

SWAZILAND HIGH COURT

SHONGWE MOSES T.
Plaintiff

Vs

BHEKI G. SIMELANE & CO
1st Respondent

SIMELANE BHEKI GOODWILL
2nd Respondent

SIMELANE THEMBELA ANDREW
3rd Respondent

Civ. Case No. 1802/2002

Coram

Sapire, CJ

For Plaintiff

Mr. P.R. Dunseith

For Respondent

Mr. L. Mamba

JUDGMENT

(28/06/2002)

The applicant was a client of the 1st respondent which is a firm of attorneys which until recently has been practising in Mbabane. The 2nd and 3rd respondents are alleged to be the constituent partners of the first respondent.

The applicant sought judgment on motion against all three respondents, requiring the respondents jointly and severally the one paying and the others to be *pro tanto* absolved. What the applicant required was the accounting for and the payment of the proceeds of a settlement of a third party accident damages claim. The 1st respondent had acted as applicant's attorney in the matter, and had received an amount of E400.603.00 in settlement of applicant's claim.

On 2nd March 2002 the 1st Respondent, under cover of a letter furnished the applicant with a draft account for services rendered. The account is a three-page recitation of what the respondent claimed to have done without specifying any charge for any particular item.

The last line reads

"All our fees included as per Power of Attorney dated 11 July 2000 and the amount claimed was E120 180.00.

A copy of the Power of Attorney was enclosed to justify the charging of the fee which on the face of it appears to be an exorbitant amount, considering that no summons had been issued.

In the mandate there are clauses touching on the remuneration of the 1st respondent, which are of doubtful validity in law. The amount claimed is 30% of the amount recovered and is so provided for in the Power of Attorney. There is no relationship to the work actually done. It is not necessary for the present purposes however to comment on propriety of procuring the client's signature on the document of this nature.

When the application came before me, judgment had already been granted against the first 2 respondents that is, against the company Bheki G. Simelane & Company and the 2nd respondent who was the individual Bheki Goodwill Simelane. The applicant now sought judgment against the third respondent. When I pointed out to Mr. Dunseith who appeared for the applicant, the impropriety of his claim, he abandoned it, but urged that in terms of Rule 14, I should declare third respondent to have been a partner of the first respondent at the time of the accrual of the cause of action so that it would not be necessary to again come to court when the first respondent had been unproductively excused.

The provisions of Rule 14 are wide enough for me to entertain the application and it is not necessary at this stage to quote the provisions to which I refer.

While the main application should have properly been directed only against the partnership in the firm's name, the second and third respondents were in fact joined and cited and they are alleged in the papers to be the constituent partners of the first respondent. The application was served on them. They were given the opportunity to contest the allegation that they were the partners constituting the first respondent. Notwithstanding that notices in terms of (c) and (d) of Rule 14 were not served, there has been substantial compliance with the rule. In the case of the third respondent, he has addressed the issue of his being a partner in the affidavit filed by him, and placed material before the court to support his denial that he was a partner. Indeed as far as he is concerned it is the only issue. It would be wasteful and pointless not to decide the issue if possible on the papers now.

The applicant has alleged in the founding affidavit that the third respondent was, and presently still is a constituent partner of the first respondent (see paragraph 4). As this

Was not to his knowledge in issue he made no further allegations to support the assertion. Having regard to the provisions of Rule 14 this was in fact sufficient.

The third respondent apart from raising points in limine which were not persisted in or indeed of any substance in the first instance replied to the allegation that he was a partner in the first respondent in this manner.

"AD PARAGRAPH 4

I state that although my name appeared as a partner in the first respondent's letterheads, I was in fact not such partner. It was agreed between the second respondent and myself that I would only become a partner on payment of the purchase price of E300 000.00 in respect of my intended shareholding in the first respondent which sum I never paid. Although I was a co-signatory to the first respondent's accounts this was only for purpose of convenience and I was never in fact a partner."

One immediately asks the question if he is not a partner why does his name appear on the letterheads?

The third respondent thereafter attempted in succeeding paragraphs of his affidavit to justify the fee provisions of the Power of Attorney, which the applicant had been required to sign. His submissions in this regard are neither impressively convincing nor indeed relevant to the present case. More importantly, there is no evidence to support his denial of being a partner and nothing apart from his say so to corroborate his self-contradictory version of his status in the first respondent. His conduct is self-contradictory in that he has for an unspecified but substantial period preceding the present difficulties facing the firm had his name appear as a partner on the firm's stationery, and in its entry in the Hortor's Diary list of Swaziland legal practices, whereas he now to avoid personal liability for the debts and obligations of the first respondent seeks to reveal that he was never a partner. Such a belated revelation cannot affect his liability to third parties such as clients who dealt with the firm on the basis of 3rd Respondent being one of its constituent partners. Third

Respondent's conduct recalls to mind the idiomatic description of the conduct of passengers of a floundering vessel.

Why has no balance sheet or supporting accounts been placed before the court? Why has the firm's accountant not corroborated the third respondent? To what accounts is he, the third respondent the co-signatory? If it is the third respondent's bank accounts to which reference is made, why has he not produced testimony from the bank that he operates on the firm's accounts otherwise than as a partner. There is on the papers nothing to substantiate, what appears to be a fabrication of recent vintage, conceived by third respondent to excuse him from liability for defalcations of clients' monies. I do not believe the third respondent, and find on the overwhelming preponderance of probabilities amounting to a certainty that the partnership stationery and the entry in the Hortor's Diary correctly reflect third respondents position and status in the firm, namely, that he is and at all material times was a partner in the first respondent.

If it were necessary to do so I would find that third respondent is estopped from denying that he was a partner in the respondent firm. It cannot be denied that he held himself out so to be. The applicant and other clients entrusted their affairs to the firm, which to all intents and purposes comprised two qualified and practicing attorneys. It was on the professional integrity of both of them, which the clients were entitled to rely. Now that there are fears that one of them has possibly absconded, it is not open to the other to be heard to say I was not really a partner and although we gave out that I was a partner, we had a private arrangement that I was in fact not a partner and would not be jointly and severally liable for the obligations of the firm. Mr. Mamba, who appeared on third respondent's behalf has argued that the applicant has not alleged that but for the representation that third respondent was a partner he would not have put his case in the hands of the firm. In other words there is no allegation that the applicant has acted on the representation of third respondent being a partner to his prejudice. The applicant however does not have to go so far to show prejudice. The prejudice is that he would have had two debtors, one of whom would

fall away if the third respondent were permitted to advance the case he now seeks to raise.


The doctrine of holding out in these circumstances has been stated in the following terms:

"A man, who is not a partner, who by his words or conduct represents himself to be a partner, or knowingly allows himself to be represented as a partner, is liable to anyone who on the faith of that representation dealt with or given credit to the firm." ²

Estoppels operate in favour only of those who were induced by the representation to consider him a partner. This does not mean however that it has to be shown that but for the representation he would not have dealt with the firm.

For the purposes of the present application and the applicant's claim against the partnership, the third respondent is declared to be a constituent partner of the partnership that is the first respondent and in the event of an unsuccessful excursion of the partnership assets execution may be levied on his private assets.

Third respondent is to pay applicant's costs of these proceedings.


SAPIRE, CJ

² Jelliman v SA Manufacturing Co. 1923 CPD 215 at 218