

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
AT LUSAKA**

2011/HP/260

BETWEEN:

HOTELIER LIMITED

1ST PLAINTIFF

ODY'S WORKS LIMITED

2ND PLAINTIFF

AND

FINSBURY INVESTMENTS LIMITED

DEFENDANT

**BEFORE HON. JUSTICE NIGEL K. MUTUNA ON 14TH DAY OF DECEMBER,
2012**

**FOR THE PLAINTIFFS: MR. S. SIKOTA SC OF MESSRS CENTRAL
CHAMBERS**

**FOR THE DEFENDANT: MR. J. SANGWA OF SIMEZA SANGWA AND
ASSOCIATES**

R U L I N G

Authorities referred to:

1) High Court Act, Cap 27

**2) The Legal Practitioners' Practice Rules, 2002, Statutory
Instrument Number 51 of 2002**

This is the Plaintiffs' application by way of summons to determine the status of the Defendant's counsel in relation to this mater. The application is made pursuant to Order 3 rule 2 of the **High Court Act** as read with Rules 32(3) and 33(1) of the **Legal Practitioner's Practice Rules**.

The application is supported by an affidavit filed on 24th July, 2012 and sworn by one Odysseas Mandenakis. The Defendant's response is by way of an

affidavit in opposition filed on 8th August, 2012, sworn by counsel for the Defendant, one John Peter Sangwa (the practitioner).

The brief facts of this case as they are relevant to this application are as follows. In October, 2010 Odysseas Mandenakis, the managing director of the Plaintiff companies, lodged a complaint on his behalf and that of the Second Plaintiff against the practitioner, counsel for the Defendant, with the Legal Practitioner's Committee. The complaint related to an allegation of misconduct on the part of the practitioner.

Following consideration of the complaint, the Legal Practitioners' Committee handed down its ruling on 15th June, 2012. The Legal Practitioners' Committee found the practitioner culpable and in breach of the rules of professional conduct and severely reprimanded him. It also expressed its hope that that was the last time the practitioner would take instructions from a client where obvious issues of conflict of interest exist.

The affidavit evidence of Odysseas Mandenakis alleges the following facts. That the Plaintiffs are currently involved in this litigation against the Defendant which is represented by Messrs Simeza Sangwa and Associates. The dealing counsel on behalf of the Defendant is the practitioner. Previously, Messrs Simeza Sangwa and Associates have represented the Second Plaintiff in other matters in particular the cases involving the land dispute for the plots on which the subject matter of this dispute is located. In so doing the practitioner rendered advice to Odysseas Mandenakis on the issue on various occasions. Further, that he had represented him and his companies in other matters such as the case of *Fred Matipa-Vs-Ody's Works Limited*.

The affidavit revealed further that in October, 2010, Odysseas Mandenakis lodged a complaint against the practitioner which was adjudicated upon by the Legal Practitioners' Committee of the Law Association of Zambia. The Committee found that it was wrong for the practitioner or indeed Messrs

Simeza Sangwa and Associates to take instructions against his or their former client the Second Plaintiff. Arising from the content of the ruling, the Plaintiffs and their advocates wrote a letter to Messrs Simeza Sangwa and Associates to find out if they would continue to act against the Second Plaintiff in this matter in the wake of the ruling of the Legal Practitioners' Committee. The Plaintiffs' advocates also spoke to the practitioner to state his position on the matter and he has indicated that he will continue to represent the Defendant in this matter against the Plaintiffs despite the ruling of the Legal Practitioners' Committee because he sees no conflict of interest. Pursuant to the foregoing facts, it was contended that there is a conflict of interest resulting from the practitioner acting for the Defendant whose effect was evident during cross examination of Odysseas Mandenakis as the Plaintiffs' witness. Further that, the said conflict of interest is prejudicial to the interests of the deponent and is in clear breach of the practitioner's duty as an advocate towards him.

In the affidavit in opposition the practitioner confirms that he is counsel practicing in the firm of Messrs Simeza Sangwa and Associates and that he has conducted this matter on behalf of the Defendant. He also confirms that he was the Respondent in proceedings before the Legal Practitioners' Committee instituted by Odysseas Mandenakis and the Second Plaintiff. Further that, the sanction imposed on him by the said ruling was a reprimand and he has continued to practice law. He ends by stating that the ruling is now the subject of legal proceedings before this Court under cause number 2012/HP/0877 instituted at his instance and that the issues that the Plaintiffs seek to address through this application are therefore subjudice.

The application came up for hearing on 13th November, 2012. Counsel for the parties agreed that they would file written submissions following which I should render the ruling. There is default on the part of both counsel because they did not comply with the directive.

In determining this application I have therefore only considered the affidavit evidence and pleading on the record.

This application raises a very important issue which is counsel's duty to his client or former client. It's determination lies in the interpretation to be given to the ruling handed down by the Legal Practitioners' Committee and indeed ***The Legal Practitioners' Practice Rule, 2002.***

The affidavit evidence reveals that there are a number of facts that are not in contention and they are as follows:

- 1) that a complaint was taken out against the practitioner in his capacity as counsel by Odysseas Mandenakis and the Second Plaintiff which complaint was adjudicated upon by the Legal Practitioners' Committee.
- 2) that the Legal Practitioners' Committee found the practitioner culpable and reprimanded him
- 3) in the ruling of the Legal Practitioners' Committee it is clear that it proceeded on the premise that the practitioner had initially been counsel for Odysseas Mandenakis and the Second Plaintiff in another matter. The ruling therefore, indicates that initially there was a lawyer/client relationship between the practitioner and the two
- 4) despite the facts in 3 above, the practitioner later took instructions in a matter involving a party against Odysseas Mandenakis and or the Second Plaintiff
- 5) the Legal Practitioners' Committee reprimanded the practitioner and expressed hope that he would not take instructions where obvious issues of conflict of interest exist

Arising from the foregoing undisputed facts, the issues as I see them for determination are, what is the effect of the ruling of the Legal Practitioners' Committee; and should the practitioner and his firm be representing the Defendant in this matter against the Second Plaintiff.

It has been contended by the Plaintiffs that the ruling bars the practitioner from acting against the Second Plaintiff. The practitioner on the other hand has contended that it merely reprimanded him and he continues to practice law. Further that, he has taken out an action in judicial review which action raises the same issues that this application raises. The matter is therefore, subjudice.

Before I consider the issues, it is important that I highlight the background to the complaint lodged against the practitioner and the basis upon which the Legal Practitioners' Committee made its decision as can be discerned from the ruling.

The background to the complaint is that, there was a legal dispute outstanding between the Second Plaintiff and Finsbury Investments Limited and Rajan Mahtani. The practitioner was representing Finsbury Investments Limited and or Rajan Mahtani in that dispute, whilst the Second Plaintiff had engaged Messrs Central Chambers. During the course of the dispute, around 24th July, 2012, the practitioner made direct contact with Odysseas Mandenakis as representative of the Second Plaintiff in an effort to seek an amicable settlement to the dispute. Whilst doing this the practitioner was acting in his capacity as counsel for Finsbury Investments Limited and or Rajan Mahtani and he was well aware that the Second Plaintiff had engaged counsel. The contacts made by the practitioner were to Odysseas Mandenakis by way of phone calls and visits to his residence. In justifying the said contacts the practitioner alleged that he considered Odysseas Mandenakis as a friend, their relationship having started off as lawyer/client.

In arriving at its decision the Legal Practitioners' Committee considered two issues namely:

- 1) whether or not it was professionally proper for the practitioner to take instructions in a matter against his former client and a person he considered a friend

- 2) whether or not in the circumstances and all things considered the practitioner could justifiably bypass the Second Plaintiff's advocates and directly approach the Second Defendant with a proposal for settlement of the matter in contention between Rajan Mahtani and or any company associated with him.

In answering the first issue the Legal Practitioners' Committee was guided by the provisions of rules 32 (3) and 33 (1) (f) of the **Legal Practitioners' Practice Rules**, whilst in answering the second issue it was guided by Rule 37(3) of the same rules. The Legal Practitioners' Committee as I have stated earlier proceeded to find against the practitioner and severely reprimanded him.

I now turn to determine the two issues. The first issue is on the effect of the ruling of the Legal Practitioners' Committee. As I have stated in the earlier part of this ruling, the Legal Practitioners' Committee found the practitioner culpable and in breach of the rules on professional conduct. It proceeded to severely reprimand him and recorded its hope that that was the last time he would take instructions where obvious issues of conflict of interest exists. The Legal Practitioners' Committee arrived at the foregoing decision after it considered three rules namely rule 32(3) 33(1)(f) and 37(3). Rule 32(3) states as follows:

"A practitioner shall act towards a client at all times in good faith."

On the other hand rule 33(1) (f) states as follows:

"A practitioner shall not accept any brief if to do so would cause the practitioner to be professionally embarrassed under the following circumstances

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

(f) there is or appears to be some conflict or a significant risk of some conflict either between the interest of the practitioner, or of any partner or other associate of the practitioner, and some other person or between the interest of any one or more of their clients.”

While rule 37(3) provides as follows:

“A practitioner shall not communicate about a particular case directly with any person whom the practitioner knows to be represented in that case by another practitioner without the latter’s consent.”

The foregoing rules clearly set out the duty that counsel owes to a clients and how he should conduct himself when dealing with his clients. Further, and in particular rule 37(3) prohibits a practitioner from communicating with a party that is represented by another party. Arising from the foregoing, the net effect of the ruling is that it found that the practitioner having been counsel for the Second Plaintiff in another matter and dealt with Odysseas Mandenakis as its representative, ought not to have taken on instructions against the Second Plaintiff. He should not also have dealt with Odysseas Mandenakis directly as representative of the Second Plaintiff because the latter had engaged counsel. Further, the expression of the hope by the Legal Practitioners’ Committee that that was the last time such a thing would occur was a directive to the practitioner that he should desist from taking instructions against former clients or dealing directly with a represented party.

For purposes of this application the relevant portion of the ruling is the one that relates to rule 33(1)(f) and the finding that the practitioner should not have taken instructions against his former client.

Having determined the effect of the ruling, I now turn to determine the second issue of whether or not the practitioner and his firm should be representing the Defendant against the Plaintiffs in particular the Second Plaintiff. The deponent to the affidavit in support of this application has given a background to the client/lawyer relationship that existed between the practitioner and his firm and the deponent and the Second Plaintiff. The practitioner has not denied that such a relationship existed and in fact it appears from the ruling that he did concede during the proceedings before the Legal Practitioners' Committee that he was not only a friend to the deponent but also had been his and his company's counsel. The said situation places the practitioner and his firm squarely in breach of rule 33(1) (f) of the **Legal Practitioners Practice Rules** and he should therefore not have taken on instructions in this matter. I would go further and state that arising from the allegations made by Odysseas Mandenakis that the practitioner used information he obtained from him during the subsistence of their relationship as client and lawyer in cross examination, that he was in further breach of rule 33(1)(g). The said rule states as follows:

"33. (1) A practitioner shall not accept any brief if to do so would cause the practitioner to be professionally embarrassed under the following circumstances:

- (a) ...***
- (b) ...***
- (c) ...***
- (d) ...***
- (e) ...***
- (f) ...***

(g) the matter is one in which there is a risk of a breach of confidences entrusted to the practitioner, or to any partner or other associate, by another client or where the knowledge which the practitioner possess of the affairs of another client would give an undue advantage to the new client.”

The background to the relationship between the practitioner and Odysseas Mandenakis as representative of the Plaintiffs reveals that the practitioner gave Odysseas Mandenakis advice in respect of the land dispute where the subject matter of this dispute, the hotel is located. Clearly this gives the Defendant undue advantage over the Second Plaintiff because as its counsel, the practitioner has information on the subject matter of the dispute which he obtained as counsel for the Second Plaintiff. This information as Odysseas Mandenakis has alleged was used by the practitioner during cross examination, which fact is not denied by the practitioner in his affidavit in opposition. It is irrelevant that at the time he was taking on the instructions in this matter the ruling of the Legal Practitioners' Committee had not yet been delivered because he was still bound to comply with the rules which were promulgated in the year 2002.

Further, it is no defense that he was reprimanded by the Legal Practitioners' Committee and as such he can now move on, because the reprimand was with a caveat that he should not repeat such conduct which he did by virtue of continuing to act against the Second Plaintiff in this matter after the ruling was brought to his attention. It is also no defense to state that the practitioner has taken out an action in judicial review against the ruling of the Legal Practitioners' Committee. This is because for as long as he shall remain former counsel for the Second Plaintiff he will be revisited by rule 37(1)(f) whenever he is confronted with a decision whether or not to take an instruction from a client who is against the Second Plaintiff. This rule will be in place and continue to haunt the practitioner whether or not the decision of

the Legal Practitioners' Committee is quashed in the judicial review proceedings.

In answer to the second issue, I find that the practitioner, John Peter Sangwa and his firm Messrs Simeza Sangwa and Associates ought not to have taken on instructions against the Second Plaintiff in this matter. I accordingly find merit in the application and direct that the practitioner and his firm should forthwith remove themselves from the record as acting for the Defendant.

I also award costs to the Plaintiffs.

Leave to appeal is granted.

Delivered in chambers this 14th day of December, 2012.

NIGEL K. MUTUNA

HIGH COURT JUDGE