

**IN THE HIGH COURT OF ESWATINI
JUDGMENT**

CASE NO: 03/2023

HELD IN MBABANE

IN THE MATTER BETWEEN

MDUDUZI KUNENE

WINILE SHONGWE

NONHLANHLA KUNENE

AND

SIBONGILE NCONGWANE N.O

**ESTATE OF THE LATE ALSON MANDLAKAPHELI KUNENE MASTER'S
REFERENCE NO. EH242/2012**

MASTER OF THE HIGH COURT

THE ATTORNEY GENERAL

THE MUNICIPAL COUNCIL OF MBABANE

1ST APPLICANT

2ND APPLICANT

3RD APPLICANT

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

4TH RESPONDENT

5TH RESPONDENT

NEUTRAL CITATION:

**MDUDUZI KUNENE & 2 OTHERS Vs
SIBONGILE NCONGWANE (N.O) & 3
OTHERS (03/2023) SZHC – 72 [17/04/2023]**

CORAM:

B W MAGAGULA J

HEARD:

17/03/2023

DELIVERED:

17/04/2023

SUMMARY:

Civil procedure - declaratory order sought declaring that registration of property was unlawful and hence void up origine. Further; the court is called upon to condone the Applicant's failure to report the death of an estate to the Master of the High Court. Points in limine in respect of conflict of interest of the firm of attorneys representing the Applicant's raised. A senior partner in the firm of attorneys representing the Applicants' previously represented the 1st and 2nd Respondents in a previous litigation involving the same parties in the Magistrate's court.

HELD:

It cannot be discounted that privileged information could have been shared in light of the proximity of the relationship between the attorney who was previously seized with the matter who is a depository of privileged information and the attorney presently handling the matter. This is due to the fact that they are partners in the same firm. Point in limine in respect of the conflict of interest upheld with costs.

JUDGMENT

BW MAGAGULA J

Back ground facts

[1] This matter came before this court on a certificate of urgency, where the Applicant seeks amongst others the following orders;

- 1.1 *That an order be and is hereby granted declaring that the registration of Plot 468 Block C, Mahwalala Zone 5 in Mbabane under the District of Hhohho in the Kingdom of Eswatini into the name of the Late Alson Mandlakapheli Kunene was unlawful and hence void ab origine;*
- 1.2 *An order condoning the Applicants for the failure to report the death of the Late Caliwe Saraphinah Ndaba Kunene and that leave be and is hereby granted to the Applicants to report the death of the said Caliwe Saraphinah Ndaba Kunene and to report her Estate accordingly;*
- 1.3 *That Plot 468 Block C, Mahwalala Zone 5 in Mbabane under the District of Hhohho in the Kingdom of Eswatini be and is hereby registered under the name of the Estate of the Late Caliwe Saraphinah Ndaba Kunene until such time as such Estate is liquidated and distributed at the hands of the Master of the High Court;*

- [2] The 5th Respondent has been joined into the proceedings. In as much as an affidavit was filed on the day of the oral arguments, no submissions were made by counsel on it's behalf.
- [3] I observe that it is now not uncommon in our jurisdiction that when death strikes, those left behind engage in ferocious litigation pertaining to the assets of the deceased. This matter is no different. The son and daughters of the late Caliwe Saraphinah Ndaba – Kunene are before court seeking to reverse the registration of a property from the name of their late brother whose widow is the 1st Respondent and have it registered in the name of the estate of their late mother.
- [4] The 1st Respondent met and married one Alson Mandlakapheli Kunene (the deceased) on the 2nd December 2007. Thereafter they proceeded to live together as husband and wife¹. Unfortunately, on the 13th June 2012 the said Alson Kunene died. Upon his death, the 1st Respondent was allegedly appointed as the Executrix Dative of his estate. The Applicant has challenged the 1st Respondent to produce letters of Administration.
- [5] Forming part of Alson Kunene's estate is the immovable property described as Plot No. 468 Mahwalala Zone 5, Mbabane, District of Hhohho, Eswatini (the property). Pursuant to the 1st Respondent's appointment as an executor, the Applicants moved an application at the Magistrates Court contesting the title of the deceased to the immovable property². This application was

¹ See page of the 79 Book of Pleadings, where the 1st Respondents sets out a detailed background of the matter.

² This is the very same application which forms the genesis of the point in *limine* taken by the 1st Respondent.

dismissed on the grounds that the Court was not seized with the requisite jurisdiction to hear and determine the matter.

- [6] The 1st Respondent is said to be unaware of the true genesis of the acquisition of the aforesaid property. She only became part of the family in 2007. However, she argues that her marriage to Alson Kunene led her to believe that the property in fact belonged to her husband. This is apparently because he was the one that constructed all the rental rooms as well as the shop on the property. Further, the deceased was alleged to be the one paying the dues to the 5th Respondent.
- [7] It is alleged that the 1st Respondent's late mother-in-law, Caliwe Saraphinah Ndaba-Kunene, obtained the immovable property when the deceased and his siblings were children. It is common cause that in the past a woman could not *khonta* without a husband or a male child. Due to her desire to obtain the property, she apparently *khontaed* under the name of the deceased³. The immovable property was subsequently registered in the name of the deceased. Prior to the 1st Respondent's mother-in-law's death, the immovable property was rezoned and it ceased being Swazi Nation Land and became Municipal Council land. The immovable property was then registered in her name. However, by virtue of the fact that the immovable property had been acquired in the name of the deceased, she always emphasized to all her children that upon her death, the immovable property would belong to the deceased.

³ Acquisition of land on Swazi Nation land through the Custom *kukhonta* from a Chief through the due procedure of *bandlancane* as such similar traditional council.

- [8] The deceased and the 1st Applicant were the only surviving male children and as such each had designated plots. The 1st Applicant is currently residing on the plot that was allocated to him. The property currently occupied by the 1st Applicant was allegedly obtained for him when he was still a minor in order to avoid any conflict between the 1st Applicant and the deceased. Over the course of her lifetime, the 1st Respondent's late mother-in-law informed all her children, including the Applicants that the immovable property would belong to the deceased (Alson) by virtue of the fact that it was his name that was used to khonta.
- [9] The 1st Applicant is alleged to have been aware at all times of the fact he was expected to leave the homestead and construct his own home on the plot that his mother acquired for him. However, the 1st Applicant built a small structure on the deceased's immovable property. When he was reminded that he was expected to vacate the premises, he pleaded that he be compensated for the house that he had built and as such, he was given an amount in excess of E10, 00-00 (Ten Thousand Emalangeni) to use to construct a new structure on his own plot as well as 12 (twelve) corrugated iron by the deceased.
- [10] The 1st Applicant apparently even acknowledged receipt of this money at the District Commissioner's Office wherein he attempted to usurp the deceased's immovable property. With the understanding that the immovable property belonged to him, Alson built a shop for purposes of selling day to day products and create another revenue stream. It is apparently this very same shop that

the 1st Applicant has allegedly forcibly taken. The 1st Respondent submit that it is common knowledge that this immovable property upon the death of Alson's mother, would pass to Alson. Apparently everyone, including the Applicants accepted this state of affairs.

- [11] After the death of the 1st Respondent's mother-in-law, and pursuant to a meeting with the elders of the family, which was inclusive of the Applicants, Mr Zephaniah Nkambule (the Zone Leader) and the late Mathews Kunene, documentation was prepared to effect the registration to Alson's name. This was apparently done with the full knowledge and in the presence of the Applicants. It is alleged by the Respondents that is how the immovable property was subsequently registered in the name of the deceased without any quarrel from the Applicants who were fully aware of the registration as this was theirs and their mother's wishes.
- [12] Subsequent to the death of the 1st Respondent's husband, it is alleged that the 1st Applicant has taken measures to divest the 2nd Respondent of the property on the basis that he is the surviving male child. After the death of her husband the 1st Respondent's health began to decline. It is alleged on the papers before court she then made the decision to leave the Kingdom of Eswatini and temporarily relocated to the Republic of South Africa. It is contended that despite her physical absence she continued to collect the rentals from the tenants on the property.

[13] The 1st Respondent contends that in December 2022, she decided to return home and resume her duties as executrix of her husband's estate. When she attempted to collect the rentals from the tenants, they refused to pay to her. This is despite that they were informed that she was the executrix of the estate of Alson Kunene and the rooms that they were renting belonged to her late husband. It is upon this refusal that she is said to have given the tenants notice to vacate the premises. The response was that the Applicants moved the present application.

[14] The above synopsis is only a summary of the history of the matter between the parties. As it can be gleaned from the papers before court, the Applicants are of the view that the court must declare that the registration of the property in question to the late Alson Kunene is void *ab origine*.

Issues for determination

[15] As it is apparent from the points raised in *limine* by 1st Respondent, they should be the first to be determined. I will now discern to consider the points. I will start with the one pertaining to conflict of interest.

Conflict of interest

[16] The Respondents' argue that the Applicant's present attorneys failed to disclose to this court that a senior partner in the Applicant's firm, Mr Mxolisi Dlamini at some point during the litigation between the parties at the Magistrate's court, represented the 1st and 2nd Respondents. This is when he

was still practicing with the firm of Robinson Bertram. The Respondents' in fact, contend that the Applicant's attorneys ought not to have represented the Applicants against them. This is due to the fact that Attorney Mxolisi Dlamini is privy to material information that was given to him in his capacity as the 1st and 2nd Respondent's attorney at that time. The information is said was shared as part of consultations between attorney and client. Hence the basis of the conflict. His firm therefore cannot act against them now, so the argument goes.

[17] It is therefore argued by the Respondent that the firm is conflicted and as such it should not have represented the Applicants. The argument is developed further, not only that the senior partner has a conflict of interest, but he has on numerous occasions refused to see the 1st Respondent and to hand over to her the contents of her file. The contents comprises of documents that were handed over to Mr Dlamini whilst he acted as their attorney of record. The Respondents further contend that the conduct of the firm has been the most repugnant to the ethos of the justice and the rule of law.

[18] The 1st and 2nd Respondents contend that the Applicants deliberately approached their attorneys and the said attorneys have accepted these instructions having the full knowledge that one of their partners Mr Mxolisi Dlamini has a conflict of interest. The Applicants and their attorneys have deliberately and with a settled intention of perverting the course of justice acted in direct conflict of the 1st Respondent's interest and in the process violated the ethics and integrity of the legal system, so the 1st and 2nd

Respondents argue. The conduct of the Applicants and their attorneys is said to be the most repugnant to the core ethos of the justice system and the rule of law. The 1st and 2nd Respondents submit that the Applicants and their current attorneys should not be allowed to approach the portals of equity and justice, until this conflict of interest is remedied.

- [19] In response to this point of law, the Applicant's argue that the nature of the point of law is defamatory in nature. The Applicant's argue that in the current proceedings, the Applicants are not represented by Robinson Bertram, which is the firm that had instructions to represent the 1st and 2nd Respondent, way back in 2014 whilst Attorney Mxolisi Dlamini was working there.
- [20] The Applicants' argue that a conflict of interest can only arise if a member of the current firm represents the other side. The Applicants' also contend that the Respondents' have in fact conceded that they were not able to meet the said Mr Mxolisi Dlamini. As such, no instructions were given to Mr Dlamini to represent them in these proceedings.
- [21] The other issue that has been raised by the Applicants' is that the current matter is not being handled by Mr Mxolisi Dlamini personally, but by a totally different attorney, who has not been influenced by Mr Dlamini and who has never been instructed by the Respondents'.

- [22] The Applicants' further discharge another salvo being that clients generally do not have a blanket legal assurance, where once an attorney represents a client in a particular matter, then the client is "married" to the attorney to the extent that a retainer relationship is established.
- [23] The contention is further that Eswatini, being a small jurisdiction with high legal competition, any client is at liberty to be represented by an attorney of their own choice.
- [24] As I begin to dissect and analyze the arguments placed before me, I must mention that, most if not all legal practitioners are at some stage during their professional careers faced with a problem of representing clients with conflicting interest in one way or the other. The conflict may occur in many areas of practice. I do not intend discussing the problem as it occurs in the different areas of the law, but I will confine my analysis to the problem as it occurs in litigation.
- [25] What a practitioner does when faced with a conflict depends in many cases on his integrity and his attitude to the conflict. A conflict which one practitioner may regard as serious enough to warrant his withdrawal from the representation, may not in the opinion of another require such a drastic action.
- [26] By virtue of the privilege attaching to communications between a legal practitioner and his client, the existence or gravity of a conflict will not in

many cases become known to anyone besides himself and his client. In some cases, to the legal practitioner alone. There is therefore a duty on the practitioner when faced with a conflict or potential conflict to recognize the problem and to act accordingly.

- [27] What a legal practitioner's approach should be when faced with a conflict is not always clear. The mere fact that one practitioner may feel compelled to withdraw when faced with a particular situation, does not necessarily mean that another legal practitioner will be guilty of improper or unethical conduct if he chooses not to withdraw from acting in another particular circumstances.
- [28] There are two situations where a conflict of interest may arise. The first is where an actual or potential conflict arises during the simultaneous representation of two or more clients. The second, arises where a practitioner represents one client against a former client. In the latter situation there is usually no actual conflict, rather the problem which arises is one involving the possible use or disclosure of confidential information obtained from a former client to his detriment.
- [29] It appears that the matter before me, concerns the latter scenario. The argument by the Respondent is that, it is possible that Attorney Mxolisi Dlamini may have used certain documentation or information that were entrusted to him in confidence, against them by virtue of the perceived association with his new firm.

- [30] In as much as Attorney Mxolisi Dlamini has not filed an affidavit before court stating his side of the story, during the arguments it was contended by Mr Mntungwa that the concept of conflict does not arise as the matter which the Respondents are referring to, was not placed in the hands of Attorney Mxolisi Dlamini per se, but was placed in the custody of the firm of Robinson Bertram. Unfortunately this argument does not address the contention that the verbal consultations were made with Attorney Mxolisi Dlamini irrespective of the fact that he was practicing with the firm Robinson Bertram. He is considered the repository of the privileged information, including the contents of the documents that were given to him.
- [31] Mr Mntungwa also alluded to developments that transpired when Attorney Mxolisi Dlamini and some of his colleagues transitioned from the firm of Robinson Bertram into the current law practice that represents the Applicants. The contention is that the physical file which the Respondents opened at Robinson Bertram and where the documents were kept is not necessarily the property of Attorney Mxolisi Dlamini. As such, all documents that may have been entrusted to Attorney Dlamini, were placed with the firm, being Robinson Bertram. Therefore, when Attorney Mxolisi Dlamini left the the firm Robinson Bertram, he did not leave with the documents which could have been the source or cause of a potential conflict. Again this argument does not negate the fact that Attorney Mxolisi Dlamini does have the institutional memory of the contents and detail of the documents which he can share with his partner to the prejudice of the 1st and 2nd Respondents.

[32] Also, part of the contention by the Respondents' is that the perceived use of information obtained by an attorney from a former client may have been used to her detriment in the current litigation. The other disturbing concern of course is that Attorney Mxolisi Dlamini has not deposed to any affidavit, where he controverts all these allegations. The facts of what happened came through the oral arguments of Mr Mntungwa from the bar. The veracity of same could not be tested.

[33] During the arguments, Miss Charamba made ferocious arguments regarding the unavailability of the letters of administration and other pertinent documents. She submitted that these documents form part of the documents

[34] I have previously observed earlier on in the judgment that despite the nature that were placed with attorney Mxolisi Dlamini when 1st Respondent instructed him to represent her. She also argued that it is ironic that the Applicants in the present application, seek *inter alia* to contest her appointment as an executrix, when the letters of administration which she may use to respond to such averments were handed to Attorney Mxolisi Dlamini during the consultations when he represented her.

[34] I have previously observed earlier on in the judgment that despite the nature of the point of law raising a conflict issue specifically in relation to Attorney Mxolisi Dlamini. In their reply, the Applicants' have elected not to place Attorney Mxolisi Dlamini's version on the issues that appear to be centered around him.

[35] The court in effect has one version on the issue of the documents being handed to Attorney Mxolisi Dlamini. In reply, the point of law is addressed, although not through an affidavit of Mxolisi Dlamini himself, but through the affidavit of the 1st Applicant and of course the oral representations made by Mr Mntungwa.

[36] In paragraph 5, 1st Applicant responds to the point in *limine* effectively as follows;

36.1 An argument is raised that since the Deponent herself alleges that the meeting she had attempted to have with Attorney Mxolisi Dlamini never materialized, that would mean that she eventually could not instruct Mr Dlamini on the matter at hand. The question of conflict therefore does not arise at all, because Mr Dlamini never took the instructions relating to the matter.

[37] In my view, the above response clearly misses the gravamen of the contention. It presupposes that the conflict is being challenged from an angle that the 1st Respondent intended to instruct Attorney Dlamini in respect of the current matter. Yet, the 1st Respondent's cause of discomfort is that she previously placed confidential information and documentary material in Mr Dlamini's hands, during an attorney/client consultation. This is during the era where Mr Dlamini represented her in a matter obtaining at the Magistrates Court involving the same parties.

- [38] The other angle in which the point of law is being arraigned is that the matter that the Respondents are complaining about, occurred by virtue of instructions that were given to Attorney Dlamini in 2014. The argument therefore is that, it would be absurd and onerous to conclude that an Attorney who acted for a client in 2014 is prohibited from acting against the same client in 2023.
- [39] There is an apparent irritation in the tone of the Applicants' response. The Applicants' view these allegations as defamatory in nature, as the point of law seek to portray Attorney Mxolisi Dlamini or the firm as lawyers that violate ethics and the integrity of the legal justice system.
- [40] I have taken time to peruse the Legal Practitioner's Act. It appears that the legislation does not specifically deal with specific instances which would constitute a conflict of interest pertaining to an Attorney. However, common law is replete with material on the issue.
- [41] In the case of *Kirkwood Garage (Pty) Ltd Vs Lategan and Another 1961 (2) SA 75*, it was held that where an attorney acts for both parties, he should place an affidavit before court explaining and showing how it was proper for him so to act. Academics have also dabbled on the subject matter. In *JR Midgley Lawyers' Professional liability (Jutas and company Ltd)* at page 83, the learned author discusses the duty to avoid a conflict between a lawyer and client. The learned author also acknowledges that a lawyer in some certain cases may 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 representations. However, this will not enable the attorney to act where privileged information is likely to be disclosed.

[42] The general proposition advanced by the legal authorities is that in the event of a material conflicting interest existing or arising during the course of a litigation, Counsel should withdraw and act for neither client⁴.

[43] This court in the matter of *Standard Bank vs Lambros Dinso and Visikili Dinos Civil Case No 2899/2001 SB Maphalala J* (as he then was) had an occasion to determine a matter where there was a conflict of interest. A law firm acting for the Plaintiff had previously acted for the Defendant. The court held that where a law firm was involved in the negotiations and drawing of certain documents for a client, and in fact where a law firm had acted for that client in the past, it could not act against the same client in the future, especially pertaining to the same issue. The court opined that the firm must have shared certain confidences with the client and as such, that constitutes a clear conflict of interest. In that matter, the court held it was not proper for the firm to act in a subsequent matter against that client. The point of law was upheld in that decision.

Adjudication on the point in limine

⁴ See also the decision of *Standard Bank Swaziland Ltd Vs Lambros Dinso and Another Civil Case No. 2899/2001* at page 2 of the judgment

[44] The Applicant's argument in response to the point that it is the firm Robinson Bertram that was instructed not Mr Mxolisi Dlamini appears to be scratching the surface.

[45] It has not been disputed that Attorney Mxolisi Dlamini was the one that was seized with the matter. It has again not been controverted that he is the Attorney that was placed with confidential information and documents by the 1st and 2nd Respondents. It is also common cause that Attorney Mxolisi Dlamini is indeed a senior partner in the new firm Dynasty Inc Attorneys which is now representing the Applicants against the very same Respondents that Attorney Mxolisi Dlamini represented before. The fact that the matter is personally seized with Attorney Mayibongwe Mntungwa, does not negate the principle that was stated by **SB Maphalala J** in the *Standard Bank v Lambros Dinso and Visikili Dinos Civil Case No 2899/2001*. An attorney must not act where privilege information is likely to be disclosed (underlining my own). The notion is that it is not all the time that an attorney should actually disclose privileged information, but I read the judgment to be that even in situations where the information is likely to be disclosed, a conflict arises.

[46] A firm is an association of attorneys who come together to pursue a common purpose of establishing a legal practice. The purpose being to offer legal services which include representation of common clients. It follows that the attorneys in the firm share one objective, to pursue the interest of their clients to the best of their abilities. From a stand point of someone looking at this from outside, two partners in a law firm are clearly likely to share information.

Whether they actually share it, in my view does not negate a perceived conflict of interest. It is the impression that is given to the client that is looking at the scenario from outside that is material. Also, the close proximity of the attorneys is inherent in the nature of their association, being partners in the same law firm, fuels the likelihood of the sharing of information.

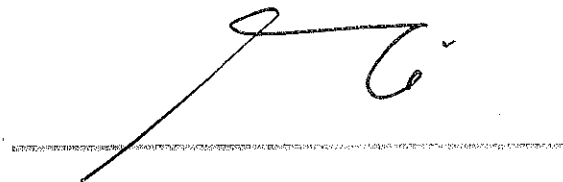
[47] In the matter at hand, the 1st and 2nd Respondents were previously represented by Attorney Mxolisi Dlamini pertaining to the same issue at some point in the past. The same firm where Mr Mxolisi Dlamini is a senior partner is now representing their opponents. It may not be unreasonable to conclude that there is likelihood, that information could be disclosed between the attorneys of the same firm.

[48] I accept the submissions by Mr Mntungwa which he made from the bar that he was not aware that Mr Mxolisi Dlamini had represented the 1st Respondent on the same matter. However, it appears to me to have been proper that once he became aware that his partner was involved on the same matter acting for the opposite side, the proper thing to do, would have been to withdraw and not to continue with acting for the other side due to the apparent conflict.

[49] Due to the foregoing reasons, the point in *limine* in respect of the conflict of interest is upheld. I consider it to be academic to determine the other points of law raised at this point.

ORDER

The point in *limine* pertaining to the conflict of interest is upheld. The Applicant's application is accordingly dismissed with costs.



BW MAGAGULA

JUDGE OF THE HIGH COURT OF ESWATINI

For the Applicants: Mr M. Mntungwa (Dynasty Inc. Attorneys)

For the Respondents: Miss B. Charamba (Waring Attorneys)