IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 3391/08**

In the matter between:

JOSIAH LOKOTFWAKO **APPLICANT**

AND

LANGATILE LEPHLINAH LOKOTFWAKO **1st RESPONDENT**

MABILA ATTORNEYS **2nd RESPONDENT**

P.S. MAGAGULA ATTORNEYS **3rd RESPONDENT**

In Re :

LANGATILE LEPHLINAH LOKOTFWAKO **APPLICANT**

AND

JOSIAH LOKOTFWAKO **1ST RESPONDENT**

SWAZILAND SAVINGS AND DEVELOPMENT BANK (N.O.) **2nd RESPONDENT**

CORAM **MAMBAJ**

FOR APPLICANT **MR S. DLAMINI**

FOR 1st & 3rd RESPONDENTS **MR M. NDLOVU**

(2nd respondent abiding decision of the court)

JUDGEMENT

15th April, 2009

[1] Whatever the true relationship is between the Applicant and the 1 Respondent - for the Applicant denies that the 1st Respondent is his wife - they, at one stage, lived together in one home as husband and wife or as simple partners or lovers. The home they shared together was affected by the Mbabane-Ngwenya bye-pass road and the ground on

which their home stood or was situated was expropriated by the state to make way for the road construction.

[2] Following the aforesaid expropriation, the Applicant and first respondent entered into a written agreement with the Government of the Kingdom of Swaziland whereby it was agreed that the Government would pay a sum of E1089215.80 to them jointly as compensation for their home.

[3] The agreement further notes that the Applicant is represented by lawyers *Mabila Attorneys* of Mbabane and the first respondent by lawyers *P.S. Magagula,* also of Mbabane. Payment was eventually made by government by cheque payable to the Applicant who duly deposited it into his bank account with the Swazi Bank, undertaking to the first Respondent that he shall pay to her, her half share once the cheque had been cleared at the bank. It was anticipated by both parties that the cheque would be cleared on 27th July 2008. However, when that date came and passed and the Applicant made himself scarce and did not pay to the first respondent as promised, she, on 2nd September 2008 applied for an order on an urgent basis, inter alia that:

> "2.1 The account which he holds with the 2nd Respondent, Mbabane Branch should not be frozen so that he cannot have access to the amount of E1 0892, 215.80...which amount was paid to the Respondent by the Ministry of Works and Public Transport.
>
> 2.2 The Respondent should not have access to the account up until the dispute in issue has been resolved.

3. That both the Applicant and the first Respondent should share the money equally as per the agreement.

4. That prayer 2 operate with immediate effect,"

and the notice of motion was served on Mabila Attorneys on the same day, who accepted these court papers without reservations.

[4] Attorney Sabelo Dlamini of *Mabila Attorneys* who received the notice of motion from the first Respondent's attorneys tried in vain to contact

the Applicant in order to alert him of the application and also no doubt, to get instructions from him on the matter.

[5] By 9.30 a.m. that day when the matter was due for hearing Mr Dlamini had not contacted the Applicant and thus had no instructions from him on how to handle the Application. When the matter was called in court that day, Mr Dlamini informed the court that he was acting for the Applicant and he consented to a final order being made ordering and empowering the bank to transfer a sum of E544607.90 from the Applicant's bank account into the account of the first Respondent. The bank was, also by consent, ordered to comply with the order by 3.00 p.m. the next day and it did so. When the Applicant discovered this about a month later, he filed this Application against the respondents wherein he claims inter alia for an order:

> "2. Rescinding and setting aside the order of this Honourable Court granted on 2
> September in civil case no. 3391/08.
> 3. Prayer 2 above having been granted, directing the Respondents to pay the Applicant the sum of E544 607.90, and or alternatively so much of the said sum as may still be in any of the Respondents' possession.
> 4. Directing the 1st and 3rd Respondents to account for so much of the said sum of E544 607.90 as they are unable to forthwith pay the Applicant.
> 5. Directing the Respondents to pay the Applicant's costs of this application at attorney-client scale."

[6] The Applicant's main contention in support of his Application is that he neither instructed *Mabila Attorneys* to represent him in the Application that culminated in the order for the debit aforesaid from his bank account nor instructed them to consent to the order aforesaid. In fact he was not aware of the Notice of Motion as such notice was not served on him at all but on the said attorneys.

[7] In response to the Application attorney Sabelo Dlamini states that:

" 3.21 On the 27th August 2008 the Applicant did not show up and at the time Ms Magagula was pestering me and I tried to get hold Applicant to no avail until I was served with a Notice of Application by 3rd Respondent. 3.22 Upon receipt of the Notice of Application (filed under a certificate of urgency) I consulted with Mr Mabila (whom I always updated in the matter and who had briefly shown up in the meeting of the 20th August 2008) who after perusing the Notice of Application said we should only oppose the costs order as there was no basis for defending the matter in view of the agreement (i.e. sharing fifty-fifty) between the parties of which he was fully aware. Mr Mabila then instructed Ms Bongiwe Dlamini (another professional assistant in 2nd Respondent) to have the consent order recorded.

3.23 At all material times hereto, and as evident above, Applicant had engaged 2nd Respondent to act for him and the 2nd Respondent acted within the scope of its mandate in consenting to the matter as the agreement had been reached in our presence.

3.24 In actual fact, prior to discussing the matter with Mr Mabila I tried calling Applicant in his cellular phone (being number 641 2127) to no avail and eventually got hold of his son Nelson in his cellular phone number 605 7441 and I advised him about the application and Nelson said he was going to pass the message to Applicant.

3.25 It is worthy to mention that Applicant had fully instructed 2nd Respondent and I attended to his matter in my capacity as an employee of 2nd Respondent and it should be noted that, professionally, I cannot engage in any form of employment in conflict with my contract with the 2nd Respondent.

3.26 Lastly, it is surprising why Applicant never raised the issue of lack of mandate on the part of 2nd Respondent and in the meetings we had he always referred to me as his lawyer and the 1st Respondent as his wife. In actual fact, the last time we met with Applicant was when the said oral agreement was reached on the 20th August 2008.

4. In the circumstances, I humbly submit that the application is spurious and defamatory to 2nd Respondent and an order for costs at a punitive scale shall be sought at the hearing of the matter and that the fees owed by Applicant to 2nd Respondent be paid in full as he had never paid a cent only promising to do so upon receipt of payment from the Ministry of Works."

On the latter aspect, he is supported by the first Respondent and her attorney who also make these rather startling allegations :

"5. AD PARAGRAPH 3

Save to deny that 2nd Respondent purported to act for Applicant and state that it did indeed act for him, contents hereof are not in issue. Applicant should not suffer from selective amnesia in particular because in the meetings we had he

always referred to Sabelo Dlamini who is employed by 2nd Respondent as his attorney. ...

7. AD PARAGRAPH 6

The Applicant was served with the Application through his Attorneys being the second Respondent. Applicant should recall that in the last meeting we had it was agreed that our respective Attorneys (who were present in the meetings) would deal with the Ministry of Works regarding payment in execution of our agreement (which will be clearly set out hereunder), and logically it made sense to serve them and it was even convenient."

These allegations are not only factually incorrect but bad in law. The Applicant did not choose Mabila Attorneys as his "domicilium". First, domicilium denotes a physical place of service, not a person or group of persons. According to **Erasmus,** SUPERIOR COURT PRACTICE, atB1-23,

"A domicilium citandi is a place chosen by a person where process in judicial proceedings may be served upon him." Secondly, *Mabila Attorneys* were chosen as the agents or representatives of the Applicant in the negotiations and agreement between the Government and the parties thereto pertaining to the payment of the compensation. Thirdly, the appointment of the said attorneys as agents for the Applicant did not specify that such appointment was for purposes of service of judicial process. Even if they were his attorneys generally, they required specific instructions on the specific issues at hand. They had no such instructions. They were not mandated to implement, on his behalf, the verbal agreement referred to above.

[8] Whilst it is true that *Mabila Attorneys* accepted service of the Notice of motion on behalf of the Applicant as stated above, they clearly had no mandate to either accept such service or to consent to any order or to the final order that was eventually issued by this court.

This is also clear from the affidavit of attorney Sabelo Dlamini who says that upon receipt of the Application he tried to get hold of the applicant to notify him about the Application. The other aim of course must have been to obtain instructions or a mandate from him on how to handle the

Application. It is therefore inexplicable and beyond my ken, how the same attorney who had failed get such mandate from his supposed client, could turn up in court and advise the court that he was representing the Applicant and in fact had instructions to consent to the order sought by the 1st Respondent. Infact the first Respondent, according to her notice of motion, sought an interim order and not a final order. His knowledge of the agreed sharing arrangement between applicant and 1st Respondent was not a mandate for him to compromise applicant's rights.

[9] I should mention here that at the beginning of the hearing of this application, Mr Mabila of *Mabila Attorneys* informed the court that they were neither supporting nor opposing this application and had filed their affidavit merely to explain to court their situation and why they had acted in the way they did. This stance is commendable in the circumstances, although it is of very little, if any, value to the applicant at this stage.

[10] In view of the above factual position, I am of the considered view that if the presiding officer was aware, at the time he granted the consent order, that *Mabila Attorneys* had no mandate to represent the Applicant and had no mandate to consent to the order sought, he would not have granted it. The fact that *Mabila Attorneys* were aware that their erstwhile client had agreed to give half of the compensation money to the first Respondent, is neither here nor there. The bottom line is that they had no right or authority to represent him or speak on his behalf in those proceedings. The "consent" order was granted in the absence of the Applicant and it was erroneously sought and granted as envisaged under rule 42(1)(a) of the rules of this court and is hereby rescinded.

[11] When the bank effected the debit of E544 607.90 from the Applicant's account and credited that sum to the first Respondent's account, it did so on the strength of a court order. It had to follow the

court order and therefore no blame may be apportioned to it for this. It would be of no value or effect to order the first Respondent to restore the money in question to the Applicant. (In fact I was informed that it had been used already in building a home by and for the first Respondent). If the Applicant is minded to pursue its return, he is at liberty to do so and this rescission judgement partly opens the door for him to do so.

[12] The third Respondent acted as attorneys for the first respondent and I can find no justification for an adverse order for costs against it. Admittedly they irregularly served the Notice of Motion on the wrong party. But ultimately, they were led to believe that that party had the mandate to represent and speak on behalf of the Applicant and proceeded to obtain the order on the strength of such representations, which turned out to be incorrect.

[13] *Mabila Attorneys* may have honestly or genuinely believed they had the requisite mandate and instructions to act for the Applicant and did what they did in the best interests of their apparent client, but their .belief has been shown to have been wrong. They have not opposed this application and they have explained why and how they acted as they did. It would, in my judgment, be rather harsh to visit their action with an adverse order for costs and I consider that, should the Applicant sue for the recovery of the money debited from his account, this may well involve *Mabila Attorneys* as one of the parties to that suit and that suit would take care of the costs herein.

MAMBA J