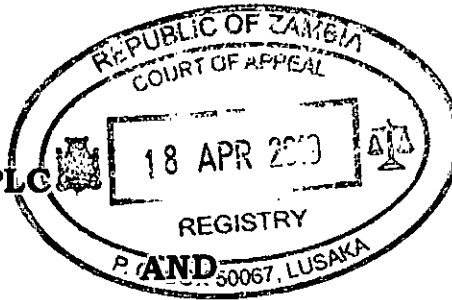


IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 69/2018**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

INVESTRUST BANK PLC



APPELLANT

MONICA MUMBA

RESPONDENT

Coram: Makungu, Sichinga, Ngulube JJA
On the 22nd November, 2018 and the 18th day of April, 2019.

For the Appellant: Miss T. Sakala. – Messrs Fraser Associates
For the Respondent: No appearance

JUDGMENT

MAKUNGU, JA delivered the Judgment of the court.

Cases referred to:

1. *Kuta Chambers (Sued as a Firm) v. Concillia Sibulo (suing as Administratrix of the estate of the late Francis Sibulo) – (SCZ) Judgment No. 86 of 2015*
2. *Simwanza Namposya v. Zambia State Insurance Corporation Limited (2010) ZR 339*
3. *Indeco Estates v. Marshall Chambers – (SCZ) Judgment No. 4 of 2002*
4. *Kapoko v. The People – Concourt Judgment No. 23 of 2016*

Legislation referred to:

1. *Legal Practitioners Act Chapter 30 of the Laws of Zambia*
2. *Statutory Instrument No. 8 of 2001*
3. *Law Reform (Miscellaneous Provisions) Act Chapter 74 of the Laws of Zambia*
4. *Constitution of Zambia (Amendment) Act, 2015*
5. *Court of Appeal Rules, 2016*

Other authorities referred to:

1. *Bryan A. Garner, Blacks Law Dictionary (2007) 8th Edition Thompson West: USA*

This appeal arises from a Judgment of the High Court delivered on 2nd February, 2018. The matter was commenced on 2nd March, 2015 by way of Originating Notice of Motion pursuant to Statutory Instrument No. 8 of 2001. In support was an Affidavit sworn by the respondent and the gist of the contents thereof was that the respondent was an account holder at the appellant's bank. Between 17th and 25th October, 2014 the sum of K261, 161. 70 was stolen from her account owing to the appellant's carelessness and negligence in securing her funds. The appellant admitted that there were some erroneous transactions that were done on the account and the sum of K261, 617. 20 was refunded accordingly. The issue before the lower court was the payment of the collection charge in the sum of K26, 161. 70. The appellant contended that the respondent was not legally entitled to the said amount as she was not a registered legal practitioner.

In her reasoned judgment, the learned trial judge was of the view that although the applicant is not entitled to invoke the provisions of Statutory Instrument No. 8 of 2001 which provides for the

remuneration of legal practitioners, the justice of the case demands that she cannot be disallowed to recoup the legal costs incurred in recovering her money from the respondent [Sic]. The court also found that the said Statutory Instrument places an obligation on counsel in non-contentious matters to agree on fees with the client before an assignment is undertaken.

She also found that there was an agreement between the respondent and her advocates that the collection charges were pegged at 10%. Thus, she was of the view that there was no justification to interfere with the amount of the professional bill as it was in accordance with the scale set out in the schedule to the Statutory Instrument.

Accordingly, the learned trial judge found that notwithstanding the technicality, the respondent herein was entitled to be indemnified the legal costs she incurred in recovering the debt.

The appellant has advanced three grounds structured as follows:

- 1. The erudite Judge in the Court below erred in both law and fact in that while agreeing with the appellant's submissions that the respondent was not entitled to invoke the provisions of Statutory Instrument No. 8 of 2001 being a non-qualified legal practitioner, she***

nonetheless dismissed the submission as a legal technicality when she ought to have dismissed the action;

In the alternative:

1. The erudite Judge in the Court below erred in both law and fact by failing to address her mind to the fact that there was no shred of evidence on record proving that the respondent had paid the sum of K26, 161. 70 to her advocates as legal fee upon which she could rightfully claim a reimbursement.

2. The erudite Judge in the court below erred both in law and fact by failing to appreciate that the respondent was not entitled to unilaterally determine the 10% collection commission in the absence of a Court Order and or evidence of an agreement between her advocates and herself charging her 10%.

The respective advocates for the parties filed written heads of argument in support of their positions. At the hearing of the appeal, counsel for the appellant, Miss Sakala relied on the heads of argument wherein it was submitted that the evidence on record reveals that the respondent was not a legal practitioner at the time of commencement of the matter and that the 10% commission claimed was meant for the respondent's advocates and not the respondent herself. Counsel stated that the issue for

determination was whether or not the respondent had the right to claim debt collection charges pursuant to Statutory Instrument No. 8 of 2001. She referred to paragraphs 1 and 2 of the said Statutory Instrument which state as follows:

“1 (1) This order may be cited as the Legal Practitioners’ (Conveyancing and Non – Contentious matters) (Costs) Order, 2001.”

“(2) This Order shall apply in respect of any business done in any conveyancing or non – contentious matter after publication of this Order.”

Counsel argued that **Section 70 of the Legal Practitioners Act** ⁽¹⁾ allows for the making of general orders prescribing and regulating the remuneration of practitioners. That this position was confirmed in the High Court: ***In the matter of the Legal Practitioners Act and In the matter of the Legal Practitioners (Costs) Order, 2001*** ⁽²⁾ and in the matter of the ***Legal Practitioners Committee of the Law Association of Zambia***. ⁽⁴⁾ Reliance was also placed on the Supreme Court case of ***Kuta Chambers (Sued as a Firm) v. Concillia Sibulo (suing as Administratrix of the Estate of the late Francis Sibulo)*** ⁽²⁾ where the court guided as follows:

“Legal Practitioners are obliged by the Legal Practitioners Act, Chapter 30 of the Laws of Zambia, to charge in accordance with the scale of fees set out in the Legal Practitioners’ (Conveyancing and Non – Contentious matters) (Costs) Order 2001”

Counsel was of the view that unless a person is a legal practitioner and holding a valid Practicing Certificate, he or she cannot bring an action for debt collection charges pursuant to Statutory Instrument No. 8 of 2001. That the lower court was right when it pointed out that the respondent was not entitled to invoke the provisions of the said law. However, treating the issue as a mere technicality was a serious error.

The alternative grounds: two and three, were argued together. It was submitted that, even assuming that the respondent was entitled to recover the debt collection costs as found by the trial court, there is no evidence on record to show that there was an agreement between the respondent and her advocates to charge the said amount. Further that, there was no evidence that the respondent incurred the sum of K26, 161. 70 in legal fees which should be refunded. There was no proof that the same was arrived at in accordance with the Statutory Instrument in issue. The case

of ***Kuta Chambers*** ⁽¹⁾ was again called in aid where the Supreme Court stated thus:

“We can only add that the fees paid by the instructing client ought to be treated as a recoverable expense. In claiming the costs awarded to the successful party, therefore, the legal practitioner ought to factor in the fees paid by the instructing party to him.”

Counsel finally urged us to allow the appeal.

The respondent filed a cross appeal on 10th May, 2018 which was dismissed for non- appearance of the respondent who was considered as the appellant in the cross appeal, pursuant to Order X Rule 19 (1) (a) of the Court of Appeal Rules, 2016.

We have taken into account the respondent ‘s heads of argument filed herein on 10th may, 2018 wherein it was stated as follows:

The letter of demand for payment of the debt owed to the respondent which is dated 6th January, 2015 (on page 29 of the record of appeal) indicates that the collection charge of 10% of the principle sum should be paid to Messrs HBM Advocates. The collection charge was based on paragraph 10.2 of Statutory Instrument No. 8 of 2001 which provides:

“Commission chargeable on collection of debts; the charge shall not be more than ten percent of the amount recovered.”

Counsel further submitted that the demand was rejected by the appellant by letter dated 9th February, 2015 appearing on page 31 of the record of appeal. The lower court was aware that the respondent was represented by counsel when it made its decision on a technicality. Counsel relied on **Article 118 (2) (e) of the Constitution** ⁽⁴⁾ as follows:

“Justice shall be administered without undue regard to procedural technicalities.”

He also referred us to the case of **Simwanza Namposhya v. Zambia State Insurance Corporation Limited** ⁽²⁾ where it was held thus:

“An appellate court will not upset the findings of fact unless they are perverse or made in the absence of relevant evidence or based on misapprehension of facts such that on a proper view of evidence no trial court acting correctly could have reasonably made.”

In response to the alternative arguments under grounds two and three, it was submitted that it is common knowledge that legal

practitioners do not do pro bono work as they are in business. Therefore, the appeal should be dismissed.

The appellant's advocate's oral submissions in reply were that Article 118 (2) (e) of the Constitution does not assist the respondent because in the case of **Kapoko v. The People** ⁽⁴⁾ the Constitutional Court held that Article 118 (2) (e) is not meant to do away with existing procedural law and principles. The letter of demand dated 6th January, 2015 from the respondent's advocates to the appellant indicates clearly in the last paragraph that the respondent's advocates were claiming their collection charge at 10% of the amount claimed by their client. Therefore, the respondent had no legal right to claim the same for herself.

We have considered the record of appeal, and the written and oral submissions made. Our views are as follows:

The Supreme Court has in a number of cases including the case of **Indeco Estates Development Company Limited v. Marshall Chambers** ⁽³⁾ addressed the issue of legal fees as follows:

"The instructing client is the one primarily liable to pay the lawyers' fees as the person who retained the lawyer's services."

It is clear from the wording of paragraphs 1 and 2 of Statutory Instrument No. 8 of 2001 *supra* that this law applies only to legal practitioners. Therefore, the appellant was right to state that the respondent had no legal basis to commence the proceedings because she was not a Legal Practitioner.

Our firm position is that the lower court erred to grant judgment in favour of the respondent who had claimed collection charges pursuant to a Statutory Instrument which does not apply to her. The respondent had no *locus standi*. In Black's Law Dictionary at page 960 *Locus Standi* is defined as the right to bring an action or to be heard in a given forum. We hasten to state that the issue of *standi* must be determined in *limine*. That is, before the substance of the case is presented. Thus, standing concerns whether some one who approaches a court is the appropriate person to present the matter to the court for adjudication. The *locus standi* goes to the root of the matter. Therefore, the lower court should not have entertained the case.

For the foregoing reasons, we allow the appeal on the basis of the first ground only. Under the circumstances, it would be otiose for us to deal with the alternative grounds of appeal. We order that

the costs both in the lower court and this court be borne by the respondent. The costs are to be taxed in default of agreement.

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C.K. MAKUNGU
COURT OF APPEAL JUDGE

.....
D.L.Y SICHINGA
COURT OF APPEAL JUDGE

.....
P.C.M. NGULUBE
COURT OF APPEAL JUDGE