THE HIGH COURT OF SWAZILAND

FIKILE MTHEMBU

1st Applicant

WELILE MKHATSHWA

2nd Applicant

And

WELILE MABUZA

Respondent

Civil Case No. 3645/2005

Coram: S.B. MAPHALALA J

For the Applicants; MR. P. DUNSEITH

For the Respondent : MR. M. MAGAGULA

RULING

(On points of law in limine)

(8th November 2005)

[1] This matter concerns a partnership of attorneys practising in this court which has gone asunder. The Respondent having resigned from the partnership under a cloud of allegations of financial

misappropriation of funds leading to criminal charges having preferred against him for fraud. The partnership has two offices one in each major city of Manzini and Mbabane. The Applicants operated the Manzini office of the partnership and the Respondent operated the latter office. There is now a tug-of-war which has arisen regarding the operations of the Mbabane office where the Applicant has launched an urgent application before this court, for various forms of relief, including orders that the Respondent deliver to the auditors of the partnership Messrs Ndalahwa and Associates all the files, receipts books and accounting records of the partnership; deliver the keys to the Mbabane offices; Respondent to be interdicted and restrained from entering the Mbabane offices of the partnership; obstructing the Applicants from entering such offices; interfering with the law practice of the partnership carried on at such offices; holding himself out to be a partner, attorney or representative of such practice; and in prayer 2 thereof the Applicants seek an interim order with immediate effect.

[2] It is reflected in the Notice of Motion that if Respondent intended to oppose this application, he is required to notify Applicant's attorneys in writing on or before the 7^{lh} October 2005 at 12.00noon and on or before the 7^{lh} October 2005 at 2.00pm to file his opposing affidavits, if any. Further that whether or not the Notice of Intention to oppose be given, the application will be made on the 7^{lh} October 2005, at 2.30pm.

[3] Indeed, the matter appeared before me at 2.30pm as reflected in the Notice of Motion supported by the Founding affidavits of both Applicants and an affidavit of one Dumsani Dlamini who is a Finance Manager of the Swaziland Royal Insurance Corporation. Various annexures pertinent to this application are filed. These include, amongst others, the Partnership Agreement (annexure "C"); various letters of correspondence including the resignation letter by Respondent and various bank statements relating to the fraud charges.

[4] In view of the fact that Respondent was served with the application at 12.30pm and was to appear before court at 2.30pm, he could not prepare and settle his opposing affidavits as required. Counsel for Respondent when the matter was called advanced points of law in limine from the bar. These points are the subject-matter of this ruling. Four points were raised in this regard vi'r i) that the affidavits of the Applicants do not prove urgency as required by the rules ii) the requirements of an interim interdict

have not been fulfilled; iii) the Applicants have contravened the doctrine of "clean hands"; and iv) the application is riddled with disputes of facts. In this regard I heard full arguments for and against these points and I reserved my ruling thereto until 3.00pm on Monday the 10th October 2005. However, I could not deliver the ruling as I had promised, as I needed more time to study certain authorities pertinent to this case. Thereafter the matter was postponed sine die at the request of both parties to allow for out of order negotiations to take place. Unfortunately, negotiations have broken down, thus the issuance of the ruling as requested by both parties. I shall address these points ad seriatim hereunder, thusly;

i) The issue of urgency.

[5] The argument advanced in respect of the point of urgency is that the Applicant have not shown the circumstances as required by the Rules in that the cause of action in this matter arose when the Respondent filed his resignation letter on the 12th September 2005. It is not clear, so the argument goes, why Applicants brought this matter on an urgent basis, and on an extremely urgent basis for that matter. That the paragraphs in the Applicants' Founding affidavit on urgency fall far too short in satisfying the relevant rule governing urgency viz, Rule 6 (25) (a) and (b).

[6] On the other hand it was argued by Mr Dunseith for the Applicant that urgency has been canvassed on the Founding affidavit and thus this point of law ought to be overruled. The court was taken through the sequence of events as reflected in the Founding affidavit of the 1st Applicant to support this position. It appears to me that Mr. Dunseith is correct in this regard that urgency has been shown on the papers. It also appears to me that one single event which propelled Applicants to file this application in the manner they did, is the letter from the Respondent's attorney dated 5lh October 2005, marked "J". This might have been the proverbial straw which broke the camel's back, so to speak. In the result, I am satisfied that the Applicants have proved urgency as required by the rules and therefore this point of law in limine ought to fail.

ii) The requirements of an interim interdict.

[7] This point is intertwined with the third point that Applicant are not coming to court with "clean hands" and therefore have not shown a clear right as required by the law governing interim interdicts. As for the point that Applicant has not fulfilled the requirements of an interim interdict, it was contended that the court has to look at this issue against the backdrop of the legal position that when a partner in a partnership resigns/withdraw from the partnership it does not mean his rights thereto are terminated as from date of the withdrawal, as it is common in employer/employee relationships. In this regard the court was referred to a number of passages in Jourbert, The Law of South Africa, First Re-issue, Vol. 19 at paragraph 321 et seq and the case of Purdon vs Midler 1961 (2) S.A. 211.

[8] The point about the doctrine of "clean hands" is premised on the submission that the Applicants cannot approach this court as they do, in view of the fact that they have contravened the provisions of Section 24 (8) of the Legal Practitioner's Act in filing an accounting certificate with the Attorney General which was in fact is not true regard to be had to what is averred by the Applicants themselves in their Founding affidavits that the financial situation of the partnership was a deficit in its Trust Account. In this regard the Respondent relied on a number of paragraphs being 10, 11, 12, 13, 16, 17 thereof. The essence of these paragraphs is that after the death of the late Sam Earnshaw, the auditors of the firm alerted the partners that there was a serious Trust Account deficit on the Trust Account for the Mbabane office amounting to about El, 700,000-00. The partners tried various means to offset the deficit over the years, by amongst other things, disposing off their own individual personal properties and in some instances securing their personal assets. Also, by introducing measures like suspending all personal drawings from the practice until such time that they had significantly reduced the Trust deficit.

[9] It was argued by Mr. Magagula for the Defendant that the above-mentioned scenario should be viewed against the ccrtificate/s filed by the auditors of the partnership during that time in terms of Section 24 of the Legal Practitioner's Act of 1964 certifying that financial statements of the firm complied with the Act. The argument in this regard is that the said certificate is not worth the paper in which it is written on, regard being had to the fact that the partnershiD at the time operated an unlawful deficit in its Trust Account. Further, that such practice is sanctioned criminally by subsection 8 thereof which provides that any attorney, notary, or conveyancer who contravenes subsection (1) shall be guilty of an offence and liable on conviction to a fine not exceeding Five Hundred Emalangeni or imprisonment for a period not exceeding eighteen months, and further shall be guilty of unprofessional

conduct and liable to be struck off the roll or suspended from practice.

[10] Subsection (1) of Section 4 provides that every practising attorney, notary or conveyancer having an offence within Swaziland shall open and keep a separate Trust Account, at a bank lawfully established within Swaziland, in which he shall deposit all moneys held or received by him in connection with his practice within Swaziland, on account of any person; and shall further keep proper books of account containing particulars and information as to moneys received, held or paid by him for or on account of any person.

[11] It is on the above submissions therefore that this court is called upon to dismiss the application on the basis that Applicants have contravened the doctrine of "clean hands" in that the practice, namely "Mthembu Mabuza Attorneys" is tainted with illegality. It appears to me that this argument is based on the dictum in the leading case of Mulligan vs Mulligan 1924 W.L.D. 164, 167 - 168 where the following was said:

"Before a person seeks to establish his rights in a court of law he must approach the court with clean hands; where he himself, through his own conduct makes it impossible for the processes of the court (whether criminal or civil) to be given effect to, he cannot ask the court to set its machinery into motion to protect his civil rights and interest ... where the court to entertain a suit at the instance of such a litigant it would be stultifying its own process and would, moreover, be conniving at and condoning the conduct of a person, who through his flight from justice, set law and order in defiance"

[12] Mr. Dunseith on the other hand took the position that the objection raised in this regard is ill-founded as the Applicants have approached the court with "clean hands" and there is nothing untoward in the Applicants' conduct to be denied a hearing.

[13] It would appear to me on the facts thus presented that the Applicants have not approached the court with clean hands and therefore cannot access the halls of justice. The facts presented are clear in this regard that on their own affidavits the Applicants operated their practice when they had a deficit in their Trust Account contrary to the provisions of the Legal Practitioner's Act since 2002 and from that

time certificates have been filed with the Attorney General to the effect that the Act has been followed. In this regard I agree in toto with the submissions made by Mr. Magagula that in the circumstances the court cannot be seen to connive and condone the conduct of the Applicants. In this regard I have considered the dictum in Mulligan vs Mulligan (supra). This case was cited with approval by Nathan CJ in the case Photo Agencies (Pty) Ltd vs The Royal Swaziland Police and another 1970 - 76 S.L.R. 398 at 407 where the Applicant in that case, who had, in breach of and in order to circumvent an embargo of sale of arms to the apartheid South African regime imposed by the United Nations Security Council, imported arms which were confiscated by the police and was denied access to the halls of justice. I have further took refuge in the landmark English case where Lord Denning dealt with this very issue in the case of Hadkinson vs Hadkinson (1953) 2 ALL ER 571 at 574 - 5 as follows:

"It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which the court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing a compliance. Applying this principle I am of the opinion that the fact that a party to a cause has disobeyed an order of court is not of itself a bar to his being heard, but if his disobedience is such that so long as it continues it impedes the course of justice in the cause by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may, in its discretion, refuse to hear him until the impediment is removed or good cause is shown why it should not be removed".

[14] For the above reasons therefore 1 have come to the considered opinion that this point of law raised ought to succeed and as a result thereto it would not be necessary to traverse the remaining points of objection and therefore the application stands to be dismissed on this ground.

[15] It would appear to me although commenting en passant that the Law Society of Swaziland ought to intervene in this matter urgently with a view to appoint an impartial and independent person to look into the affairs of the partnership in terms of the law. Also, in the same token the office of the Attorney General is to take appropriate action as required by the Act.

[16] In the result, for the afore-going reasons the application is dismissed with costs.

S.B. MAPHALALA

JUDGE