MEDICAL AND DENTAL PRACTITIONERS
COUNCIL OF ZIMBABWE
versus
DR KUMIRAI CHIKWAVA

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 22 February & 4 May 2016

Stated Case

R Magundane with N Tiyago, for the plaintiff
I Musimbe, for the defendant

TSANGA J: This matter was placed before me as a stated case in terms of Order 29 r 199 of the High Court Rules, 1971. This rule provides that parties to a civil action may, after summons have been issued, concur on questions of law in the form of a stated case for the court's opinion.

The facts informing the stated case were common cause. Sometime in 2011, the defendant was arraigned for various medial malpractices before a tribunal constituted by statute, namely, the Health Professions Act [*Chapter 27:19*]. It establishes the Health Professions Authority ("the Authority") whose mandate is to coordinate the functions and operations of the health professions and to hear appeals from the various councils that regulate different categories of the health profession. Among councils established by the Act is the Medical and Dental Practitioners Council, ("the Council"). It is established in terms of s 29 of this Act. Its responsibility is to regulate medical and dental professions in Zimbabwe.

The defendant was found guilty by this Council's disciplinary committee, of improper conduct. He was suspended from medical practice for a year. In terms of s 113 (2) (c) and (d) of the Act, he was also ordered to pay a penalty of $300.00 and costs incidental to the enquiry, all of which he has not paid. The total amount claimed from him is $10 695.00. Of this $ 9995.00 is said to relate to legal costs while the balance of $700.00 arises from the imposed fine of $300.00 whilst $400.00 is for sitting allowances for the disciplinary committee. At the crux of the stated case is therefore the payment of the penalty and costs arising from the enquiry and costs incidental to the enquiry. Section 117 in particular of the

applicable Act, allows the Council to approach the court to recover costs or penalty ordered in terms of the hearing. It is in terms of the above provisions the plaintiff seeks to recover the above sum.

On 10 June 2011, the defendant filed an appeal before the Health Professions Authority of Zimbabwe. It refused to hear his appeal on the basis that it was a conflicted and an interested party in the outcome of the case. Ordinarily, an appeal from the Health Professions Authority ("Authority") would have been heard by the High Court. With the refusal by the Authority to hear the appeal, the matter has remained stagnant with nothing being done by the defendant to pursue it further. The decision of the Council's disciplinary committee therefore effectively remains extant.

The points of law to be determined by the court were stated by the parties as follows:

i) Whether or not plaintiff is entitled to recover its costs as claimed in the summons in term of s 117 of the Health Professions Act [*Chapter 27:29*].

ii) Whether or not the costs incurred by plaintiff arising from the attendances to the appeal filed by the defendant before the Health Professions Authority of Zimbabwe can be recovered by the plaintiff from the defendant in terms of s 117 of the Act.

iii) Whether or not the legal costs paid by the plaintiff are reasonable under the circumstances.

iv) Whether or not the legal fees are subject to taxation in terms of the High Court Rules.

v) Any other issue of law arising from the statement of agreed facts filed by the plaintiff or defendant.

Following the filing of the plaintiff's heads of argument, the defendant raised a special plea of prescription in terms of s 15 (d) of the Prescription Act [*Chapter 8:11*]. This was on the grounds that the legal fees charged by plaintiff's counsel having been settled by the plaintiff on 24 March and 5 July 2011 respectively, prescription commenced as soon as the debt was due.[1] Cases such as *Eagle Insurance Company v Grant,* [2] *Rogers* v *Rogers & Anor*[3] *w*ere cited in support of the interpretation accorded to the relevant legal provision on the running of prescription. Mr *Musimbe,* counsel for the defendant, argued that prescription began to run 6th of July 2011. Since the defendant did not acknowledge the debt or pay anything, he further argued that there was no interruption of prescription. The summons

[1] See section 16 (1) of the Prescription Act Chapter 8:11.
[2] 1989 (3) ZLR 278 (S)
[3] SC 64-07

having been issued on 1 September 2014, the gist of his argument was that a three year period had elapsed and the debt had effectively become prescribed on 6 July 2014.

In response to the arguments raised in the special plea, Ms *Magundane*, counsel for the plaintiff, counter argued that what was due was a judgment debt and that as such in terms of s 15 (a) (ii) of the Prescription Act, its prescription period is 30 years.[4] At the crux of Ms *Magundane*'s argument was that the decision of the Council's disciplinary committee was a judgment, and incorporated in that judgment was a judgment debt. The debt arose from the Council's ability to impose a fine as a consequence of the disciplinary hearing and also to order a party to pay any costs or expenses incidental to the enquiry.[5] Furthermore, she highlighted that in terms of s 117 of the Health Professions Act, the Council may, by action in a competent court, recover these costs and penalty that have been ordered to be paid by the person disciplined and that this is precisely what it sought to do.

As regards the standing of the Council and its ability to make judgments, she argued that s162 in of the Constitution of Zimbabwe[6] which provides for the court system in Zimbabwe, in addition to outlining the courts vested with judicial authority, clearly recognises other courts established under an Act of Parliament.[7] Tribunals for arbitration, mediation and other forms of alternative dispute resolution are also clearly provided for in terms of s 174 (d) of the Constitution.[8] She therefore argued that the plaintiff, being the Medical and Dental Practitioners Council, and duly established under the Health Profession

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[4] Whilst the Act does not define a judgment debt it does define debt as including "anything which may be sued for or claimed by reason of an obligation arising from statute, contract, and debt or otherwise.

[5] This is in terms of s 113 (2)(c) &(d) of the Health profession Act [Chapter 27:19]

[6] Amendment (no.20) Act 2013

[7] Section 162 of the Constitution of Zimbabwe is couched as follows:

Judicial authority derives from the people of Zimbabwe and is vested in the courts, which comprise –

a) The Constitutional Court
b) the Supreme Court
c) the High Court
d) the Labour Court
e) The Administrative Court
f) The magistrates courts
g) The customary law courts;
h) **Other courts established by under an Act of Parliament** *(Emphasis added)*

[8] Section 174 provides as follows:

An Act of parliament may provide for the establishment , composition and jurisdiction of -

a) magistrates courts , to adjudicate civil and criminal cases
b) customary law courts whose jurisdiction consists primarily in the application of customary law
c) other courts subordinate to the High Court
d) tribunals for arbitration, mediation and other forms of alternative dispute resolution (emphasis added).

Act, is a competent tribunal established through an enabling Act and is vested with judicial authority to make orders as judgments. Furthermore, she emphasised that the Prescription Act does not restrict the scope of judgments to any particular court or tribunal. She further argued that the judgment having in actual fact remained effectively not appealed against, was still extant and could therefore be enforced following the mechanism laid out in s 117, by way of an action in this court.

With the leave of the court, Mr *Musimbe* filed supplementary submissions. The gist of his supplementary argument was that the meaning of judgment debt had been fully canvassed by the Supreme Court in the case of *Kanengoni* v *Zimbabwe Spinners and Weavers (Pvt) Ltd)*[9].

In that case, Gubbay CJ as he then was, cited with approval the South African case of *Kilroe-|Daley v Barclays National Bank Ltd*[10] in which the meaning of judgment debt in s11 (a) (ii) of the South African Prescription Act was considered. Galgut AJA stated in that case as follows as regards the meaning of judgment debt:

> ""….judgment debt" in s 11 (a) (ii) refers, in the case of money, to the amount in respect of which execution can be levied by the judgment creditor: that in the case of any other debt steps can be taken by the judgment creditor to exact performance of the debt, i.e. delivery of the property or performance of the obligation. A further feature of a judgment debt is that the judgment is appealable."

Drawing on the above, Gubbay CJ in the *Kanengoni* case further asserted that the word "judgment" describes a decision of a court of law upon relief claimed in an action. Therefore in light of the above elucidation as to what constitutes a judgment debt, and the nature of a judgment, Mr *Musimbe* argued that in this instance, judgment meant a judgment of the court of law, which judgment allows the creditor to execute or exact performance of the debt. He asserted that disciplinary proceedings do not constitute an action. His argument was also that the claim did not arise in relation to the disciplinary proceedings but from expenses incurred. Furthermore, he argued that if indeed the plaintiff Council had been in possession of a judgment debt, it would have been able to execute without further ado by approaching the Sheriff. In this case, the plaintiff, he emphasised, had to approach this court in order to enforce. He also placed reliance on the case of *Hingeston* v *Lightfoot*[11] in which

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[9] *1995 (2) ZLR 348 (S)*
[10] 1984 (4) SA 609 (A)
[11] *2000 (2) ZLR 247 (S)*

the argument that certain expenses arising from a consent paper, constituted a judgement debt was held to be untenable.

Ms *Magundane*'s submissions in response to the above were that the two cases cited were unique and distinguishable in that they were decided prior to the promulgation of the new Constitution. The import of this being that the new Constitution in s 174 clearly recognises tribunals for arbitration as having effective jurisdiction. As such, she argued that defendant's assertion that the decision by the Council was not a pronouncement of a judicial body lacked merit. She emphasised that the statement by Gubbay CJ as he then was clearly related to the limited courts then recognised by the Constitution then in existence at that time. She further stressed that it should be in light of the current constitutional provisions and the relevant Act that this court must make its decision as to what constitutes a judgment and a judgment debt, in view of the bodies that are recognised as having judicial authority.

Furthermore, she drew attention to the fact that in the *Kanengoni* case which the defendant's counsel so heavily relied on, the decision challenged was that of the Minister and not that of a tribunal as in this case. It was in that context that the decision had been held to lack the characteristics of a judgment. Since Gubbay CJ emphasised that the decision in question was not a decision of a judicial or a *quasi-judicial* body, Ms *Magundane* argued that Gubbay CJ thereby clearly recognised that *quasi-judicial* bodies could make judgments. She put the decision *in casu* in that category. To bolster this point, she emphasised that the judgment by the plaintiff in this case emanated from a hearing in which parties were fully represented, evidence was led and witnesses were cross examined. As such it was a trial before a specialised tribunal and could not be compared to a decision simply made by the Minister as in the *Kanengoni* case. The case of *Hingefoot* was also said to be distinguishable on the basis that the claim for reimbursement did not arise from an order of court incorporating the consent paper but from claimant's payment of the expenses she had incurred. *In casu* by distinction, the judgment rendered had specifically ordered the payment of costs, and as such the claim was predicated on a court order. It is against the backdrop of the above arguments that this court is asked to decide on the point *in limine* on prescription.

The operative part of what the plaintiff's disciplinary committee described as the *"Judgment in the matter of Dr Kumirai Z Chikwava* was couched as follows:

> "The committee orders that:
> 1. You be erased from the register and be suspended from private practice for one year.

2. You will be seconded in the Department of Obstetrics and Gynaecology at a Central Hospital to work under supervision for twelve months.
3. You are required to rectify all the anomalies submitted by HPA regarding your premises.
4. You should comply with conditions of the Health Committee during the period of suspension.
5. You should attend CPD activities and attain 50 points for the yes 2011.
6. **Pay a penalty of $300.00 (three hundred dollars) payable to the Council.**
7. **Pay any costs or expenses of and incidental to the inquiry.**"

Analysis

As to whether the decision by the Council's disciplinary authority constitutes a judgment, of significance is that the Council draws its powers from statute. Much therefore depends on the empowering statute and the authority it grants the quasi-judicial body in question. For reasons of expertise in medical issues the legislature through the Health Professions Act, has clearly delegated to the Council the power to adjudicate on medical issues. The power to adjudicate is evidently not the preserve of judges sitting in a formal court of law even if there is a distinction between these expert bodies and courts of law. In this instance the Council's disciplinary committee has judicial jurisdiction and certainly acts as a *quasi-judicial* body exercising *quasi-judicial* functions when it purports to discipline its members for improper or disgraceful conduct. [12] It is mandatory for it in terms of s 110 of the applicable Act to record proceedings and any evidence heard, the decision made by it and the reasons thereof. In terms of s 22 of the applicable Act, appeals from the decision of a council such as the one in this case, are made to the Health Professions Authority. Additionally, in terms of s 128 any person aggrieved by the decision of this Authority can appeal directly to the High Court against the decision.

What is being appealed against in both instances is in my view clearly a judgment in the broader sense of the word. However, it is not a judgment in the technical sense where the word is used in relation to a decision of a formal court of law and has specific implications. Court judgments come in various forms such as judgments on merits, default judgments, summary judgments, and judgments by consent to mention a few. Each has a very specific meaning and legal consequences arising therefrom. Decisions from tribunals and administrative bodies have generally been called "determinations." However, a determination, referring as it does to a final resolution of a dispute, can equally refer to a decision made by a formal court in as much as it can also refer to a decision made by an

[12] See Part XIX of the Health Professions Act Chapter 27:19 which deals in detail with the discipline of Health Practitioners.

administrative agency. The word determination may itself also mean a judgment. It is therefore for this reason that I am inclined to see the decision of the Council's disciplinary committee as a "judgment" in the wider sense of the usage of the word.

By making specific mention of "tribunals for arbitration mediation and other forms of alternative dispute resolution" as bodies for which an Act of Parliament may provide for the "establishment, composition and jurisdiction" thereof, what s 174 does is to constitutionally recognise such bodies as part of the overall structure of dispute resolution, albeit distinct from the courts. These bodies that the Constitutions now effectively mainstreams under courts and other tribunals through Acts of Parliament and indeed may continue to do so, were already in existence under various Acts prior to the promulgation of the current Constitution.

Section 162 vests judicial authority in specified courts as well as "other courts" established by or under an Act of Parliament. Neither the "Council" nor the "Health Authority" are courts in the way the word court is understood. Given the range of processes canvassed by the term alternative dispute resolution, when the Council's disciplinary committee hears disciplinary matters pertaining to health professionals, it is sitting as a *quasi-judicial*, "alternative dispute resolution" body. By virtue of the Council's specialist focus, it is sitting as alternative to the court, in resolving the dispute with specialist medical lenses although the decision may ultimately be appealable to the courts.

Whilst s 113 2(d) allows the Council's disciplinary committee to order a party before it to pay "any costs or expenses of and incidental to the inquiry" the enabling statute is equally clear on the steps and procedure to be followed where these have not been paid. The Council has a right to approach this court by way of instituting an action for its payment. Section 117 of the Act is worded as follows:

A council may, by action in a competent court, **recover any costs or penalty ordered** in terms of this part to be paid a registered person.

The provision exists for a simple reason. The Council does not have enforcement mechanisms to collect monies owed to it. The process outlined in s 117 is precisely there to prevent orders of the applicable tribunal under the relevant Act from being a hollow vessel as far as penalties imposed and costs ordered are concerned. Providing for procedural processes to facilitate recovery of sums owing also fosters observance for the rule of law from the start of the process to its finish. Furthermore, in my view, by permitting the recovery of expenses to be brought by way of action, the provision allows for debtor who may be dissatisfied with

the incidental costs of inquiry levied, an opportunity to vent their reasons for lack of cooperation and for resisting the amount.

Applying the meaning of "judgment debt" as adopted in the *Kanengoni* case, the creditor, being the Council in this instance, could not exact performance of the debt but could instead approach this court with an action in order to obtain judgment on the debt in question. Execution could not have been levied by the Council without resorting to use of the procedure laid out in s 117. The crucial import of s 117 is that it gives the Council as creditor, a cause of action upon which to lay its claim for payment of the penalty costs and incidental expenses, and, to obtain a judgment debt if the court so agrees with the claim. In other words, the institution of the action and the resultant decision thereunder is what results in an executable judgment debt with a 30 year life span. Prior to that, if the debtor has not paid, what the creditor has in hand is a legitimate cause of action upon which to approach the court to obtain an executable court judgment on the debt.

Materially, for prescription to begin to run there has to be a debt claimable or a debt that the debtor is obliged to perform.[13] That there was a debt arising from the decision of the council's disciplinary Committee is not in dispute. However, for the reasons I have a explained above with regards the process and procedure for recouping unpaid amounts, what was ordered to be paid did not, in my view, constitute a judgment debt with a thirty year prescription period.

The definition of a judgment debt from the Cambridge Dictionary which Ms *Magundane* drew on is as follows:

> "A sum of money that **a court of law** has ordered a company or a person to pay"

Another definition from the merrian.webster.com on- line dictionary is as follows:

> "Legal obligation to pay a debt or damages evidenced by a judgment entered in a court of record and enforceable by execution or **other judicial process**." [14]

Even if one relies on the dictionary definition which Ms *Magundane* drew on for her arguments, what also emerges from that definition is the centrality of the **enforceability of the debt** by way of execution or other judicial process. The judicial process outlined in s 117 would have been the pathway to an executable debt.

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[13] See Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pvt) Ltd 1991 (1) SA 525 (A)

[14] See Http;// www.merrian–webster.com/dictionary/judgment

The defence of prescription succeeds because by the time the summons for the claim were served on the defendant, the claim had prescribed.

Accordingly, Plaintiff's claim is dismissed with costs.

Scanlen and Holderness, plaintiff's legal practitioners
IEG Musimbe and Partners, defendant's legal practitioners