which emanated from the same mine which is the subject matter of these proceedings. He should have refused to act for the applicant. In the eyes of the court, he is clearly conflicted. As a general rule, a legal practitioner is entitled to accept or refuse work where he feels that there will be a conflict of interest. A lawyer must therefore at all costs avoid acting against a former client because there is a danger of leaking information obtained in confidence to the prejudice of the former client. Having acted for the second respondent at some point, the fear of the second respondent in the eyes of the court is not far-fetched. See *Mutanga* v *Mutanga* [2004] ZWBHC 67. Such conduct can lead to a possible misconduct charge. Chances of using prior knowledge to the present client's advantage cannot be discounted. Such conduct can even

lead to punitive costs being awarded against the legal practitioner who breaches that duty. See Base Minerals (supra).

And in *Robinson* v *Van Hulsteyn and Others* 1925 AD 12 WESSELS JA (as he then was) held that the court will restrain a solicitor in whom confidences have been reposed by a client from acting against such client where it is made clear to the Court that real mischief and real prejudice will in all human probability result if the solicitor is allowed to act. The test is not the same as that which applies to the recusal of Judicial Officers, where a perceived conflict will suffice. Confidences were reposed when he was briefed for the criminal matter.

The applicant had a previous attorney-client contract with the respondent and confidential information of the applicant was imparted and received in confidence as a result of that contract, the information remains confidential, the information is relevant to the matter at hand and the interests of the second respondent are adverse to that of the former client.

However, the court is mindful of the fact that a client whose legal representative is disqualified loses not just time and money, but also the benefit of Counsel's specialized knowledge of the case. Thus, a fair balance must be exercised.

In the case of *R* v *Special Comrs and Another ex p Morgan Grenfell* 2002 UKHL 21 Lord Hoffman restated that "the policy of legal professional privilege requires that the client should be secure in the knowledge that protected documents and information will not be disclosed at all".

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. See: *Pertsilis* v *Calcaterra and Another* 1999 (1) ZLR 70 (H) per SMITH J.

CURLEWIS JA in *R* v *Hepworth* 1928 AD 265 made the profound statement that 'A Judge…is not only to direct and control proceedings according to recognised rules of procedure, but to see that justice is done'. A legal practitioner must decline or cease to act, not only where the interests of a client are prejudiced if the legal practitioner continues to act for the other client, but also where the client's interests might appear to be prejudiced. See *Pertsilis and Chisvo* (supra).

Applying the above principles to the present case, it is my considered view that the second respondent is justified in believing that the confidential information he shared with Mr Mudimu might be used to his disadvantage.

Accordingly, I cannot allow Mudimu Law Chambers to continue representing the applicant in this matter. It is so ordered that,

Mr Mudimu and his law firm be and are hereby ordered to cease acting for the applicant forthwith.

There shall be no order as to costs.

Mudimu Law Chambers, applicants' legal practitioners.
Hove Legal Practitioners, first to sixth respondent's legal practitioners.
Attorney-General's office, seventh, eighth and nineth respondent's legal practitioners.