

IN THE HIGH COURT OF ESW ATINI
JUDGMENT

In the matter Between:

Case No. 619/2013

PHILLIP VILAKATI

Plaintiff

And

SWAZILAND ELECTRICITY COMPANY

Defendant

Neutral citation

Phillip Vilakati v Swaziland Electricity Company
(619/2013) [2019] SZHC 157 (16th August, 2019)

Coram

M. Dlamini J

Heard

3rd July, 2019

Delivered

16th August, 2019

Evidence

:

Plaintiff's testimony not supporting his case onus of proof on plaintiff

Cost : Plaintiff's case failing from the very hands of plaintiff - defendant failing to apply for absolution from the instance - costs orders - principle of our law that costs follow the event - day(s) upon which defendant called its witnesses subtracted -

Summary: The plaintiff's claim of E250 000 arises from damages suffered as a result of defendant disconnecting his electricity and calling him a thief in the presence of neighbours and visitors. The defendant denies that the disconnection was justiciable.

The Parties

[1] The plaintiff is an adult male of Manzana area, Zone 1, at the outskirts of Mbabane, Hhohho region. The defendant is a *legal personae*, duly incorporated and registered in terms of the company laws of the Kingdom.

The Pleadings

The Particulars of Claim

[2] The plaintiff has stated that as a legal consumer of electricity:

"5. *On or about 6th November 2012, servants of Defendant acting during the course and scope of employment with Defendant, unlawfully disconnected electricity supply to Plaintiff's house.*

6. *As at the time when Defendant's servants disconnected the supply of electricity to Plaintiff, Plaintiff was a pre-paid consumer and consequently had deposited with Defendant money in exchange of electricity.*

7. *At the time of the disconnection of the supply of electricity, Defendant's servants stated that Plaintiff's consumption of the electricity was improper whereas he used an inventor multi plug to boost the supply to the electrical appliances that he operated in the house. "*

(3) He then claimed:

"8. *as a direct result of the unlawful disconnection of the electricity supply, Plaintiff suffered in the following damages:*

8.1 *all different types of fish in the aquarium died and were valued at E2, 298. 65:*

8.2 *meat in the deep freezer was spoiled and was valued at E17,049. 74;*

8.3 *food in the refrigerator E1,333.12;*

8.4 *400 live chickens in the chicken shed died of lack of heating valued at E50.00 = E20,000.00:*

8.5 *Samsung TV flat screen damaged valued at E13,000.00*

Total E53,681.51

The full list of the destroyed damaged items is attached hereto and marked "A "

9. *As a direct result of Defendant's action Plaintiff hired a petrol generator at the cost of E350.00 per day and petrol consumption was E200. 00 per day for 98 days.*

<i>E350.00 x 98 days</i>	<i>E34,300.00</i>
<i>E200. 00 x 98 days</i>	<i>E19;600.00</i>
<i>Total</i>	<i>E53,900.00"</i>

The total under this claim was E107 581.51.

[4] He also stated:

"2. *On or about &h November 2012, servants of Defendant acting during and within their scope as such and during their course of duty, including a certain Mr. Xaba came to Plaintiff's premises and unlawfully with the intent to injure Plaintiff in his good name and standing:*

2.1 disconnected electricity supply into Plaintiff's home;

2.2 insulted Plaintiff and called him a thief the presence of his neighbours and visitors;

2.3 alleged that Plaintiff had unlawfully connected the electricity supply"

The total amount was said to be E250 '000.

The Plea

[5] The defendant pleaded:

"2.2 *On or about the 6'h November 2012 the Plaintiff was found to have tempered with his house electricity wiring system by inserting foreign wires which draws electricity without being metered at his place of*

residence by employees of the Defendant during their routine check-up of electricity meters installed by the Defendant to its customers.

5.3 *After the disconnection, the Plaintiff approached the Defendant for purposes of reconnection. The plaintiff paid an administrative fee of E1, 680.00 (One Thousand Six Hundred and Eighty Emalangeni) and the capital amount of the electricity unlawfully consumed by him. "*

Replication

[6] The plaintiff replicated. He however failed to address, paragraph 5.3 of defendant's plea on payment of the administrative fee.

Oral Evidence

[7] The plaintiff was PW1. He testified that around 2012 the defendant, *"killed me while I was alive. "* He was about to retire in that year. He purchased chickens and meat. Thereafter defendant came and disconnected his electricity. His meat was spoiled. His chickens died as he could not heat the chickens' shed. He was not a criminal, yet defendant had portrayed him as one. On the basis that defendant had been advising consumers to save electricity, he referred the court to page 33 of the book of pleadings. He stated that in order to minimise the use of electricity, he, *"Had a battery charger plugged into an electric socket wall. The battery charger was connected to a car battery. An inventor was connected to the car battery. From the meter to a multi-plug."*

[8] He studied electricity at Boksburg, Johannesburg, in the Republic of South Africa. He was a fire fighter. He learnt about inventors as he visited Boksburg where they make fire fighters engines. He did ask defendant's

employees who disconnected his electricity as to where they studied their electricity when they said that the electricity they were using was not metred. They did not respond. He disputed tapping the electricity between the metre box and the roof box. He pointed out that it was impossible for him to have done so because the wires are imbedded into a plastered wall. He also denied that he offered a bribe to defendant's employees after they disconnected his electricity.

[9] He testified that three employees of defendant disconnected the electricity by removing a red cable. He insisted that they should restore it back. They refused and advised him to go to Mrs Masangane who was in charge at defendant. He did go to Mrs Masangane and when he eventually met her, it was said to him that he stole electricity. He disputed this. They ordered him to pay the sum of E12 000. He did pay the said sum. He also maintained an aquarium. His fishes died as a result of the disconnection. When he was using the inventor, he would purchase electricity units for E30.00. This would be for cooking, heating the chickens' shed, aquarium and for the refrigerator and a deep freezer. He would play the television as well.

[10] When he paid the sum of E12 000, he also purchased units for E30.00. He lost a number of items listed at page 7 of the book of pleadings. The total lost was E53 681.51. On his second claim he testified that it was based on being portrayed as a criminal in society. He stated:

"They removed the metre from home. They took the cable and connected it outside the box. The metre was removed. According to me why are they removing the meter. This shows that I am a criminal. "

[11] PW2 was **Magwaza Samuel Dlamini**. He testified that he was self-employed as an electrician. He qualified at Paul Raylane College, Pretoria, in 1982 with a diploma in house wiring. He returned to Swaziland College of Technology where he obtained a grade 2 certificate in 1989. He worked at the Mountain Inn Hotel as Maintenance Manager until 1994. Thereafter he worked at Swazi Inn, Smokey Mountain and Diamond Valley Hotels until 1998. He thereafter became self-employed. He was referred to the diagram at page 33 of the book of the pleadings. He pointed out that an inventor changes direct current to electricity. In the diagram, the charger was plugged on the house wall. This saves electricity as from the battery only 12 volts are taken to the inventor. The inventor converts it to 230 volts.

[12] The third witness for the plaintiff was PW3, **Lindiwe Esther Simelane** who identified plaintiff as her husband. She came to testify on the losses incurred by plaintiff as a result of the electricity disconnection. She referred the court to page 7 and identified it as the list of items lost. She mentioned that the fishes referred to at page 7 were for their consumption and sale. I must hasten to state that plaintiff who was seated in court laughed his head off as PW3 testified so on the use of the fishes. Correctly so as fishes kept in an aquarium are never for consumption.

[13] The last witness was **Steven MakhunduMotsa** who told the court that he was plaintiff's neighbour. He knows plaintiff as he sells chickens. In 2012, the purchase price of a chicken was E50.00. He kept chicken sheds in his homestead. The plaintiff closed his case. Defendant led three witnesses in rebuttal.

[14] DW1 was **Jerome Mgezeni Xaba**. He was a metre reader under the employ of defendant. On 6th November 2012, the technicians **Simanga Dlamini and MabuselaMasilela** instructed him to accompany them to his area of work i.e. Manzana to do inspections. They all proceeded to Manzana and conducted inspection in various homesteads. They arrived at plaintiff's homesteads, He announced their arrival as he was familiar with the plaintiff who was the head of that homestead. Plaintiff welcomed them as he was present. They explained their mission. **Simanga** went to the metre box and **Matsebula** entered the main house; **Simanga** switched off the power supply. **Matsebula** reported that the appliances were still on. **Simanga** entered into the house to confirm what **Matsebula** was saying. **Matsebula** decided to record all the appliances that were on while the power supply had been cut off.

[15] **Simanga and Matsebula** decided to go to the electric pole to cut off the power supply from it. He remained behind with plaintiff in the homestead. They returned after about five minutes. He confirmed to them that at that stage all the appliances were off. While **Simanga and Matsebula** were away to disconnect the power from the pole, plaintiff asked him to speak to the duo requesting them not to cut off

the power supply as he would give them something in return. Upon their return,

DWI told them that plaintiff was requesting for a favour. They told plaintiff to report to the defendant's offices to discuss the issue of interference with electricity.

[16] **Simanga Mangaliso Dlamini** was the second witness. He has been in the employ of defendant since 2008 as a system losses technician, He conduct inspections of electricity losses. He holds a diploma in electrical engineering. On 6th November, 2012; in the company of Matsebula, he went to do inspection in Mbabane. They went via Stone Age Depot and requested DWI to accompany them to Manzana area for inspection. At that time electricity was prepaid.

[17] They went to the plaintiff homestead, amongst others. DWI announced their arrival, Plaintiff attended them. They informed him that they were moving about conducting inspections. **Matsebula** entered the house while he proceeded to the metre box. He removed the jumper that supplied power from the metre. He notified **Matsebula** that he had cut off the power supply. **Matsebula** responded by saying that the lights went off but certain appliances were still on. He decided to enter the house to confirm what **Matsebula** was saying. He found the refrigerator on. All plugged items were on.

[18] He did not see any of the gadgets mentioned at page 33 of the pleadings. He formed the opinion that power supply was sourced away from the metre box. He returned to the metre box. He searched for a by-pass equipment. He could not see any. They advised plaintiff that power supply had been cut off. Plaintiff did not say anything. He, together with

Matsebula, decided to go and cut the power supply from the electric pole outside plaintiffs homestead. DWI remained with plaintiff. They returned and entered the house. They found that all plugged appliances were off. It became clear then that there was a by-pass somewhere and that power had been sourced away from the metre box socket.

[19] DW 1 told them that plaintiff was offering them something if they would reconnect the power supply. He formed the opinion that plaintiff knew what was happening about the electricity. DW2 conceded that a by-pass may cause damage to appliances on the basis that electricity flows without going via a red cable which earths or controls the overflow of currency.

[20] The next witness for the defendant was **Mabusela ChristineMasilela**. His evidence was similar to that DW2. He narrated how in the company of DW2, he left Matsapha with the intention of inspecting areas where DWI conducted metre reading. How they also reached the homestead of plaintiff. He requested to enter into plaintiffs house as DWI and DW2 remained outside by the metre box. While he was in the kitchen together with plaintiff, DW2 shouted from outside saying that he had switched off the power supply into the house. He responded by saying that the lights were off except the refrigerator and freezer.

[21] DW2 also entered the house. He verified that the double door refrigerator and freezer were on. They all proceeded to the living room. They found the television on. He explained to the plaintiff that since they had cut off

the power supply, they expected that every appliance cease from functioning. DW2 exited the house in search of the power source

supplying the appliances that were on. He asked plaintiff where the appliances were sourcing power from. Plaintiff was puzzled as to the source of power. He explained to plaintiff further that he needed to take an inventory of all the appliances that were on after the power source was disconnected at the meter box.

[22] He recorded the freezer, double door refrigerator, television and decoder. Plaintiff assisted them in the inventory. They left the house. They all i.e. DW2, plaintiff, DW1 and himself inspected the metre box. They showed plaintiff the jumper which was feeding the power into the house. He then advised plaintiff that for the reason that despite the removal of the jumper, appliances were still functioning, they were then compelled to cut off the power supply from the electric pole. He then left with DW2. Plaintiff remained behind with DW1.

[23] They proceeded to the electric pole and disconnected the power supply by removing the jumper. The pole was near plaintiffs homestead. They returned to plaintiffs homestead. They entered the house to inspect the appliances that were functioning. They discovered that they were all off. They advised plaintiff to report to the Credit Control department at their workplace. While they were boarding their motor-vehicle, DW1 told them that while they had gone to attend the electric pole, plaintiff requested him to negotiate on his behalf with them to reconnect the power supply. Plaintiff undertook to give them a token of appreciation in return. They enquired what DW1 had said in response. DW1 told them that he told plaintiff to deal with defendant direct on that issue. The defence closed its case.

[24] The court by consent of Counsel for both parties called for an expert witness evidence to shed light on the diagram at page 33 of the book of pleadings. **Mr. John Sabelo Mahlalela** on oath informed the court that he was a lecturer at the University of eSwatini attached to the Electronic Engineering department since 2016. He is a post-graduate with Master of Science degree in Electrical Power Engineering acquired in Taiwan in 2015.

[25] The court referred him to diagram at page 33 of the book of pleadings. He pointed out that the diagram depicted a back-up supply of electricity in the event of a power failure. He testified:

"In case of power failure, we expect that the multi plug would discharge power provided the battery is fully charged. "

Ad indication

[26] Was there an illegal consumption of electricity in plaintiffs house, justifying a disconnection by defendant? Put differently, did the defendant unlawfully disconnect plaintiffs supply of electricity?

Determination

[27] The plaintiffs case is that he installed a device reflected at page 33 of the book of pleadings. The purpose of the device was to save the consumption of electricity. Defendant on the other hand disputed any existence of the device in plaintiffs house. It was testified on behalf of

defendant that if, firstly, the device was present, the defendant employees who were

witnesses *in casu* would have seen it. Secondly, the plaintiff himself would have drawn the defendant witnesses's attention to it. Thirdly, even if it was present, it was not a savings device.

[28] For reasons that will become apparent later in this judgement, it is unnecessary for me to make a determination on whether the device whose diagram is reflected at page 33 of the book was present in plaintiff's house.

The purpose of the device

[29] Plaintiffs testimony was that the device acted as a booster. It increased the currency drawn from the defendant's source. As a result, although he was utilising the electricity for a number of uses such as heating his chicken shed, cooking, keeping running the aquarium, large freezer and two door refrigerator, lighting and playing television with a decoder, he was only paying the sum of E30.00 per month as electricity bill with the defendant. He articulated in regard to his saving device:

"SEE (defendant) has been constantly advising us to minimize the costs of electricity. Before I install electricity, I used solar panels. A solar panel limits you in that you cannot cook. I then installed electricity. "

[30] He continued:

"I had a battery charger plucked onto the electric socket wall. I was trying to minimize electricity. This battery charger was connected to a car battery. An inventor is connected into a car battery. From the meter to a multi plug. "

(31) He expatiated further on his device:

"From the SEB DB flows electric currency of 15ams to the battery charger which is 3.5ams. This will continuously charge the battery to 13.5 volts. From the car battery to the inventor which will step up the input to de i.e. 220–240 volts. The inventor increases the voltage. "

[32) Having so testified, the plaintiff surprisingly, still under chief later testified:

"From SEB I was drawing 15ams which is equal to 220 volts. "

[33) Now, if 15ams is the same amount as 220 volts, juxtaposed with the evidence from the plaintiff that from the main socket (source) 15ams was drawn, it passed through the two batteries and finally the convertor which turns it to 220 volts, it simple means that the same amount of electricity drawn from defendant's source of electricity is the same amount emitted by the inventor to the multi-plug. Now where is the increase? The answer is an obvious, "None."

[34) In brief, plaintiff's case fell from the very onset under his evidence-in-chief. It was therefore not surprising to later hear still under his evidence-in-chief as follows:

"When I went again on Wednesday, they (defendant) said, "Oh it is the one who steals electricity. " I said I never stole electricity. They said I must pay El 2, 000 so as to reconnect it. "

[35) He was cross-examined:

Mr. W. Waring : "You confirm that you paid the fine of E12 000."

Plaintiff : "Yes"

[36] His evidence was to the effect that he did pay the sum of E12 000. The question is why pay if he did not steal it? The answer lies in his evidence in-chief that in as much as his device was drawing 1 Sams from defendant's electricity source, his inventor was remitting the same amount drawn (albeit altered to de) which was 220 volts to the multi-plug. This device was therefore not a saving device.

[37] There is a further legal connotation to the act adopted by plaintiff viz., payment of the E12 000 fine. It was well enunciated by **Henning J** under the doctrine of election as follows:

"When one party to a contract (claim) having full knowledge of all relevant facts is placed in such a position that he has a choice between two inconsistent courses of action, he must within a reasonable time decide which course he will pursue. If he exercises his choice and communicates his decision to the other party to the contract (claim) that choice is irrevocable. If he does an unequivocal act, i.e. one which would be justifiable if he had elected one way and unjustifiable if he had elected other way and that act comes to the knowledge of the other party, the law presumes that he has exercised an irrevocable choice. " (my own)

¹ Trust Bank of Africa Ltd v Eksteen 1968 (3) 529 at 639

[38] The learned **Justice Henning J** wisely referred to English Law in Halsbury² which partly reads:

"The principle that a person may not approbate and reprobate expresses two propositions, first that the person in question, having a choice between two courses of conduct is to be treated as having made an election from which he cannot resile, and second, that he will not be regarded in general at any rate as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent."

[39] The law does not countenance a party who approbates and reprobates. This alone justifies a dismissal of plaintiffs cause of action. It was therefore further not surprising to hear from plaintiffs own expert witness who testified in chief:

"The inventor changes the direct current to electricity. This is exactly what happens as I have explained. The person had plugged the charger in the house. This saves electricity."

[40] He repeated:

"This saves electricity from the battery it is 12 volts to the inventor to the appliances it becomes 230 volts."

² Laws of England, 3rd Ed at paragraph 340

[41] However, under cross-examination, PW2 testified:

Mr. W. Waring *"Turn to page 33. The battery charger connects to the wall:*

PW2 *: "Yes"*

Mr. W. Waring *: "How many voltage comes out of the wall?"*

PW2 *: "230 volts*

Mr. W. Waring *: "Normal appliances utilize how many volts?"*

PW2 *: "230"*

Mr. W. Waring *: "Is it correct to say that the battery charger also takes out 230 volts?"*

PW2 *: "Yes"*

Mr. W. Waring *: "Is an inventor equivalent to a booster or it is a backup?"*

PW2 *: "It is a backup. "*

[42] This question was repeated and the answer did not change:

Mr. W. Waring *: "it is not a booster of electricity?"*

PW2 : "Yes. "

[43] Plaintiff was also cross-examine:

Mr. W. Warring : "Your battery is it a power source ora
back up?"

Plaintiff : "Power source is the SEC (defendant)
socket."

[44] Clearly, from plaintiffs case, the inventor which was said at first to increase currency turned out not to be. The witness called by the court also confirmed the analysis made above. This witness holds a Master's degree in Science as he specialised in electrical power engineering. He described the device claimed to have been in use by plaintiff as a backup supply of electricity provided the battery was fully charged. He was questioned by plaintiffs Counsel:

Mr. B.J. Simelane : "Can it be used to save power? "

Mr. Sabelo John

Mahlalela : "In terms of efficiency i.e. power savings no
as the inventor consumes its own power due
to the switches. It is a backup and not saving
power. It is reliable on power availability. "

[45] A similar question was again posed on behalf of plaintiff:

Mr. B.J. Simelane : *"Is it correct to say iffilled the battery to the fullest, I will save power while the appliances are working?"*

Mr. Sabelo John
Mah/ale/a : *"You are not saving as these charges and inventor gadgets consume power or dissipate power as the switches in them would use power besides the load of power in them. It is like adding more load to the socket. But it is reliable for purposes of power in that when SEC (defendant) is not there, you would have power but for sometime. "*

[46] The defence Counselasked:

Mr. W. Waring : *"Is it a power saver?"*

Mr. Sabelo John

Mah/ale/a : *"I would not agree. "*

Mr. W. Waring : *"Would it boost power?"*

Mr. Sabelo John

Mah/ale/a : *"No, although it changes power from direct current (de) to alternate current (ac)."*

[47] In the analysis of the evidence by the plaintiffs expert and the court's expert witnesses, the device relied upon by plaintiff in support of his

version that he was not consuming electricity unlawfully but had the device which boosted electricity, it is clear that the position is on the contrary. On this point alone, the plaintiffs case must fall.

[48] Beside the above scientific analysis, there is a factual basis which must be considered in plaintiffs case. It is that it was common cause among the parties that as soon as DW2 removed the red cable from the DB thereby switching off the power supply from the metre box, only the lights went off. This evidence was not disputed. The rest of the appliances continued to work.

[49] Now the evidence of plaintiff is that he had plugged on the main socket a plug which was connected to the battery charger. The battery charger was connected to the car battery which in turn was annexed to the inventor. The inventor was connected to the multi-plug which supplied the various appliances in the house with electricity. Now, if every appliance sourced its power from the multi-plug as testified by plaintiff, why then did only the lights go off. Why did they (lights) not continue to light up as all other appliances were on?

[50] The answer lies in the defendant's version that the appliances that remained functioning received their source of power away from the metre box. It is for that reason that when the electric power supply was cut off from the pole, all appliances ceased to operate.

[51] There is a puzzling aspect of plaintiff's version. Having testified that he had installed the saving device in his house, he was cross-examined:

Mr. W. Waring : "On 6th when the three gentlemen came to your house, did you show them the car battery?"

Plaintiff : "They never asked/or it."

Mr. W. Waring : "On the same day did you show the three gentlemen the inventor? "

Plaintiff : "I did not as they did not have timefor me. "

[52] He was asked ifhe did inform Mrs. Masangane that he had an inventor. He replied in the positive. He was asked as to what exactly he said to Mrs. Masangane. He replied:

"I said I did not steal any electricity. "

[53] In brief, plaintiff did not disclose to any of defendant's employees that he had the device whose diagram appears at page 33. He was cross• examined on whether he had photographs of the device. He did not have any. This evidence creates doubt on the existence of the device at the hands of plaintiff. This doubt tilts the scales of justice in favour of the defendant.

[54] At one point plaintiff testified that the defendant's employees who disconnected the electricity did not have time, when asked if he told them that he was using an inventor. However, plaintiff testified in-chief that he

asked them on where they had studied their electricity. All things being equal, one would expect plaintiff to have directed the defendants' technicians to the saving device rather query their place of qualification.

[55] In its written submission, plaintiff contended that defendant failed to produce to court exhibits of illegal connection. This submission overlooks the principle of our law that the burden of proof lies with the plaintiff and not the defendant. *"Onus is on the person who alleges something and not on his opponent who denies it."*³ As correctly put by the defence, the plaintiff did not show the court and further did not produce any photograph of the same device he relied upon as evidence of a legal connection. He merely presented a drawing which did not indicate the existence of such device. Plaintiff failed in this regard.

Costs

[56] I have demonstrated above that the plaintiff's case fell from his very testimony in chief. His expert witness, PW2 under cross-examination conceded that the plaintiff's device could not boost electricity. Now the question which borders on costs of suit is why plaintiff called for his witnesses. No doubt, this evidence demonstrating a fall from plaintiffs hands, called for an astute attorney to move for an application for absolution from the instance. This was not done. The defendant took the view that it would lead its witnesses. It is obvious that such a step was unnecessary in the circumstances of this case.

³ Corpus Juris (22.3.10)

[57] In the result, much time was wasted. The court cannot pay a blind eye to a litigant who takes up its time unnecessarily. A costs order against such litigant must be in place. For the principle of our law that costs follow the event, I shall grant defendant costs of suit but subtract the day(s) upon which it had its witnesses. Further, as it was so agreed, the defendant shall be ordered to pay taxed costs of the court's expert witness *viz.*, Mr. Sabelo John Mahlalela, a lecturer at the University of eSwatini in the Science faculty who testified in court in one day.

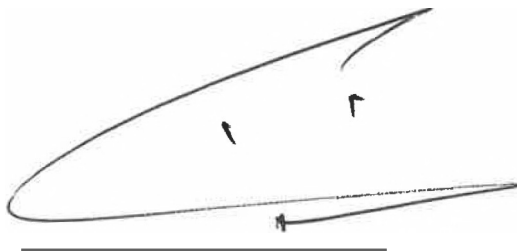
[58] In the final analysis, I enter as follows:

58.1 Plaintiff's cause of action is dismissed;

58.2 Plaintiff is ordered to pay costs of suit in terms of paragraph 57 herein to:

58.2.1 Defendant;

58.2.2 Court's expert witness.

A handwritten signature in black ink, consisting of a large, sweeping loop on the left and a horizontal line extending to the right, with a small vertical tick mark at the end of the line.

M.DLAMINI

For Plaintiff

B. J. Simelane of Ben J. Simelane and Associates

For Defendant

W. Waring of Waring Attorneys