



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 4161/2007

In the matter between:

**MTANANA NTJALINTJALI
MKHULUNYELWA MAVIMBELA
MTIWEMPHI MALINGA
MKHIPHENI NGWENYA
ALFRED MAVIMBELA**

**1ST APPLICANT
2ND APPLICANT
3RD APPLICANT
4TH APPLICANT
5TH APPLICANT**

and

ELCAN DLAMINI

RESPONDENT

In re:

ELCAN DLAMINI

APPLICANT

and

**MTANANA NTJALINTJALI
MKHULUNYELWA MAVIMBELA
MTIWEMPHI MALINGA
RESPONDENT
MKHIPHENI NGWENYA
RESPONDENT
ALFRED MAVIMBELA**

**1ST RESPONDENT
2ND RESPONDENT
3RD
4TH
5TH RESPONDENT**

CORAM
FOR THE APPLICANT

: Q.M. MABUZA -J
: MR. B.J. SIMELANE OF
BEN J. SIMELANE & ASSOCIATES

FOR THE RESPONDENT :

MR. L. MALINGA OF MALINGA,
MALINGA INC.

JUDGMENT 8/07/2010

- [1] The Applicant seeks an order in the following terms:
- (a) Rescinding and setting aside the order granted on 24th April 2009 by the Honourable Court.
 - (b) That Applicants be granted leave to oppose the main application.
 - (c) Costs of the application.
 - (d) Any further or alternative relief.
- [2] The Respondent opposes the application.
- [3] The background hereto is that the Applicants were involved in the construction of a dipping tank at Dinga. When the construction of the dipping tank was complete the Respondent instituted application proceedings in November 2007 for an interdict restraining the Applicants from erecting and or removing structures erected above the Respondents' fields and further restraining the Applicants from making preparations for the opening of the Dinga dipping tank and from dipping cattle.

- [4] A **rule nisi** was issued on the 20/3/2009 by consent with the Applicants' former attorney, Mr. M.S. Simelane. The **rule nisi** which was returnable on the 24th April 2009 was confirmed on that date with the consent of the said Mr. M.S. Simelane
- [5] It turns out that the said attorney had no mandate to consent to the issue and confirmation of the **rule nisi**. He had been instructed by the Applicants who were Respondents then to defend the matter but failed to carry out this mandate.
- [6] The Applicants now seek rescission as aforementioned. Mr. Malinga who represents the Respondents opposes this application and has raised a point **in limine**; that of non-joiner of the Applicants' previous attorney, Mr. M.S. Simelane. Mr. Malinga is of the view that Mr. Simelane should have been joined because there are serious allegations against him which clearly show that he has a substantial interest in the matter. Mr. Malinga further contends that the allegations against Mr. M.S. Simelane are so serious that if followed to their conclusion they would amount to professional misconduct. Therefore says Mr. Malinga he should have been joined in order to clear his name.

- [7] I disagree with Mr. Malinga. Such misdemeanour by the said attorney can be adequately dealt with by the relevant body of the Law society and not this court. It is up to the Applicants to report the matter to the said august body to deal with as it deems fit. The point *in limine* must thus fail.
- [8] It seems clear to me that the Applicants' intentions were at all times to defend the matter but were let down by their attorney. Evidence to support this observation is sourced from the receipt in the sum of E750.00 paid to attorney M. S. Simelane on the 13/3/2008.
- [9] I am satisfied that the Applicants were not in wilful default as they had instructed their erstwhile attorney and believed that he would act in their best interests. I am satisfied that the Applicants have a bona fide defence to the action and have a reasonable prospect of success; it is generally fair to hear both sides to an issue. A litigant who has a full proof case should not fear a reopening of such case as this will enable him to ventilate all relevant issues.

[10] In the circumstances the point *in limine* is dismissed and the application is granted. Costs to be in the cause.

Q.M. MABUZA
JUDGE OF THE HIGH COURT OF SWAZILAND