IN THE HIGH COURT OF TANZANIA
[DAR ES SALAAM DISTRICT REGISTRY]
COMMERCIAL DIVISION
AT DAR ES SALAAM

CIVIL CASE NO. 3 0F 2000
MKONO & COMPANY ADVOCATE (A FIRM).....PLAINTIFF
VERSUS
J.W. LADWA (1977) LIMITED.....DEFENDANTS

RULING

KALEGEYA, J:

Responding to an action filed by the Plaintiff, the Defendant has raised, among others, preliminary objections as follows:-

> *"The following preliminary objections ..... are without prejudice to and in the alternative of one another:*
>
> *(a) That the Plaint does not disclose a cause of action against the Defendants in so far as the claim therein is found on an Agreement that is based on an aggravated form of maintenance, to wit, champerty.*
> *(b) That the Plaint does not disclose a cause of action against the Defendants in so far as it is found on an agreement the consideration and/or object of which is manifestly illegal for being against statutes governing contractual relations and those providing for the offices of practising legal professionals."*

Mr. Mponda, Advocate, represented the plaintiff, a firm of Advocates, while Dr. Tenga of Law Associates (Advocates), represented the Defendant.

The action by the plaintiff is based on an agreement entered into by the parties. I should pose and state from the outset that for clarity, even at the danger of making this ruling unnecessarily long, I will quote at length all relevant documents. To start with the Agreement, the same runs as follows:-

" Mr. J.W. Ladwa
Managing Director
J.W. Ladwa (1977) Limited
P.O. Box 20200
DAR ES SALAAM

Dear Mr. Ladwa,

RE: AMENDED TERMS OF BUSINESS

As all the arrangements for the lodgement of your claim to the authorities are now in place, the purpose of this letter is to record the main terms of the retainer. Many of the points made in this letter of course have already been agreed but it is this firm's policy to make them clear to you at the outset.

1. The Work

The work in which we are instructed relates to acting for you in the contractor's claim against the Ministry of Works in the aggregate sum of US$1,413,232 and TShs531,4646 (together the Debt) as set out in our letter dated 3rd March, 1998 addressed to the Principal Secretary, Ministry of Works.

2. Responsibility for Work

I will have overall conduct and responsibility of this matter on your behalf although I will of course, as and when necessary, call upon the assistance of other staff in the office.

3. Fees

As remuneration for the services to be rendered pursuant to the instructions you will pay us:

(a) a retainer fees of Shs.5,000,000/= simultaneously with the execution of this agreement; and
(b) a success fee of 7% on the amount of the debt recovered from the Government: Provided that should you for any reason

compromise with the debtor so as to render the debt wholly extinguished or reduced the success payable hereunder shall nonetheless remain payable to us without demand.

4. Refund

No amount advanced hereunder is refundable; client waives any such right for refund.

5. Disbursements

You agreed to meet the incidental costs and expenses relating to these proceedings as and when they fall due.

6.1 Termination

We reserve the right to stop acting for you as Advocates if:

(i) You do not pay our costs or money on account of costs in accordance with these terms of business, or
(ii) We cannot continue to act without being in breach of rules of professional conduct; or
(iii) We are unable to obtain clear instructions from you; or
(iv) For any reason there has been a serious breakdown in confidence between us.

6.2 Subject to paragraph 5 above, you have the right, upon reasonable notice being given and upon payment of the success fee on a quantum merit basis being made to terminate.

7. Conclusion

Please review the foregoing and, if it meets with your approval, sign the enclosed copy of this letter and return it to the undersigned. If you have any question, please feel free to call me.

I look forward to working with you.

Yours sincerely,

Sgd:
Nimrod E. Mkono"

ACKNOWLEDGEMENT

I agree to the terms of engagement as spelt out herein above.

Dated at Dar es Salaam 24tth day of April, 1998.

Sgd:
J.W. Ladwa
For: ***J.W.Ladwa (1977) LIMITED***

Following the signing of the said Agreement the plaintiff was duly paid the sum of Shs.5 Million. The Plaintiff then proceeded to issue a notice to sue to the Principal Secretary, Ministry of Works. The contents thereof, among others, state as follows:

"Dear Sir,

RE: NOTICE OF INTENTION TO SUE THE GOVERNMENT UNDER SECTION 6(2) OF THE GOVERNMENT PROCEEDINGS ACT NO. 16 OF 1967 AS AMENDED BY SECTION 2 OF THE GOVERNMENT PROCEEDINGS (AMENDMENT) ACT NO. 30 OF 1994

We act for ***J.W. LADWA (1977) LIMITED*** *of P.O. Box 20200, Dar es Salaam, ("* ***our client****"), in relation to their outstanding debt as is shown hereunder and more particularly described in the schedule of computation and the copies of interim payment certificates appended hereto as Volumes 1 & 2:*

DESCRIPTION	*FOREX IN $*	*LOCAL IN T.SHS.*
Outstanding certificate payment IPC 35,36 And 37 total	*1,105,4905*	-
Release of outstanding amount in Respect of Preliminary Items:		
HOUSES TYPE 1	*26,737*	*4,444,842*
HOUSES TYPE 2	*60,354*	*10,033,511*
RE's OFFICE	*6,644*	*1,104,480*
RE's EQUIPMENT	*9,467*	*1,573,200*
Add Release of Retention Money Forex 73,920,169 x 53.98% /195 Local 73,920,169 x 46.02%	*204,626*	*34,018,777*
Add accrued interest on outstanding and Delayed payments	-	*480,294,836*

TOTAL	***1,413,233***	***531,469,646***

Despite several demands for payment and threat to sue no payment has been forthcoming.

TAKE NOTICE that unless payment of the outstanding sums aforesaid is made to our clients or to us for and on account of our clients, within Ninety (90) days counting from the date of service hereof our instructions are(?) institute proceedings against you for its immediate recovery at your sole risk as to costs and other consequences.

Yours faithfully,

MKONO & COMPANY

COPY TO BE SERVED UPON:

1. *The Attorney General*
   Attorney General's Chambers
   P.O. Box 9050
   DAR ES SALAAM.

2. *Hon. Minister of Works*
   Ministry of Works
   P.O. Box 9423
   DAR ES SALAAM.

3. *Clients*

Encls:"

The notice was followed by drafting of a plaint which was sent to the Defendant, who, for one reason or another, did not sign or return it to the plaintiff for further action.

However, between February and June, 1999 the Defendant was duly paid all the sum that was being claimed from the Government of Tanzania. Subsequent thereto, naturally, the Plaintiff called upon the Defendant to honour the Agreement. The Defendant refused to pay the "seven percent success". The Plaintiff could not stomach this hence the suit which triggered on the preliminary objections, the subject of this ruling.

In support of the preliminary objections, Dr. Tenga submitted that there is no cause of action as the claim is founded on illegality because "it flies against statutory provisions, to wit, on S. 23 of the Law of Contracts Ordinance and S. 59 of the Advocates Ordinance, Cap. 341". He insisted that due to **policy considerations**, agreements that are based on **contingent fees** are against the statutes, as much as under Common law, applicable in Tanzania, Champerty, an aggravated form of maintenance, is illegal. He made reference to A treatise by **Dutt on Indian Law of Contract 8th Edition [Eastern Law House, 1994]**; **Re Trepca Mines Ltd (1962) 3 All ER 351, Trendtex Trading Corp. vs Credit Suisse (1981) 3 All ER 520; Giles vs Thompson and related Appeals (1993) 3 All ER 320.** Elaborating further, Dr. Tenga, argued that even if it were to be maintained that the agreement between the parties was that for debt collection, which however, according to him, is not, the remuneration of shs.5,000,000/= and 7% success fee charged is against the Advocate's Remuneration Regulations and therefore illegal. That apart, he argued, "in a period spanning about 2 years the Plaintiffs did very little on the task they were engaged to perform except to put the Government on notice about the pending and to draft a set of pleadings".

In response in an equally strongly argued submission, the Plaintiff submitted that "the said agreement is neither champertous" nor founded on illegal consideration under S. 23 of the Law of Contact Ord. (Cap. 433) as the Advocate's Ordinance does not prohibit such type of agreement and that therefore the Defendant's preliminary objections are flawed.

The Plaintiff argued that the agreement between the parties was that of negotiating for a settlement of the sum owed to the Defendants by the Government of Tanzania and did "not provide for litigation of any nature"; that it provided for a "quality" of work to be done and not "quantity" as suggested by Defendants; that contrary to the alleged period of 2 years their work gave fruits within a year as the first instalment was paid therein displaying (plaintiffs') perseverance, persistence and hard work .

Detailing the arguments, the Plaintiffs fronted that the English Common Law doctrines of maintenance and champerty do not apply in Tanzania. In support thereof they insisted that even in their country of origin (England) due to changing moral and financial climate and consequently change in public policy, **maintenance** including **champerty** are no longer punishable as a crime or actionable as a tort following the 1967 amendments [Criminal Law Act, 1967 – (UK)] while certain champertous agreements are enforceable **[Thai Trading Co. (a firm) v Taylor (1998) 3 All ER 65].** Comparing with our situation they state that none of the Tanzanian statutes, including the Law of Contact Ordinance, makes maintenance a crime. Making reference to an Indian case of In the Matter of **"G", a Senior Advocate of the Supreme Court AIR 1954 SC 557** quoted in DUTT's treatise, the plaintiff argued that even in India (which equally inherited English Common law like ourselves) maintenance and champerty do not make an agreement illegal save making the advocate concerned disciplinarily liable.

The plaintiffs called upon this Court to differentiate professional legal standards applicable in India from those reigning in Tanzania. They insisted "In India, professional conduct requires an Advocate never to take a share in the proceeds of any matter in litigation" while in Tanzania, " an advocate may charge a fee for the said litigation and a success fee of 5% on the sums collected as a result of the said litigation" as **per Rule 21 of the Rules of Professional Conduct and Etiquette of the Tanganyika Law Society.** In this case however, Plaintiffs challenged that their conduct does not fall under the said rule because their debt collection exercise "was never litigated, and there was no intention to litigate the said matter"

Making further reference to **Halsbury's Laws of England, Re Trepca case** (also referred to by Defendants), **Keeka v Damji (1968) EA 91,** the plaintiffs argued that for an agreement to be champertous it should concern contentious proceedings which should have already began before a Court or before an arbitrator, and a party should have contracted to support/maintain the proceedings in consideration for a share in the proceeds/subject matter of the action. Treading on that, the plaintiff insisted that no proceedings were even commenced let alone envisaged; that a mere notice to sue

accompanied by a drafting of plaint are not commencement of litigation but were mere strategies for negotiation as per the nature of agreement.

As regards the alleged illegality under S. 59 (a) and (b) of the Advocates Ord. let the plaintiffs' wording substantially paint the picture. The submission in part runs as follows:-

> *" For Section 59 (a) of the Advocates' Ordinance to apply an advocate must do the following:-*
> *(i) he must purchase an interest or any part of the interest of his client; and in any action, suit or other contentious proceeding.*
> *(ii) in any action, suit or other contentious proceeding.*
> *....S. 59 (a).....does not apply to the present case because the agreement in dispute was not one in which the Plaintiffs purchased the interest or any part of the interest, of the Defendants in any action, suit or other contentious proceedings.*
>
> *" For section 59 (b) of the Advocates' Ordinance to apply, an advocate must*
> *(i) be employed or retained to prosecute any action, suit or other contentious proceedings and*
> *(ii) have an agreement with the client which stipulates that the advocate only receives payment in the event of success of that action, suit or contentious proceedings.*
>
> *.....S. 59 (b)...does not apply to the present case because the Plaintiffs were not employed or retained by the Defendants to prosecute any action, suit or contentious litigation. They ...were retained...to recover debt... "Even assuming that the Agreement is caught by S. 59 (b) there is no stipulation... that the Plaintiff would only revive payment in the event of success of the legal proceedings".*

As to the debt collection principle the Plaintiffs argued that under Rule 17, schedule VIII, para 8 of the **Advocates Remuneration Rules**, in non-contentious business like debt collection, where a letter of demand was not followed by litigation, an advocate is allowed to enter an agreement as the present one.

In reply Dr. Tenga insisted that there is no evidence in support of Plaintiffs' claims that they researched, considered, opinied on relevant laws let alone attending several conferences; that they cannot be heard to say that litigation was not envisaged when they wrote two letters to Defendants calling upon them to sign the Draft plaint ready for filing in Court; that in determining the correct remuneration of Counsel the work done should be looked at both quantitatively and qualitatively and that for that matter common law looks down on unconscionable remuneration.

Regarding applicability or otherwise of the English Common law doctrines of maintenance and champerty, Dr. Tenga insisted that they are, because of the Reception clause. He then referred to various cases which decided, before the reception date, on the unenforceability of a maintenance/champertous agreements. These include,

> *" **Hutley v. Hutley** (1873) LR 8 QB 112; **Stanley v. Jones** (1831) 7 Bing 369; **Strange v. Brennan** (1746) 2 Coop temp Cott 1, CA; **Earle v. Hopwood** (1861) 9 CBNS 566; **Rees v. De Bernardy** (1896) 2 Ch. 437; **Cole v. Booker** (1913) 29 TLR 295 and **Wild v. Simpson** (1919) 2 KB 544 CA"*

He went further to state that although in Britain maitenance and champerty are no longer Crimes or tortuous they are still "illegal" on policy considerations – referred to **Thai case** also referred to by the Plaintiff with an addition that the decision in that case was over-ruled by a subsequent decision in **Geraghty and Co. vs. Award Awwad and another (1999) E.W.J. No. 6188.** As to the Indian case of RE "G" Advocates cited in **Dutt** treatise, Dr. Tenga insisted that the fact that an advocate can attract disciplinary

action against him due to being a party to champertous agreement establishes that even in India They are still illegal. On Rule 21 (2) of The Professional Conduct and Etiquette of Tanganyika Law Society Rules he urged that an absurd interpretation by which an advocate would charge a fee for litigation, and then another fee called "success fee" if he won advocated by Plaintiff should not be entertained as it would be ultra vires the statutes, in that the law provides a clear distinction between "debt collection, a non-contentious process par excellence, and litigation in an action for debt, a contentious process par excellence". He reiterated that a notice to sue is an invitation of contentious proceedings because a non-contentious negotiation strategy is originated by just a demand letter. He concluded by calling upon the court to note that the Plaintiff did not respond to S. 23 of the Law of Contract +Ordinance which declares illegal agreements that are contrary to public policy.

I should start by commending both Counsel for the gallant fight exhibited by each of them in their respective submissions in support of their attacks and counter attacks and also their assistance in making available copies of literature they referred to.

Now for the analysis of the arguments. I should pause and put it clearly at this point that I will deal with only the salient issues which form the basis of the dispute.

I should state from the outset that it is a naked fact that under the English Common law, doctrines of **maintenance,** under which **Champerty,** its aggravated form falls, till 1967, (were) both Criminal and tortuous as they (were) illegal and unenforceable. **The Halbury's Laws of England, Vol. 9**, has the following to say:

> *"Maintenance was a misdemeanour at Common Law and was also punishable by various statutes. Further, a person who was a common mover, exciter or maintainer of suits or quarrels was guilty of the offence of barratry, but this offence has been abolished by* ***ibid*** *S. 13 (1). (****The Criminal Law Act, 1967*** *of U.K.). Maintenance gave rise to liability in Tort at the suit of the person injured as a result of the action (though the*

> *tort was not actionable per se: Neville v. London Express Newspaper Ltd (1919) AC 368, HL).* ***Any agreement constituting or savouring of maintenance was illegal and unenforceable: Reyned v. Sprye*** *(1852) 1 De GM & G 660."*

As to the illegality and unenforceability I will detailedly later return.

The same Vol. of Halbury's Laws of England defines maintenance as follows:-

> *"Maintenance may be defined as the giving of assistance or encouragement to one of the parties to litigation by a person who has neither an interest in the litigation nor any other motive recognised by the law as justifying his interference. Champerty is a particular kind of maintenance, namely maintenance of an action in consideration of a promise to give the maintainer a share in the proceeds or subject matter of the action."*

Under the above principles, any agreement by which a lawyer contracted to be remunerated by way of "contingency fee" (was) illegal and unenforceable.

Why such protection? What (was) the basis of this doctrine? The same authors of Halbury's Laws of England, same vol., have the following general synopsis of decisions on the matter.

> *"The doctrine of maintenance is based upon considerations of public policy, and is directed against wanton and officious intermeddling with the disputes of others in which the maintainer has no interest whatsoever, and where the assistance he renders to the one or the other party is without justification".*

The history and public policy behind this doctrine, particulary the **contingency fee** aspect, was subject of detailed discussion in **Geraghty & Co. vs Awward** case cited by the defendant and which indeed, I should point out at this juncture, over-ruled the Thai

case, referred to by the Plaintiff. The Lord Chief Justice (with approval) quoting extensively from the earlier case of **Wallersteiner v Moir (No. 2) 1975, QB 373** where judges pronounced the position of the law and policy behind, made reference to the following speeches: Scarman, L.J is quoted as saying:-

> *"A contingency fee for conducting litigation is by the law of England champerty and, as such, contrary to public policy. This is law of longstanding. It has been frequently declared by the Courts."*

Lord Denning had stated:

> *" English Law has never sanctioned an agreement by which a lawyer is remunerated on the basis of a 'contingency fee', that is that he gets paid the fee if he wins, but not if he loses. Such an agreement was illegal on the ground that it was the offence of champerty. In its origin champerty was a division of the proceeds..... An agreement by which a lawyer, if he won, was to receive a share of the proceeds was pure champerty. Even if he was not to receive an actual share, but payment of a commission on a sum proportioned to the amount recovered – only if he won – it was also regarded as champerty: see* ***Re Attorneys and Solicitors Act 1870 (1875) 1 Ch D 573 at 575****) by Jessel Mr; Re A Solicitor.* ***Even if the sum was not a proportion of the amount recovered, but a specific sum or advantage which was to be received if he won but not if he lost, that, too, was unlawful: see Pitman v. Prudential Deposit Bank Ltd*** *by Lord Esher MR. It mattered not whether the sum to be received was to be his sole remuneration, or to be an added remuneration (above his normal fee), in any case it was unlawful if it was to be paid only if he won, and not if he lost" (emphasis supplied).*

and this was a further elaboration of statement he had earlier provided in **Trepca Case** where he said,

> *"The reason why the common law condemns champerty is because of the abuses to which it may give rise. The common fears that the Champertous*

Maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses".

Not only the above, the Court in **Geraghty case** pointed out with approval yet another statement by Lord Bucklley L.J in **Wallerstein** case where he stated:-

" It may, however, be worthwhile to indicate briefly the nature of the public policy question. It can, I think, be summarised in two statements. First, in litigation a professional lawyer's role is to advise his client with a clear eye and an unbiased judgement. Secondly, a solicitor retained to conduct litigation is not merely the agent and adviser to his client but also an officer of the court with a duty to the court to ensure that his client's case, which he must, of course, present and conduct with the utmost care of his client's interests, is also presented and conducted with scrupulous fairness and integrity. A barrister owes similar obligations. A legal adviser who acquires a personal financial interest in the outcome of the litigation may obviously find himself in a situation in which that interest conflicts with these obligations. See in this connection ***Neville v London Express*** *(1919) AC 368 at 382 et seq. and* ***Re Trepca Mines Ltd (Application of Radonir Nicola Pachtch (Pasic)*** *1963) Ch. 199 at 219, 255"*

I should hurriedly add at this point that the position of the law in England todate regarding "contingency fee" vice, notwithstanding the fact that, now, champerty has been decriminalised, has not changed. It is still illegal. The Court, in this latest decision (Geraghty) observed,

" It was suggested to us that the only reason why 'contingency fees' were not allowed in England was because they offended against the Criminal law as to champerty: and that, now that Criminal liability is abolished, the Courts were free to hold that contingency fees were lawful. I cannot

> *accept the contention. The reason why contingency fees are in general unlawful is that they are contrary to public policy as we understand it in England."*

What is the position in India? Both parties made reference to a supreme Court decision in **In the matter of "G" a Senior advocate of the Supreme Court, AIR 1954 SC. 557** though with opposing views of what was decided. In that case the Advocate had entered into an agreement with his client in the following wording:-

> *'I hereby engage you with regard to my claim against the Baroda Theatres Ltd.'for a sum of Rs.9400 (Balance due to me).* ***Out of the recoveries you make take 50 per cent of the amount recovered****. I will by Wednesday deposit Rs. 200 in your account or give personally towards expenses". (emphasis mine).*

The Defendant urge that that kind of agreement is illegal in India while the Plaintiffs insist that it is not, save calling for disciplinary action to the Advocate. The latter relies on **Dutt's** commentary on the matter where he stated,

> *"It was held that a contract of this kind would be legally unobjectionable if no lawyer was involved, since the rigid English rules of champerty and maintenance did not apply in India.* ***But as G, was an Advocate such an engagement on his part amounted to professional misconduct and called disciplinary action****" (emphasis added).*

What is clear from the decision of the Court is that although champerty/maintenance doctrine is not strictly enforced in India as it is in Britain, in that such agreements are proper between other parties, they are not, where an advocate is involved. The Plaintiffs, however, rely on following excerpt from the decision to front an argument that in India "contingenty fee" agreement are illegal.

> *"Now it can be accepted at once that a contract of this kind would be legally unobjectionable if no lawyer was involved.* ***The rigid English rules of champerty and maintenance do not apply in India****, so if this agreement had been between what we might term third parties, it would have been legally enforceable and good.* ***It may even be that it is good in law and enforceable as it stands though we do not so decide because the question does not arise: but that was argued and for the sake of argument even that can be conceded".***

I should with respect, state that the Plaintiffs are not supported in that observation: The "G" Senior Advocate case was dealing with disciplinary proceedings and not the issue before us. The court was categorical on this although one may be led to read the opposite from the last ten words in the quotation above. I am saying so because in the next para. following the quoted excerpt, the Court states clearly that the issue of unenforceability of that contract is not before it. It states,

> *"But that is not the question we have to consider".*

In para.16 that follows next in the report, the Court reiterates this by referring in passing, to three other earlier decisions thus:-

> *"The question there was whether an agreement which might be objectionable on the ground of professional misconduct could be enforced by suit……*
> *……*
> *whether these cases were rightly decided or whether they would also be hit on the ground on the ground of public policy as Chitly, J, thought of a similar matter in the Punjab Record case, is something which does not arise for decision here".*

It would therefore be wrong to say that this case decided that in India, a "contigent fee" agreement with an advocate is not illegal. Although unfortunately, I did not get access to the three cases referred to or any other latest report on the matter, treading by the conflicting decisions referred to by the Court, and the Court's pronouncement that an advocate who involves himself in such agreement commits a professional misconduct (for which, in this case, Mr. G, Senior Advocate was so

condemned) one can safely say that such agreements, where advocates are involved, are illegal. This is so because I cannot see how else a counsel can be condemned for professional misconduct on something which is lawful.

The degree of condemnation in which Courts in India hold such Champerty agreements involving Advocates can be fully appreciated by looking at what was stated in another Indian case "In re Bhandara" case, cited with approval in **Re "G" Senior Advocate,** where in it was stated,

> *" I consider that for an Advocate of this Court to stipulate for, or receive, a remuneration proportioned to the results of litigation or a claim whether in the form of a share in the subject matter, a percentage, or otherwise, is highly reprehensible, and I think it should be clearly understood that whether his practice be here or in the mofussil he will by so acting offend the rules of his profession and so render himself liable to the disciplinary jurisdiction of this court".*

Can this kind of condemnation be said to be limited at just punishing the Advocate for impropriety and yet leave the perpetrated act lawful? My reaction is negative. Would the law condemn such counsel and at the same time leave him to enforce and enjoy the earnings that may have accrued from a transaction for which he has already been punished? That would defeat common sense in all aspects.
From the foregoing I hold that in India, agreements by advocates involving "contingent fees", are also illegal.

Coming to our Tanzanian situation the Defendant urged that the doctrines should be taken to be applicable due to the Reception clause under the JUDICATURE AND APPLICATION OF LAWS, Ord. Cap. 453. S. 2 of the said Ord. provides,

> *"S. 2 (1) Save as hereinafter, or in any other written law, expressed, the High Court shall have full jurisdiction, civil and criminal.*

(2) Subject to the provisions of this Ordinance, the jurisdiction of the High Court shall be exercised in conformity with the written laws which are in force in Tanganyika on the date on which this Ordinance comes into operation (including the laws applied by this Ordinance) or which may hereafter be applied or enacted, and, subject thereto and so far as the same shall not extend or apply, shall be exercised in conformity with the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the twenty-second day of July, 1920, and with the powers vested in and according to the procedure and practice observed by and before Courts of Justice and Justices of the Peace in England according to their respective jurisdictions and authorities at that date, save in so far as the said common law, doctrines of equity and statutes of general applications and the said powers, procedure and practice may, at any time before the date on which this Ordinance comes into operation, have been modified, amended or replaced by other provision in lieu thereof by or under the authority of any Order of Her Majesty in Council, or by any Proclamation issued, or any Ordinance or Ordinances passed in and for Tanganyika, or any hereafter be modified, amended or replaced by other provision in lieu thereof by or under any such Ordinance or Ordinances or any act or Acts of the Parliament of Tanganyika:

***Provided** always that the said common law, doctrines of equity and statutes of general application shall be in force in Tanganyika only so far as the circumstances of Tanganyika and its inhabitants permit, and subject to such qualifications as local circumstances may render necessary."*

However, we have to subject this to two considerations – first, whether circumstances pertaining to our local environment call for change, modification of their applicability as compared to their country of origin and, secondly, whether there is any statute which has

modified or scrapped off the same. As to local environment dictating otherwise, I find no element suggesting the same. In my opinion, the reasons for their applicability in England where the general level of education and awareness of people's rights is on the higher scale become even more important and necessary in our land where ignorance and illiteracy are very rife. What about the other element?

The plaintiff, for obvious reasons (he can hardly get support) did not put up much fight against the applicability of the doctrines under the Reception clause except urging that it is archaic and that The Rules under The Advocates Ord. have modified it. The plaintiffs' feelings can best be understood by reproducing two paragraphs of their submission:

> *"3.15 Despite, the change that has taken place in England and Wales as a reflection of the changing face of public policy, the Defendants are asking this honourable court to impose upon us a doctrine of law, that of maintenance and champerty, which has never been accepted in India; and has never been regarded as s criminal offence under our law; and which paragraph 21 (d) of the TLS Rules specifically permits in cases of debt collection; and in addition a doctrine which in recent times has seen fundamental modifications as a result of a change in the moral and financial climate in England and Wales."*
>
> .....
>
> .....
>
> *"3.17 In the alternative, if your Lordship holds that maintenance and champerty are doctrines which are applicable in Tanzania, the Plaintiffs humbly submit that their application has been limited by the TLS Rules and the Advocates' Remunerations Rules, because paragraph 21 (d) and Schedule VIII paragraph 8 respectively, clearly permit an Advocate to enter into contingency fee arrangements with clients. These statutory inroads to champerty cannot in our respectful submission be ignored."*

Without begging the obvious, the doctrines, are still applicable under the Reception clause as pronounced above notwithstanding the fact that even in the country of their origin they have undergone some changes.

We have already concluded above that agreements of champertous nature, where advocates contract with clients for a contingent fee are illegal and unenforceable in Britain and India today as they were on 22 July, 1920. The public policy considerations remain the same. In Tanzania, apart from the Rules orchestrated by Plaintiff, there is no case law or statute which has changed that position. And indeed, the abuses to which the advocates were susceptible then are as alive today as they were then.

What about the effect of Rule 21 of the **RULES OF THE PROFESSIONAL CONDUCT AND ETIQUETTE OF THE TANGANYIKA LAW SOCIETY and PARA 8 of SCHEDULE VIII OF THE ADVOCATES REMUNERATION AND TAXATION OF COSTS RULES?** Rule 21 entitled **DEBT COLLECTION"** provides:-

> *"(a) Letters of demand threatening proceedings in default of payment should, save in exceptional circumstances, allow:-*
> *7 days where the debtor resides in the same town as the advocate, not less than 10 days where he resides in a different town in Tanzania; 21 days where he resides outside East Africa.*
> *(b) There is no objection to requiring a debtor to pay the creditor's costs of collection in consideration of an agreement to accept payment of the debt by instalments. It is not, however, permissible to claim from the debtor in the original letter on behalf of a client.*
> *(c) No Advocate may request in a letter of demand before action payment from any person other than his client of any costs chargeable by him to his client in respect of such demand before action, or in respect of professional services connected with the demand.*

> *(d)* ***In addition to the fees charged for the litigation, an Advocate may charge a collection fee of a reasonable percentage of the amount collected and received by him from the debtor, but not exceeding 5%."*** *(emphasis added)*

At the same time, under the **Advocate's Remuneration and Taxation of Costs** [GN 515 of 1991], Rule 17 allows for an advocates' fees in NON-CONTENTIOUS MATTERS. The scales are then provided in Schedule VIII. Under this schedule also falls paragraph 8 which applies to debt collection. This paragraph runs as under,

> *"8. Debt Collection:*
> *In respect of non-contentious debt collection matter an advocate may enter into a general agreement with a client to charge thereof upon the following inclusive scale in lieu of charging per item for work done. Provided that in any case where not more than one letter of demand has been written the scale shall be reduced by one-half subject to a minimum fee of Shs.1,000/= and provided further that where the letter of demand is followed by the institution of proceedings at the instance of the same advocate, the scale for debt collections shall be 5% of the total debt to be collected."*

What do we gather from the above? The obvious is that the "TLS" Rules are issued by Tanganyika Law Society merely designed to guide the conduct of its members [the Advocates] as exemplified by the title thereto – for "professional Conduct and Etiquette". These however cannot be used to defeat the force of substantive law. They have no force of law. Can we categorise these rules as subsidiary legislation? Tanganyika Law Society which made those rules is a creature of statute. However, not every creature of statute is empowered to make subsidiary legislation. This power should specifically be in the parent Act. Under which law then did Tanganyika Law Society Act in making those rules? I have not been able to trace any. Secondly, it would seem the framers of Rule 21 (d) of **The Rules of Professional Conduct and Etiquette** of

Tanganyika Law Society were influenced by the wording of Paragraph 8 of schedule 8 **of the Advocate's Remuneration Rules** quoted above. I am saying so because, apart from the common entitlement "Debt Collection", the body thereto contain, substantively, similar wording, which, with respect to the framers, is full of ambiguity if not confusion. Let me support my observations with the following. Para 8 of Schedule 8 provides, among others, that an advocate may, in non-contentious debt collection matter, enter into a general agreement with a client. It then prescribes what seems to be a minimum scale if the demand is followed by one letter. Then, in a surprising u-turn the paragraph provides;

> *" Where the letter of demand is followed by the institution of proceedings at the instance of the same Advocate, the scale for debt collection shall be 5% of the total debt to be collected"!*

What I gather from the above is that if an advocate fails to collect the debt by way of demand letters he can proceed to institute "proceedings" (I take it that these are Court proceedings in a form of an action) in which case he would reap more fees – 5% of the collection! This prompts many questions. Will that matter, at that stage, be considered any longer as being non-contentious? Wouldn't this encourage an unprincipled advocate to discourage settlement of debt so that he be able to institute proceedings so as to enable him pocket more fee? What would be the rationale of giving an advocate in this matter such latitude of fee collection, but peg another advocate who is retained in another contentious matter whose subject matter is a liquidated sum of above Tshs.3 Million or in summary suit to just 3%? Doesn't this foster and encourage the evils which are fought against by the doctrines of maintenance and champerty?

In the same light, again, let us have a look at Rule 21 (d) of the TLS Rules. **"In addition to the fees charged for litigation, an Advocate may charge a collection fee of a reasonable percentage of the amount collected and received by him from the debtor, but not exceeding 5%"!** What does this mean? Would it be within the precincts of public policy to allow double charges of a client by an advocate in such manner? My unreserved answer is obviously negative. Fortunately, as I have already

held, these Rules have no force of law and hence will not have a bearing in my decision when considering the agreement before us. I can only hope, however, that the Tanganyika Law Society would find time and necessity to revisit the Rules, make necessary amendments, and also arrange to have the same accorded a force of law if they have to exalt their full usefulness in the society. This rule has not therefore punctured the efficacy of the doctrines of maintenance/champerty as received through the reception clause as contended by the Plaintiff.

Regarding paragraph 8 of Schedule VIII of The Advocate's Remuneration Rules, one may rightly say that it somehow punctures into the doctrines in that it allows a 5% charge as a "contingent fee" on the spoils of a client, but, as I have said, there is something very wanting with the rule and I can only optimistically hope that the authority concerned will look into it for necessary amendment to remove ambiguity, create certainty and tread by the unquestionable public policy on the principle of law concerned. This observation apart, even giving allowance for this seemingly perforation of the doctrines, on the facts at hand, and as conceded by Plaintiffs, this paragraph is not applicable because whatever they did was not followed by institution of proceedings, although, even if they did, they would still be caught in the web of illegality for charging above the 5% prescribed.

In conclusion therefore, I hold that the doctrines of Maintenance and Champerty apply in Tanzania with only a qualification provided under para 8 of the VIII of the Schedule to the Advocate's Remuneration and Costs Rules: that in a non-contentions debt collection matter where the demand letter has been followed by institution of proceedings by the same advocate the latter can charge 5% of the debt collected.

With the above, let us go back to the Agreement and subject it to the two remaining core arguments. The Plaintiffs vehemently argue that the agreement concerned a non-contentious matter: merely collection of debt and that champertry can only come in where there is litigation in existence thus providing for its continuity. They categorize the notice to sue and draft plaint as mere strategies of debt collection. The

Defendants argue the opposite, calling to their aid two letters written by the Plaintiffs to them. I must confess that these issues have exercised my mind. However, upon going through the arguments and various literature, I have settled on the view that the definition of "contentious proceedings" given by Hamlyn in Keeka v Damji (1968) E.A 91 at 92 (cited by the Plaintiff) where he adopted the definition of the words "contentious business" provided in the Supreme Court Costs Rules 1959 of England, in the following wording,

> *" 'Contentious business' means business done, whether as solicitor or advocate, in or for the purposes of proceedings* ***begun before a court or before an arbitrator*** *appointed* under the Arbitration Act, 1950, not being business which falls within the definition of non-contentious or common form probate business contained in subsection (1) of section one hundred and seventy five of the Supreme Court of Judicature (Consolidation) Act 1925. (emphasis added).

is so narrow and restrictive so as render useless other legal instances where the terminology is applicable. As will be noted, the English definition falls under **Costs** and it should be taken to have been intended to have a restrictive meaning to that situation alone

. Thus, it refers to costs after parties had tussled before the Court, tribunal or Arbitrator. In our situation however, when looking at the doctrine of maintenance we cannot start, logically, at the point when the matter is filed in Court so as to adopt a restrictive meaning proposed by Plaintiff regarding the words "contentions proceedings". In my view, it starts at the time a client instructs an advocate. At the time of entering into an agreement. The champertcy element originates at this point and this is what is fought against – the agreement. It is not the way or manner the litigation is conducted. It is the machinery of remuneration agreed upon between the advocate and the client that concerns us. The term maintenance in this case should not be looked at superficially, according it a narrow definition to mean continuation. It should be taken to mean and include instructions to sue. As stated in BLACK'S LAW DICTIONARY, 6th Ed. Pg. 953,

"To maintain an action is to uphold, continue on foot, and keep from collapse a suit already begun, or to prosecute a suit with effect……
To maintain an action or suit may mean to commence or institute it ……"
(emphasis mine)

As to whether the matter is contentious or not it is obvious that the moment a client instructs an advocate to take any legal step, including filing of a suit against an adversary, the matter would no longer be said to be non-contentious.

Turning to our agreement, what did the Defendants instruct Plaintiffs to do? Just to collect debts? Is debt collection per se a non- contentious matter? While, on the facts of this case, it is unnecessary to go into the analysis concerning the last question, I should observe in passing that it would seem the law appreciates that there are contentious debt collection matters. Even para. 8 of Schedule 8 already referred to, in its opening statement seems to so envisage as it provides;

"In respect ***of non-contentious debt collection matter****..." (emphasis mine).*

If it were otherwise there would be no need of including the words underlined.

Looking at the agreement, the notice issued, the draft Plaint and the two letters wrote to the defendants by Plaintiffs leaves no one in doubt that instructions included filing of a suit in the event the Government refused to pay. While the other documents have already been reproduced, the two letters referred to should also be put on record for clarity even if this entails making this ruling exceptionally long. The letter date 15th Sept. 1998 runs as under:

"Our ref. 697-NEM-098
The Managing Director,
J.W. Ladwa (1977) Ltd.,
P.O. Box 20200,
DAR ES SALAAM.

Dear Sir,

RE: COURT ACTION-REHABILITATION OF BABATI AREA ROADS

We wish to inform you that documents for the proposed court action regarding the subject captioned above have been ready for sometime now, and have only been waiting for your signature. To expedite the matter, we forward them to you herewith this letter and ask you to put your signature in the appropriate places and the necessary number of copies, and then return them to us for taking to court.

When returning the copies, kindly attach hereto a copy of a letter dated 21st January, 1997, from the Ministry (the Employer) in which the Ministry acknowledged being indebted to your company. We need to attach a copy of that letter to the papers to court but presently we do not have a copy of the same among the various documents we received from you.

Yours faithfully,

MKONO & COMPANY"

while that of 29th October, 1998 has the following,

"Our Ref:
697-NEM-098
The managing Director,
J.W. Ladwa (1977) Ltd.,
P.O. Box 20200,
DAR ES SALAAM.

Dear Sir,

RE: COURT ACTION ON REHABILITATION OF BABATI AREA ROAD

We wish to refer to our letter to you, dated 15th September, 1998, concerning the subject captioned above and note that you are yet to sign and return to us the copies of the Plaint which were for that purpose forwarded to you with the letter aforesaid.

On that account the proposed court action has not been instituted in court. It will be instituted immediately on return to us of the signed papers as we asked: We do hope that there will be no further delay.

When returning the signed papers, kindly remember to attach thereto a copy of the letter of 21st January 1997, from the Ministry of Works (the Employer) as we requested in our earlier letter aforesaid.

Yours faithfully,

MKONO & COMPANY"

Would the Plaintiffs have the audacity, in view of the above, of saying that there were no instructions to sue? The answer needs pronouncement.

Thus the agreement before us concerned contentious proceedings and as we have already indicated, the contentions proceedings commence from the stage where instructions are given by a client to an advocate, and for champerty, the moment an agreement for contingent fees in struck. What about the contents? The agreement clearly was champertous. In very certain terms it provides;

"a success fee of 7% on the amount of the debt recovered from the Government".

In their plain meaning it needs no magic to note that this is contracting to share in the spoils of the client. The Plaintiffs argue that the fee indicated in the agreement was

not contingental upon success. Possibly they front that argument basing on the proviso to sub (6), which states:-

> *"Provided that should you for any reason compromise with the debtor so as to render the debt wholly extinguished or reduced the success payable shall nonetheless remain payable to us without demand".*

In my considered view, the proviso makes very little difference. The controlling part is the one contained in the first statement. In fact, one reading the proviso gets a feeling of a shrewd protection by the Plaintiffs of their contingency fee. The proviso is designed in a manner which discourages the Defendant from compromising the debt, for, who would be naïve as to undertake to pay a percentage of what he does not earn. This precisely is one of the many reasons behind the policy controlling the champerty doctrine.

With the above exposition it stands out established that the agreement between the parties was champertous hence illegal and unenforceable as much it violated sections 23 of the Law of Contract Ordinance and S. 59 of the Advocates Ordinance. The said laws entertain no such agreements in very clear terms as follows:-

> *S. 23 of The Contract Ord. provides*
>
> *"S. 23. (1) The consideration or object of an agreement is lawful unless:*
>
> *(a) it is forbidden by law, or*
>
> *(b) is of such a nature that, if permitted, it would defeat the provisions of any law or*
>
> *(c) ……*
>
> *(d) ……or*
>
> *(e) the court regards it as immoral, or opposed to public policy.*
>
> *(2) In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration*

is unlawful is void; and no suit shall be brought for the recovery of any money paid or thing delivered, or for compensation for anything done, under any such agreement, unless:

(a) the court is satisfied that the plaintiff was ignorant of the illegality of the consideration or object of the agreement at the time he paid the money or delivered the thing sought to be recovered or did the thing in respect of which compensation is sought, and that the illegal consideration or object had not been effected at the time when the plaintiff became aware of the illegality and repudiated the agreement; or

(b) the court is satisfied that the consent of the plaintiff to the agreement was induced by fraud, misrepresentation, coercion or undue influence, or

(c) the agreement is declared to be illegal by any written law with the object of protecting a particular class of persons of which the plaintiff is one."

while S. 59 (a) and (b) of the Advocate's Ord. runs as under:

"S. 59 Nothing in sections 54, 55, 56, 57 or 58 shall give validity to:

(a) any purchase by an Advocate of the interest of any part of the interest, of his Client in any action, suit or other contentious proceeding; or

(b) any agreement by which an advocate retained or employed to prosecute any action, suit or other employed to contentious proceedings stipulates for payment only in the event of success of that action, suit or proceeding.

(c) ……."

Plaintiffs' arguments regarding non applicability of S. 59 (a) and (b) of the Advocates Ord. have sufficiently been covered.

For the reasons discussed the preliminary objections are upheld and the suit is dismissed accordingly.

L.B. KALEGEYA
JUDGE

Certified as true Copy of the original.

Dr. J.E. Ruhangisa
REGISTRAR
COMMERCIAL COURT