

INTERFIN BANK LIMITED (IN LIQUIDATION)
versus
PINNACLE PROPERTIES HOLDINGS (PVT) LTD
and
PHILLIP CHIYANGWA
and
NATIVE INVESTMENT AFRICA (PVT) LTD

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 23 May, 12 July & 16 August 2017

Opposed Application – Stated Case

F Siyakurima, for the applicant
I Ndudzo, for respondent

CHAREWA J: The parties referred to the court for determination as a stated case the single legal issue “whether costs of suit on an attorney client scale and collection commission as provided for under the Law Society of Zimbabwe By-laws (1982) are payable by the first and third defendants jointly and severally, the one paying the other to be absolved, and if not, to determine the appropriate scale of costs”.

The facts and background

The facts and legal background of the matter are common cause: some time in 2011 the parties entered into a Credit Facility Agreement. Upon breach by the defendants (respondents in this matter) the plaintiff (applicant in this matter) issued summons claiming the capital sum, (which aspect the parties have resolved by way of a Deed of Settlement), costs of suit on the legal practitioner and client scale plus collection commission in terms of the Law Society By-laws (1982).

The defendants tendered costs on an attorney and client scale which the plaintiffs declined, insisting on the payment of collection commission as well.

The dispute that therefore remained pertained to the claim, in the summons, for payment of both attorney/client costs and collection commission in accordance with para 5.7 of the agreement.

Parties' submissions

The applicant submitted that the parties agreed among themselves, that should the applicant be compelled to take legal action, the respondents would be liable for both the higher costs and collection commission. The applicant conceded that it is generally impermissible to charge both higher costs and collection commission. However, it argued that s70(2)(iii) of SI 314/1982 entitles legal practitioners to charge both, in so far as trade debts are concerned, as long as there is agreement to that effect between the parties.

Consequently, the applicant submitted, the issue of whether a contractual clause entitling it to both collection commission and higher costs is a penalty clause falls away by operation of the law.

Further, the applicant submitted that the case of *Scotfin v Ngomahuru (Pvt) Ltd*¹, is authority for this position, which binds this court in terms of the *stare decisis* rule. Therefore, applicant argued, any attempt to deviate from this case would be improper, particularly since SI 314/82 goes to the extent of formulating the way such relief must be couched, which formulation was followed with exactitude in the agreement between the parties.

On their part, the respondents agreed with the principles enunciated by the applicant with regard to the *Scotfin* case (*supra*), but disagreed with the conclusion drawn by the applicant. They argued firstly, that collection commission can only be recovered together with higher costs prior to judgment being given. Once there is a judgment then collection commission is not recoverable as any collection is consequent upon an order of the court.

Therefore, the respondent submitted, a legal practitioner is only entitled to collection commission where he has collected on the debt before judgment, unless there is a subsequent agreement after judgment.

Secondly, the respondents argued that the term of the contract obliging them to pay both collection commission and higher costs is a penalty clause which is *prima facie* unenforceable.

¹ 1997 ZLR (2) p567

The law

It is trite that it is generally impermissible to charge both collection commission and costs on the legal practitioner and client scale unless there is agreement to that effect between the parties.

By-law 70(2)(iv) provides that:

“a legal practitioner who is not obliged in terms of this by-law, to charge collection commission on monies collected by him shall be entitled, by agreement with his client, to charge collection commission on such monies”

This is the position that was confirmed in the *Scotfin* case per SMITH and GILLESPIE JJ at 582 B as follows:

“As is well known, costs are awarded at this higher rate only in exceptional circumstances. They may, however, be awarded when there is agreement to such an effect. The purpose of such agreement, quite obviously, is the same as the intention behind an agreement that the debtor will be liable to reimburse his creditor collection commission. It is to ensure that the creditor does not suffer the inevitable loss which will be incurred as a result of the taxation of a party and party bill, even though he recovers his costs.”

They proceed at 584 F-G:

“The appropriate form of order for such relief moved in the High Court is accordingly the following, where there is an agreement between the creditor and debtor that collection commission and costs on the higher scale may be recovered:

‘Judgment for the plaintiff in the sum of \$x together with interest at the prescribed rate, presently y% per annum from until the amount is paid in full and collection commission thereon calculated in accordance with by-law 70 of the Law Society of Zimbabwe by-Laws, 1982, and costs on the legal practitioner and client scale to the extent such costs are permitted in proviso (iii) to by-law 70(2).

Now, By-law 70(2)(iii) provides that:

“in the collection of a claim falling outside the jurisdiction of the magistrates courts, the legal practitioner shall, in addition to collection charges, be entitled and obliged to charge his client with fees for professional services rendered in regard to the obtaining of judgment against the debtor.....”(my emphasis)

It seems to me therefore that By-law 70(2)(iii) entitles a legal practitioner, once the parties have agreed, to charge collection commission up to and including the obtaining of judgment. In order to make collections on a debt, a legal practitioner must employ a series of tools, commencing with the issuance of a letter of demand. Should this fail to elicit the required result an escalation of the collection method is necessary, up to and including

issuance of summons, obtaining judgment and perhaps ensuring execution thereof as appropriate.

The proposition for a division of the collection process upon which it is argued that after a certain point, a legal practitioner should not claim collection commission in addition to attorney and client costs, despite agreement to that effect, seems to me to be superficial. Rather, it appears more logical that once a debt is handed over, a legal practitioner is entitled to employ whatever means necessary to ensure collection, including obtaining judgment, and receive the collection commission therefor. It is therefore not necessary to enter another agreement to that effect after judgment has been handed down.

It is thus illogical to suggest that if the instrument of collection of a debt is a letter of demand, the parties' agreement is applicable, but once the instrument becomes a judgment of the court, the agreement is inapplicable. It seems to me that such an interpretation defeats the very purpose of By-law 70(2)(iv) as explained in the *Scotfin* case at 582B.

In fact, By-law 70 appears to support the interpretation that there is no limit as to when collection commission may be charged, providing as it does in sub-by-law (1)(a) that

“payment of instalment collected’ includes any payment madeafter the matter has been handed to the attorney for collection”. (my emphasis)

The period after a matter has been handed over extends beyond the issuance of a judgment since no cut off is prescribed by the by-laws. In fact the only limitation appears to be for uncontested claims in terms of sub-by-law (2), which puts the maximum limit of commission payable at \$100 where payment is made in one lump sum in response to a letter of demand.

Application of the law to the facts

The plaintiff and the defendant entered into a loan agreement where the defendant agreed to pay, in the event of litigation, the plaintiff's costs on a legal practitioner and client scale, as well as collection charges. The starting point therefore is that this agreement between the parties rendered inapplicable the principle that both collection charges and costs on the higher scale are not normally payable.²

² See also *Tselentis House (Pvt) Ltd v Southern African P&P House (Pvt) Ltd* 1995(1) ZLR 56 (H) and *SEDCO v Guvheya* 1994 (2) ZLR 311 (H)

The defendants do not dispute this baseline argument. Rather, their contestation of the obligation to pay both these costs is based on the premise that since the matter was resolved by a judgment of the Court, rather than collection by the legal practitioner, then no collection commission is leviable.

I am not persuaded by the respondents' argument, having regard to the interpretation of By-law 70(1)(a) and 70(2)(iii) above. The cases that have been decided on this point in our jurisdiction have leaned either one way or the other. For the reasons I have elucidated above, I favour the interpretation rendered in the cases which have held that, upon agreement between the parties, collection charges and legal practitioner and client costs are recoverable at any stage after handover to legal practitioners.

To suggest otherwise, as advanced by the respondent, is tantamount to making new contract terms for the parties, which our law frowns upon.³ The court would in fact be saying to the parties, your agreement that any legal expenses incurred "by way of the institution of legal proceedings or otherwise, arising from your default or failure to adhere to the terms and conditions" of the contract between you shall be recoverable "on a legal practitioner and client basis in addition to any collection charges" is altered to read that these expenses are only recoverable before the issuance of judgment.⁴

It would be an absurdity for the law to allow parties to agree that should litigation ensue, the plaintiff should recover its costs on the higher scale together with collection commission, and then turn round and say, such agreement will only apply before judgment is rendered, when the agreement itself does not say so. Such a position would be tantamount to giving with one hand and taking with the other and amount to a negation of the parties' freedom to choose what terms to agree on, in circumstances where such agreement is not illegal.

Nor am I persuaded that the agreement between the parties, that both collection commission and higher costs are payable, amounts to a penalty clause which is *prima facie* unenforceable. This is because, firstly, it is trite that penalty clauses are enforceable in the exercise of a court's discretion.⁵ Secondly, the law, in the form of By-law 70(2)(iii) permits this particular penalty clause.

³ *Kundai Magodora & Anor v Care International* SC 191/13

⁴ Per clause 5.7 of the Facility Agreement *in casu*

⁵ See s4(1) of the Contractual Penalties Act [Chapter 8:04]

Further, the courts also recognise the sanctity of agreements between the parties and are loath to interfere with contractual obligations unless there are compelling reasons like illegality or a lack of *ad idem*.⁶ That a contracting party might not like the consequences of his contractual obligation is certainly not good reason to seek the court's protection.⁷

Consequently I find that a claim for costs on the higher scale and collection commission are perfectly permissible in our jurisdiction so long as

- i. the claim arises from an express term of agreement between the parties
- ii. it is intended to compensate a plaintiff for costs unnecessarily incurred in suing for and collecting on a debt which is admitted or has been proved; and
- iii. as long as the contractual terms are legal.

The court, in those circumstances will not and should not interfere with the consequences of the agreement between the parties even up to and after judgment.

Disposition

In the premises, it is ordered that the 1st and 2nd respondents shall pay, jointly and severally, the one paying and the others to be absolved, the applicant's costs of suit on a legal practitioner and client scale together with collection commission as provided for under the Law Society of Zimbabwe By-Laws 1982).

Sawyer & Mkushi, applicant's legal practitioners

Mutamangira & Associates, respondent's legal practitioners

⁶ Innocent Maja, *The Law of Contract in Zimbabwe 2015* at p.24-25

⁷ R.H. Christie, *The Law of Contract in South Africa*, 2nd Ed.