IN THE HIGH COURT FOR ZAMBIA **2012/HP/1363**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

BETWEEN:

K.B.F & PARTNERS **PLAINTIFF**

AND

SABBIR SULEMAN PATEL **1ST DEFENDANT**
IDRIS SUELAMAN PATEL **2ND DEFENDANT**

Before: ***The Hon. Mr. Justice Charles Zulu.***

For the Plaintiff: Ms. M. Banda, Mr. L.K. Phiri & Ms. C. Mulenga of Messrs. K.B.F & Partners.

For the Defendants: Mr. C. M. Sianondo of Messrs Malambo and Company.

J U D G M E N T

Cases referred to:

1. ***Griffiths v. Evans [1953] 2 ALL E.R. 1365.***
2. ***Ohaga v. Akiba Bank Limited (2008) 1 EA 300.***
3. ***Hurlingham Estates Limited v. Wilde & Partners [1997] 1 Lloyds Law Report, 523.***
4. ***Mushemi Mushemi v. The People (1982) Z.R. 71***
5. ***The Legal Practitioners' Act, Ex-parte the Legal Practitioners' Committee of the Law Association of Zambia (2018) Z.R. Special Edition 33.***
6. ***Warmington v. McMurray [1937] 1 ALL ER 562.***

Legislations referred to:

1. ***The Legal Practitioners (Costs) Order, Statutory Instrument No. 6 of 2017.***

2. ***The Legal Practitioner's Act, Chapter 30 of the Laws of Zambia.***

Other Materials referred to:

1. ***Halsbury's Laws of England, (4th Edition Re-issue Vol. 17 at para. 48.***
2. ***Halsbury's Laws of England (4th Edition Re-issue Vol. 44 (1) para 114-118).***
3. ***Lewis and Kyrou, "Handy Hints on Legal Practice" (Second Edition, South Africa, Lexis Nexis, 2011 reprinted page 20).***

INTRODUCTION

Mr. Kelvin Bwalya Fube, an advocate of the Superior Courts in Zambia, practicing under the style of KBF and Partners took out a writ of summons and statement of claim dated November 9, 2012. The action was taken out in the name of his law firm against the Defendants, his former clients, seeking the following reliefs.

(i) the sum of K1,430,000,000.0 being money owed to the Plaintiff by the Defendant for the legal service rendered to the Defendant.
(ii) interest at commercial bank lending rate; and
(iii) costs.

The Defendants entered their appearance and defence dated December 10, 2012. They disputed the Plaintiff's claims, and averred that legal fees for legal services rendered by the Plaintiff were by agreement fixed at the sum of K100, 000.000.00, and the debt was fully discharged, before the advocate client relationship was terminated.

BACKGROUND

It is not in dispute that the Defendants, Nabir Suleman Patel and Idris Suleman Patel who happen to be brothers, in 2009 were arrested and charged with murder in the case of the ***People verses Mathew Mohan and Two Others (Defendants) HP/03/2010***, involving the killing of Sajid Mohammed Itowala on July 21, 2009. The Plaintiff among other law firms, Messrs Mumba S. Kapumpa Associates and Messrs Milner Katolo and Associates were retained by the Defendants to defend them in the said murder case.

It appears the Defendants were committed to the High Court for summary trial on September 16, 2009, and trial commenced on January 14, 2010. Between September 4, 2009 and February 26, 2010, the Defendants, in three instalments paid to the Plaintiff a total sum of K100, 000, 000.00 (un-rebased) for legal fees.

The Law Association of Zambia by letter dated February 2, 2010, suspended Mr. Bwalya from practicing law and was debarred from appearing in any court of law or tribunal, until November 8, 2010, when his practicing certificate was restored. The effect of the suspension was such that the law firm was closed. However, the other law firms respectively retained by the Defendants continued to appear in defence of the Defendants during trial until their acquittal in 2013.

And while the Defendants were in detention, Mr. Bwalya by letter dated June 1, 2012, presented to the Defendants an itemized bill of costs for legal services rendered to the duo, supposedly for a period

from September 2009, to April 2012, and demanded to paid the sum of K1, 430, 000, 000.00. And by letter dated November 22, 2012, the Defendants expressed shock at the bill of costs, and rejoined that, what was agreed to paid as legal fees covering the entire case was K100, 000, 000. O0 and that the same was fully paid.

The Plaintiff in reply described the Defendants' defence a total fabrication, and averred that it was impossible to a have a fixed agreed flat fee with a client in a criminal matter, because the length of trial was unpredictable.

Furthermore, the Defendants filed a counter-claim against the Plaintiff, alleging that while in detention they gave Mr. Bwalya some money, which he failed to repay, the counter-claim was couched as follows:

(i) refund of the sum of ZMK 332,000,000.00 and US$ 55,000.00;

(ii) an order that the Plaintiff be only paid on quantum meruit rule regarding the agreement of ZMK 100,000,000.00 for the whole case which the Plaintiff did not fulfill;

(iii) interest; and

(iv) costs.

The counter-claim was disputed by the Plaintiff, by alleging that the monies were given with instructions for onward transmission to third parties, the Defendants had dealings with.

SUMMARY OF THE PLAINTIFF'S CASE BY WITNESSES' TESTIMONIES

Four Plaintiff Witnesses (PWs) testified. PW1 was Mr. Kelvin Fube Bwalya (hereinbefore mentioned).

PW1, Mr. Bwalya testified that on September 5, 2009, while the Defendants were in detention and before he met them, he was approached by Mr. Essa (DW1), who sought legal representation on behalf of the Defendants. He said when Mr. Essa asked how much it would cost to represent the duo. He said he indicated to Mr. Essa that it was difficult to give him a flat figure for legal fees, because the length of trial was unpredictable. He said thereafter he visited the Defendants in prison and took instructions, and indicated to them that he needed to be paid a deposit. He said the Defendants assured him that they would send their younger brother to pay.

He said the Defendants paid K100, 000.00 (rebased) (NB the currency hereinafter is rebased). He added that the said K100, 000.00 was paid as a deposit towards legal fees. He made reference to receipts issued by the Plaintiff exhibited at page 7 and 8 of the Defendants' bundle of document showing that: (i)on September 4, a sum of K30, 000.00 was paid as "deposit towards costs"; (ii) on September 25, 2009, a sum of K20, 000.00 was paid as "being payment received on costs"; and (iii) on February 26, 2010, a sum of K50, 000.00 was paid as" deposit towards costs".

He said during his suspension as an advocate, he still used to attend the Defendants' trial, and would sit in the court room pews,

and that he used to converse with serving advocates defending the Defendants as a consultant. He added that after his suspension was lifted in November 2010, he was re-engaged by the Defendants.

And as regards the counter claim, he said between he and the Defendants they had developed mutual trust. He said as a result, the Defendants used to send their younger brother (DW1) to his office with sums of money with instruction for onward payment to third parties. He said he paid as instructed and complained that he found it unfortunate that now he was being asked to account for monies, paid to third parties who were strangers to him. He denied borrowing from the Defendants to buy poultry equipment, stating that he has never been a farmer.

In cross examination, he admitted being privy to the term 'letter of engagement' also known as a 'retainer agreement'. According to him, the letter of engagement spells out terms of the relationship between an advocate and his client. And he admitted that between he and the Defendants there was no letter of engagement. He also conceded that after his re-engagement he had no letter of re-engagement, or proof that he was engaged as a consultant. He also said he had no documentary proof of payments made to third parties in respect of monies given to him by the Defendants in sums of K332, 000.00 and USD $55, 000.00 respectively.

PW1 was Mr. Mumba Smith Kapumpa SC, an advocate of the Superior Courts in Zambia. He said he was the most senior advocate that was engaged by the Defendants in their murder case.

He stated that in criminal matters unlike in civil matters, when getting instructions from a client, an advocate does not from the onset agree with the client on a specific amount to be paid as fees for the entire case, except on a deposit to be paid. He added that as the case progress, an advocate updates his/her client, including advising the client on the fees to be paid from time to time.

He said at the end of the case, a final bill is presented to the client, detailing work done, the time spent, and the deposit paid. He reiterated that in criminal matters, it was impossible to agree with a client how much a client should pay for the entire case, because it was not certain to know when the case will come to an end, especially in complex criminal cases.

According to him, in the light of the uncertainties in criminal matters, the practice was such that an advocate does not agree with his/her client on the amount (legal fees) to be paid.

He said even at the time Mr. Bwalya was suspended by LAZ, Mr. Bwalya used to sit in the auditorium during trials and that during breaks, including when the case was adjourned, Mr. Bwalya was participating in strategic defence team discussions involving the case.

He added that after Mr. Bwalya's suspension was lifted, he continued to be part of the defence team as if he was not on suspension. He said after the acquittal of the Defendants he presented his final bill to the Defendants, but the same was not paid.

PW3 was Melody Ndhlovu, the Personal Secretary to Mr. Bwalya, for convenience, I will proceed to PW4, Mr. Milner Joseph Katolo.

PW4 was Mr. Milner Joseph Katolo, an advocate of the Superior Courts in Zambia and one of the advocates individually retained by the Defendants in their murder case. He materially testified in similar lines as PW2, Mr. Kapumpa SC. He said the Defendants paid to him a deposit of $25,000 as legal fees for legal representation. He said the amount was paid 'to start the case and run the case'. He said in criminal matters there was no scale of fees. He explained that an advocate had to agree with the client how the client was to be billed; whether by way of a lump sum for the entire case or hourly rate. He added that his final bill for the Defendants was still outstanding.

He said when Mr. Bwalya was on suspension, Mr. Bwalya used to do legal research in the background, and from time to time he would meet with the Defendants.

In cross-examination he admitted that he was not privy to the terms of engagement between Mr. Bwalya and the Defendants.

PW3 was Ms. Melody Ndhlovu, the Personal Secretary to Mr. Bwalya. She said the K100, 000.00 paid by Mr. Irfan (DW2) on behalf of his brothers (Defendants) to the Plaintiff was a deposit. And that after the case came to an end a final bill was prepared less the deposit paid.

THE DEFENDANTS' CASE BY WITNESSES' TESTIMONIES

Defence Witness number one (DW1) was Mr. Younus Essa. He said on August 28, 2009, he and Irfan Patel, the brother to the Defendants went to see Mr. Bwalya at his office with a view to have him engaged to represent the Defendants in the murder case. He added that on August 30, 2009, he, Mr. Ifarn Patel and Mr. Bwalya had a meeting with the Defendants at Kamwala Remand Prison. He said, the second Defendant Mr. Idris Suleman Patel, asked, Mr. Bwalya the cost of legal representation. He said Mr. Bwalya replied that he would advise as the case progressed. He said Mr. Idris Suleman Patel requested for the full amount for the entire case, and that Mr. Bwalya responded by stating they should pay K150, 000.00 for the entire case regardless of the length of trial. He added that after negotiations, the amount was reduced and a flat fee of K100, 000.00 was agreed upon. He said the amount was paid in three instalments, namely K30, 000, K20, 000, and K50, 000.

He said Mr. Bwalya was suspended from practice, and did not fulfill his commitment. According to him, Mr. Bwalya should return part of the K100, 000.00 he was paid by the Defendants.

DW2 was Irfan Suleman Narbandh, also known as "Shabbi", the brother to the Defendants. He said in 2009, he established contact with Mr. Bwalya, through Mr. Essa (DW1) when the Defendants were implicated in the murder of Itowala. His testimony was materially similar to that of DW1, suffice to record that he stated that the total full amount agreed upon for legal representation

between Mr. Bwalya and the Defendant was K100, 000.00. He said the amount was paid in full, in three instalments to Mr. Bwalya through him.

He said when the last payment in the sum K50, 000.00 was paid and a receipt was issued, indicating that it was a 'deposit'; he raised issues with Mr. Bwalya. He said Mr. Bwalya assured him that his secretary was not aware that it was a final payment, and that it was going to be rectified. He said he did not make a follow up on the issue.

He also stated that his elder brother Idris Patel, also asked him to deliver and delivered the sums of K332, 000.00 and USD$55,000.00 to Mr. Bwalya. He said he did not know why he was paying this money to Mr. Bwalya.

DW3 was Mr. Patel Idris Suleman, the second Defendant. He said when his brother, Ifarn (DW2), Mr. Essa (DW1) and Mr. Bwalya visited him and his co-Defendant in prison, legal fees agreed to be paid was in the sum of K100,000.00 for the whole case from the Subordinate Court to the High Court. He said the sum of K100, 000.00 was paid in three instalments. He said during trial Mr. Bwalya was suspended, but Mr. Kapumpa SC, and Mr. Katolo carried on with the case.

He said in 2010, when Mr. Bwalya visited him in prison, Mr. Bwalya pleaded with him, asking for some money, for him to sort out issues he had with another client. He said this was followed by another request for financial help. He said financial assistance rendered was

in the sum $55, 000.00, and K52, 000.00. He added that in July 2010, Mr. Bwalya again requested for financial assistance for importation of his poultry farming equipment. He said he assisted him with the sum of K280, 000.00. He said all the amounts were made available to Mr. Bwalya through his brother, Ifarn (DW2). He said the said monies were given to Mr. Bwalya, and that he waited for repayment of the same, but to no avail

He said he was instead shocked to be presented with a bill of K1, 430, 000.00 for legal fees from Mr. Bwalya. He made reference to the response he and his co-Defendant wrote to Mr. Bwalya dated November 22, 2012, couched as follows:

> ***KBF & PARTNERS***
>
> ***RE: BILL OF COSTS***
>
> ***This is in reference to the bill you sent to us dated 1st June 2012.***
>
> ***We are shocked that you could send such a bill amounting to K1, 480, 000, 000 after we agreed before we hired u***(sic) ***that we should pay you K100, 000, 000 (hundred million kwacha) for the whole case and we paid the K100, 000, 000 in 3 instalments and you gave us the receipts. We cannot believe that you can send us such a bill claiming such an amount and showing that we only paid you K50, 000, 000 as deposit.***
>
> ***We paid you the full amount even though you were not on the bench for 9 months due to your suspension.***
>
> ***We have since been asking you through your representation to come to prison to see us but till now you have failed to come.***
>
> ***We are sorry but we do not think we owe you any money.***

Please check your debtors' record or and come and see us.

Kind regards

Idris Patel

Shabbir Patel

In cross examination, he admitted that he was alive to the fact that certain information was shared in confidence with Mr. Bwalya, but denied giving instructions to Mr. Bwalya to pay third parties as alleged by Mr. Bwalya. He said he was not aware that the money was paid to his brothers' girlfriend, or to his co-accused, Mohan or his mother. He said the money given to Mr. Bwalya was never evidenced in writing.

SUMMARY OF THE PARTIES' SUBMISSIONS

The Plaintiff's Counsel kindled their submissions by noting that legal representation in criminal matters, unlike in civil litigation was not regulated by an instrument of law in terms of a scale of fees. That whereas legal representation in contentious civil litigation, legal fees or a legal practitioner's bill was recovered and measured in conformity with the ***Practitioners (Costs) Order, Statutory Instrument No. 6 of 2017***, legal representation in criminal matters was not covered by any statutory instrument prescribing legal fees.

It was submitted that the practice in criminal matters is that, a legal practitioner upon taking instructions, the client is asked to pay a deposit, and as the case progresses interim bills are issued

from time to time, and that at the end of the case a client is presented with a final bill. It was submitted that the final bill is informed by: the gravity of the case, number of witnesses, visitations by client, and time spent on the case. That it was impossible in criminal matters, for a legal practitioner to agree with a client on a flat fee at the beginning of the case for the entire case, due to uncertainties, such as the length of trial, and that the full extent of the case may be unascertained at the time of taking instructions.

It was argued that there was no agreement between the Plaintiff and the Defendants, that the latter would only pay a flat fee of K100,000.00 (rebased) to cover legal representation for the entire case. According to Counsel, the documents (receipts) presented before court indicate that the sum of K100. 000.00 was a deposit, and not final payment.

And as regards the counter-claim, it was first pointed that communication passed to Mr. Bwalya in the course of the retainer with the Defendants was confidential and was protected from disclosure by legal professional privilege. And, reference was made to paragraph 235, of ***Halsbury's Laws of England, Volume 17*** wherein it is recorded:

> ***Privilege of a witness may in certain grounds be claimed as a ground for refusing to give evidence as to matters relevant to an issue even though the witness who would depose to such matters is generally competent and compellable to give evidence. Privilege may be waived to***

be given of matters in respect of which might have been claimed.

It was argued that the money that was given to Mr. Bwalya was distributed according to instructions given by his clients, the Defendants. It submitted that in the absence of consent from the Defendant to allow Mr. Bwalya to disclose communication passed in confidence, it was impermissible for Mr. Bwalya to go into detail to disclose to whom the monies were paid.

According to the Plaintiff, the counter-claim was an afterthought, designed to escape the obligation to pay legal fees. I was thus urged to allow the Plaintiff's claims and dismiss the counter-claim.

The Defendants' Counsel, Mr. Sianondo, argued that the Plaintiff's assertions that the amount paid in the sum of K100, 000.00 was a mere deposit, was contradicted by the Defendants. He thus advised that in the absence of a written agreement (retainer) between the Plaintiff and the Defendants, the Court should take the approach approved in ***Griffiths v. Evans (1953) 2 ALL ER 1365*** in which Lord Denning held:

> ***On this question of retainer, I would observe that where there is a difference between a solicitor and his client upon it, the courts have said, for the last 100 years or more, that the word of a client is to be preferred to the word of the solicitor, or, at any rate, more weight is to be given to it (see Crossley v. Crowther, per Turner V-C, and Re paine, per Warrington J.) the reason is plain. It is because the client is ignorant and the solicitor is, or should be, learned. If the solicitor does not take the precaution of getting written retainer, he has only***

> ***himself to thank for being at variance with his client over it and must take the consequences.***

It was observed by Counsel that, there was no letter of engagement by the Plaintiff to the Defendants setting out the terms of the agreement. And as a matter of emphasis, the case of ***Ohaga v. Akiba Bank Limited (2008) 1 EA 300 at page 304*** was vouched in which it the Court held:

> ***It is the position of the law that if there is no evidence of retainer except the oral statement of the advocate which is contradicted by the client, the Court will treat the advocate as having acted without authority/permission...***

I was urged to uphold the Defendants' position that, the total lump sum agreed as legal fees for legal representation between the Plaintiff and the Defendants for the entire case was the sum of K100, 000.00. And that the same having been paid, the indebtedness was discharged. According to Counsel, instead it was the Plaintiff that was supposed refund to the Defendants on the basis of the *quantum meruit rule,* otherwise that payment of legal fees should be based on *pro rata* basis, since Mr. Bwalya was unable to represent the Defendants until the end of the case, following his suspension by the Law Association of Zambia.

And as regard the counter-claim, it was first observed that the Plaintiff admitted to receiving the monies from the Defendants, without demonstrating that the said monies was paid to third parties as alleged or deposited in the client's account. I was persuaded to allow the counter-claim.

DETERMINATION

The facts not in dispute are restated. I am satisfied that the Defendants, Nabir Suleman Patel and Idris Suleman Patel who happen to be brothers, in 2009 were arrested and charged with murder in the case of the ***People verses Mathew Mohan and Two Others (Defendants) HP/03/2010***, involving the killing of Sajid Mohammed Itowala on July 21, 2009. The Plaintiff among other law firms, Messrs Mumba S. Kapumpa Associates and Messrs Milner Katolo and Associates were retained by the Defendants to defend them in the said murder case.

The Defendants, in three instalments paid to the Plaintiff a total sum of K100, 000.00 as legal fees.

Whereas the Plaintiff alleges that these payments were a deposit and not the final bill of costs, the Defendants allege otherwise that, the said payment of K100,000. 00 was a full and final payment for all legal fees rendered by the Plaintiff to the Defendants for the whole case, otherwise referred to as the agreed flat fee.

Undoubtedly, instructions from the clients (Defendants) to the Plaintiff were verbal. The retainer between the Plaintiff and the Defendant was equally never reduced in writing. A retainer is a contract between a legal practitioner and a client, by which a legal practitioner is engaged and by which a client undertakes to pay for legal services rendered by an instructed a legal practitioner (see ***Halsbury's Laws of England (4th Edition Re-issue Vol. 44 (1) para 114-118).*** The retainer must state the scope of the

instructions, the terms of the retainer, including terms of payment. Accordingly, it is wisely stated that:

> ***It is desirable for [a legal practitioner] to agree expressly with [a] client on the scope of the retainer and the precise nature of the matter falling within the retainer, rather than leaving these important issues to be implied. Importantly a legal practitioner can negotiate a "divisible contract"" instead of an "entire contract", for example separate stages in the matter constitute separate retainers.***
>
> ***Where it is proper and convenient a legal practitioner should define the retainer in a way which will enable a legal practitioner to send regular bills to [the] client and be paid promptly for work completed*** (see Lewis and Kyrou, "Handy Hints on Legal Practice" (Second Edition, South Africa, LexisNexis, 2011 reprinted page 20.)

The Plaintiff having received verbal instructions from the Defendants, it was imperative that the Plaintiff should have written to the Defendants to confirm the instructions and the terms thereof, or atleast keep file notes, diary notes or attendance notes, as proof of the said instructions. These elementary precautions were given weight in ***Hurlingham Estates Limited v. Wilde & Partners (1997) 1 Lloyds Law Report, 523at page 526***, cited by the Defendant's' Counsel, wherein Lightman J., had this to say:

> ***The second remarkable feature is that there is no written record of the alleged (but disputed) agreement to limit the solicitor's duties. Any such agreement must plainly, if it is to have any legal effect, be clear and unambiguous: the client must be fully informed as to the limited reliance he may place on his solicitor and the reason for it(i.e. the***

solicitor's lack of any basic knowledge or competence), that this limitation is not a normal term of a solicitor's engagement, and that the client may be better advised to go to another solicitor who is not handicapped and can be retained with no such limitation.

Common sense requires that all these matters should also be recorded in an attendance note of the meeting where they are discussed and agreed, and should subsequently be recorded in a letter to the client. The letter is required, not merely to evidence what has been agreed, but to ensure that, after receipt of the letter, the client can consider (and discuss with others) the position and its implications away from, and free from any constraints imposed by, the presence of the solicitor. These are elementary precautions to ensure that the clients gives a fully and informed consent to a potentially disadvantageous arrangement when there is an obvious potential conflict between the interest of the solicitor (in retaining his client's work) and the client (in obtaining the best or at least competent, service and advice).

It is said, the absence of written instructions or retainer, is a potential minefield of wrangles between a legal practitioner and a client. The strife of accusations and counter-accusations relating to the retainer or its absence, as the case may be, in present times appears to be invariably rife, between a client and an advocate, especially on legal fees, thus judicial intervention in some case has been sought.

Generally, in ***Mushemi Mushemi v. The People (1982) Z.R. 71*** the Supreme Court guided, on how to deal with accusation and counter-accusation between parties to a dispute giving conflicting testimonies, by stating that:

The judgment of a trial court faced with conflicting evidence should show on the face of it why a witness has been seriously contradicted by others is believed in preference to others.

However, in the present case, a distinction must be noted as stated in the memorable case of ***Griffiths v. Evans*** (supra). The words of the Defendants that the agreed bill was K100, 000.00for the entire case must prevail, rather than as alleged by the Plaintiff that the bill should stand around the sum of K1, 430, 000.00. The fact that the last receipt clearly shows that the last payment in the sum of K50, 000, 000, was a deposit, matters-less, in the light of the ***Griffiths v. Evans Rule***, as it were. It is, therefore, otiose to venture to review the advocate and client's bill of costs presented by the Plaintiff, as to the validity and reasonableness of every item in the bill of costs.

I desire to state that, the common practice of receiving instructions from clients in criminal without a properly settled retainer, is undesirable. A client has a right to be informed how he or she will be billed, the deposit to be paid and how it will be applied, and whether the billing will be phased or it will be a flat fee, paid once and for all. The consequence of a legal practitioner not reducing the retainer in writing, and not disclosing material terms upon which the retainer is anchored, can have serious financial consequences to his or her professional business. The word of a client against the word of his/her advocate invariably prevails.

The absence of a scale of fees or tariff in criminal matters is no wanton excuse to charge exorbitant legal fees, or use it to disingenuously make it appear to a client that legal representation in criminal cases as it relates to estimation of legal fees is hopelessly unpredictable or ungovernable. The rationale for non-imposition of a statutory tariff is in my opinion designed to promote access to justice through legal representation. That access must correspond with reasonable professional charges procured by a process of full and frank disclosure of material terms and *bona fide* negotiations between a client and an advocate.

I now turn to the counter-claim by the Defendants against the Plaintiff specifically involving the sums of K332, 000.00 (rebased) and US$ 55,000.00. There is no documentary proof to support the assertion that the amounts were loaned to the Plaintiff, in particular to Mr. Bwalya for the alleged purpose as pleaded by the Defendants. However, Mr. Bwalya said the money was given to him with specific instructions to distribute to third parties. Mr. Bwalya partly disclosed some of the third-party beneficiaries. I reckon, such disclosure is not a violation to the duty of confidentiality imposed on Counsel. I am mindful, that the privilege accrues to a client rather a legal practitioner, although in reality the privilege is enforced on behalf of the client. However, litigation between a legal practitioner and his client resulting from a retainer provides one of the exceptions to the rule on confidentiality and legal professional privilege enforcement.

It was stated that given the un-waivered privilege enjoyed by the Defendants to protect information passed in confidence to Mr. Bwalya, Mr. Bwalya was professionally unable to give full details regarding expenditure of the said monies. In the context of this case, it's my considered opinion that, in the absence of documentary proof that the monies were loans, I find it probable that the monies were meant to be distributed by Mr. Bwalya to third parties as instructed by the Defendants. Otherwise, for what purpose would the Defendants haphazardly release such huge sums of money, without documentation, if indeed the object was genuine? The monies were delivered to Mr. Bwalya through the Defendant's brother, Mr. Irfan Patel (DW2). Curiously, Mr. Ifarn said he did not know for what purpose the money was delivered to Mr. Bwalya. Again, if the money was genuinely a loan, it's inconceivable that Mr. Ifarn Patel was kept in the dark.

Perhaps, in passing, I should add that it is not the business of the court to enforce 'contracts' that appear non-justiciable, because that is against public policy, especially if such 'contracts' are in conflict with the law or repugnant to good conscience.

I now turn to the claim for an order that the Plaintiff should only bill on the basis of the *quantum meruit rule*. By this claim the Defendants allege that since no legal services were rendered or done by Plaintiff after the suspension of Mr. Bwalya, and that given the fact that the sum paid was for the entire retainer, the Plaintiff should be obliged to make a *pro rata* refund. In other words, it was

contended that the Plaintiff should only recover for what he worked for up to the time of his suspension.

Incidentally, I should add that legal fees or costs as defined in section 2 of the ***Legal Practitioners Act Chapter 30 of the Laws of Zambia,*** and elucidated in the memorable case of ***The Legal Practitioners' Act, Ex-parte the Legal Practitioners' Committee of the Law Association of Zambia (2018) Z.R Special Edition 33***, are only recoverable in respect of professional work done and/or for actual expenses incurred. I should add that the work done and the expenses thereof, must relate to the actual work executed when the practicing certificate is or was in force or operational at material time. It is for this reasons, legal fees or costs purported to be recovered for work not done, or done without an operative practicing certificate are out-rightly irregular and are quickly disallowed during taxation.

However, in the present case, I find it improbable to allow the claim sought under the said *quantum meruit rule.* In justifying this position, I desire to firstly state that, having found that the flat fee of K100, 000.00 prevails, and that some professional work was done by Mr. Bwalya, the *quantum meruit rule* is contextually inapplicable. It would have been sensible to consider that approach, only if the Plaintiff was successful and the itemized bill was subject to taxation with objections raised thereof.

Secondly, notwithstanding the suspension of Mr. Bwalya, the retainer was never expressly terminated by the Defendants, such

that, when the Mr. Bwalya's practicing certificate was restored, Mr. Bwalya continued to act for the Defendants, and the Defendants never raised objection with that representation. The retainer was only brought to an end when the Plaintiff decided to sue on November, 2012. It was the Plaintiff's act to commence civil proceedings that brought the retainer to end, rather than via termination by the clients (see ***Warmington v. McMurray [1937] 1 ALL ER 562***.)

CONCLUSION

In the light of the foregoing, the Plaintiff's claim fails and stand dismissed. Similarly, the Defendants' claims are unsuccessful, and stand dismissed. In both instances, I make no order as to costs.

Leave to appeal is granted.

DATED THIS 21ST DAY OF MARCH, 2022.

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THE HON. MR. JUSTICE CHARLES ZULU