

THE HIGH COURT OF SWAZIALND

STANDARD BANK SWAZILAND LIMITED

Plaintiff

And

LAMBROS DINSO

1st Defendant

VISIKILI DINOS

2nd Defendant

Civil Case No. 2899/2001

For the Plaintiff

Advocate Theron (Instructed by  
Robinson Bertrams)

For the Defendants

Mr. P. Shilubane

RULING

(03/12/2003)

The matter was to commence for trial this morning. When the matter was called Mr. Shilubane for the Defendant raised a point of law in limine from the bar. The point raised is that the offices of Robinson Bertram cannot act on behalf of the Plaintiff in this matter as they acted for the Defendant in the same matter in 1997. The offices of Robinson Bertram have not withdrawn as attorney of record for the Defendant and thus there is a clear conflict of interest in this matter.

Mr. Shilubane premised his objection on the dicta in the case of Kirkwood Garage (Pty) Ltd vs Lategan and another 1961 (2) S.A. 75 where it was held that where an

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attorney acts for both parties he should place an affidavit before the court explaining how the position arose to show that it was proper for him so to act.

Mr. Shilubane further referred to a textbook by J.R. Midgley, *Lawyers' Professional Liability* (Juta's & Co. Ltd) at page 83 where the learned author discusses the duty to avoid a conflict between a lawyer's duty to his client and his ethical duties. The learned author cites Gough to the statement that a lawyer may in some cases continue to act in a conflict situation provided that both clients consent, the attorney having informed them of the nature and origin of the conflict and the implications of such representation. However, this will not enable an attorney to act where privileged information is likely to be disclosed, unless waiver has occurred.

The general proposition advanced by these authorities, argues Mr. Shilubane is that in the event of a material conflicting interest existing or arising during the course of a trial, counsel should withdraw and act for neither client.

Mr. Theron for the Plaintiff argued per contra. He referred the court to page 20 of "Bundle "A" to annexure "C", more particularly to Clause 5.2 which reflects that there was a compromise in this matter and that such has the effect of res judicata and is an absolute defence to an action on the original contract. For this proposition he cited the case of Dennis Peters Investments vs Ollerenshaw and others 1977 (1) S.A. 197 at 202 E to 203 B. He further cited the authority in the case of Goliach & Comperts (1967) Pty Ltd vs Universal Mills & Produce Co. (Pty) Ltd and others 1978 (1) S.A. 914 at 922 to the proposition that a transaction, whether extra-judicial or embodied in an order of court, has the effect of res judicata.

It is common cause that the offices of Robinson Bertram acted for the Defendant in the same matter in 1997 as reflected in the application for summary judgment filed by the Plaintiff against the Defendant. The latter being represented by the offices of Robinson Bertram. The application for summary judgement is dated the 8th April 1997. The case was under Civil Case No. 492/97. It is common cause that the parties entered into a compromise as reflected in Clause 5.1 in annexure "C". It is further common cause that attorneys Robinson Bertram have not withdrawn as attorneys of record for the Defendant. This was partly conceded by Mr. Theron from the bar when

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he withdrew on behalf of the office of Robinson Bertram. He however, argued that the rules of court have not been complied with in the present case. He contended that what is important is that the parties had knowledge of what is happening. Rule 41 has not been complied with.

It is furthermore common cause that the offices of Robinson Bertram were involved in the negotiations and drawing of annexure "C". It appears to me that the principle enunciated in the cases cited by Mr. Theron applies "inter partes", the fact remains that the offices of Robinson Bertram acted for the Defendant and must have shared certain confidences with the Defendant. I agree with Mr. Shilubane in his submissions in toto that in casu there is a clear conflict of interest in this matter.

In the present case I hold that it would not be proper for the offices of Robinson Bertram to act in the matter in the face of what I have said therefore I would sustain the objection raised by the Defendants.

S.B. MAPHALALA

JUDGE