IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO. 34/1997

In the matter between:

Shilubane, Ntiwane & Partners Appellant

vs

Paul Mhlaba Shilubane 1st Respondent

Swaziland Posts & Telecommunications 2nd Respondent

Coram

Kotze, JP

Schwartzman, A.J.A.

Browde, JA

For Appellant: Mr. P.R. Dunseith

For Respondent Mr. H.B. Fine

JUDGMENT

(04/12/97)

BROWDE. JA

The appellant, who was the applicant in the Court a quo, and who I will continue to refer to as such, is Shilubane, Ntiwane and Partners.

In the founding affidavit the applicant is said to be a firm of attorneys practising in Mbabane whose partners are Collin Ntiwane, who I refer to as Ntiwane; Lindifa Mamba, who I refer to as Mamba.

Ntiwane is the deponent of the founding affidavit; Mamba has deposed to a confirmatory affidavit. The 1st respondent is Paul Shilubane, an attorney practising for his own account in Mbabane: he was the first respondent in the Court a quo. The 2nd respondent is the Swaziland Posts and Telecommunications Corporation (which is originally referred to as

"Limited" but the "Limited" has now been erased) a company duly incorporated carrying on business in Mbabane. It inter-alia leases out post boxes. It was the 2nd respondent in the Court aquo. In the founding affidavit it is alleged that as at the 30th June 1996 Ntiwane, Mamba and the 1st respondent were partners conducting an attorneys practice under the name Shilubane, Ntiwane and Partners. It is then alleged that in terms of a written agreement the partnership terminated on the 1st of July 1996.

The agreement inter alia records that:

1. The 1st respondent would retire from the partnership;
2. Ntiwane and Mamba would continue to practise as partners in the name of Shilubane,

Ntiwane and Partners and that they would continue to use the name until they had paid the 1st respondent for his share in the dissolved partnership.

3. The 1st respondent would for a limited period act as a consultant to the new partnership.

Sometime after the dissolution of the partnership the 1st respondent went to Nelspruit in South Africa to practise there as an Attorney. In about September 1997 he returned to Mbabane where he opened his own practice. The founding affidavit goes on to allege that on the 5th of September 1997 the applicant was unable to gain access to the post office box used by it and which had been used by the former partnership. On making enquiries with the 2nd respondent it was told by the latter that it had, on the instructions from the 1st respondent, changed the lock and the key to the box. These facts gave rise to an urgent application in which the applicant sought the following order:-

1. Directing and ordering the 2nd respondent to restore the exclusive use and control possession and access to and the use of Post Office Box A93 Swazi Plaza to the applicant forthwith.
2. Interdicting and restraining the 1st respondent from interfering with the applicant's exclusive access to and use of the said post office box.

The 2nd respondent did not oppose the application. In his answering affidavit the 1st respondent before dealing with the merits raised the following points in limine:-

1. The applicant has no locus standi to bring the application as the existing partnership had been dissolved;
2. The applicant has failed to disclose material facts pertinent to the matter as will appear in the combined summons which the 1st respondent has filed and issued under case no. 2587/97.

The application came before Maphalala AJ on the 16th of September, 1997. After hearing arguments on the first point in limine he reserved judgment. On the 2nd of October 1997 he

delivered a judgment, which is referred by him as a ruling, in open Court in which the first point in limine was upheld. A transcript of the judgment forms part of the record before us. On the 9th of October 1997 the applicant brought an urgent application to this Court in which it now seeks an urgent hearing of its appeal against the judgment and order of the Court a quo. This Court has been specially convened for the purpose of hearing this application. The first respondent has not filed an answering affidavit to this application and having read the affidavit in support of the application we were satisfied that the case of urgency had been made out and we proceeded to hear the appeal. The ratio of the Court a quo for its judgment is the following and I refer to page 45 of the record before us in which the judgment concludes with saying the following:

It is common cause that the partnership has been dissolved. The Attorney for the applicant said so here in Court that it was dissolved in 1996 so it follows that such a partnership does not exist in law.

The mere fact that applicant was trading using their name does not give the applicant locus standi before the court.

The partnership that was dissolved in 1996 was one, as I have already referred to, in which the first respondent, Ntiwane and Mamba practised and traded under the name of Shilubane, Ntiwane and Partners. Had the judge a quo not relied on the statement from the bar, but read the founding affidavit, and the written agreement which it is alleged by the applicant was concluded between the parties, he could not have failed to notice that on the dissolution of the existing partnership it was agreed that Ntiwane and Mamba would, from the 1st July 1996, practice in partnership under the name of Shilubane, Ntiwane and Partners. In the circumstances what was created was a new partnership practising and trading under the name that had been used by the dissolved partnership. From a reading of the founding affidavit it is patently clear that the applicant is the new partnership . I need

only refer, in this regard, to paragraph 20 on page 10 of the record in which it is alleged in relation to the post box, (the matter which I shall return to in a moment) that the post box was used by the new partnership as a facility and asset of the new partnership and such use has continued unabated until the present. All fees for the use of the box have been paid up-to-date by the applicant. In the face of this allegation it is strange that Mr. Fine, who appeared for the 1st respondent, can contend that there is no allegation in the papers that the new partnership commenced practising at all. In terms of the rules of the High Court a partnership has locus standi to sue in the name of the partnership and is not required to cite the partners individually. That the name of the new partnership is the same as that of the dissolved partnership is irrelevant. If authority is needed for the trite proposition that, if on the dissolution of the partnership, by the retirement of the partner, the remaining partners agree to continue the business of the partnership a new partnership is created, we need only to refer to LAWSA Volume 18, page 274, para D, 1997 and the authorities there cited. And I may say that although it is regulated by statute, the English law is to the same effect.

In the result the appeal against the judgment of the Court on the preliminary point a quo must succeed. In argument it was submitted by Mr. Dunseith, who appeared before us for the appellant, that in terms of section 33(1) read with Section 33(4) of the Appeal Court Act No. 74 of 1954, we should decide the merits of the application into which the Court a quo did not enquire. In our opinion, this was a proper case for the Court to exercise the discretion granted

to it by that Act, and consequently we proceeded to hear argument on the merits of the matter. The facts which have been established by the applicant, and which appear to be common cause, are that on dissolution of the partnership the 1st respondent gave the applicant the right to use the post box A93 Swazi Plaza. This box had previously been used by the original partnership. In pursuance of the right given to it by the 1st respondent, the appellant used the post office box for the purpose of its practice for about 16 months. After his return to this Kingdom and in or about September 1997 the 1st respondent, without reference to the appellant, and as already referred to, persuaded the 2nd respondent to change the lock of the box thus depriving the applicant of access to it. In the face of the agreement to allow the applicant use of the box this unilateral usurpation of the use of the box clearly amounts to a spoliation. It needs no citation of legal authority for the proposition that this entitles the appellant to an order ante omnia restoring its possession of the box. The 2nd respondent, which in no way indicates that it has been wrongly cited, as was contended for by Mr. Fine, and which contention in my judgment is without merit, has adopted the attitude that it abides the decision of the Court and according to a letter addressed to the Registrar yesterday and which was read to us by Mr. Dunseith contends, correctly we think, that this is really a dispute between the appellant and the 1st respondent. I should say that even if there was merit in Mr. Fine's contention that the 2nd respondent was wrongly cited, I find it difficult to understand what that would have to do with relief sought by the applicant and the appellant against the 1st respondent. In the circumstances the appellant is entitled to a spoliation order against the 2nd respondent as prayed, namely, an order directing the 2nd respondent to restore the exclusive control, possession, access to and use of Post Office Box Number A93, Swazi Plaza to the applicant forthwith ante omnia. The 1st respondent, who is an officer of this Court, has, we regret to say, attempted to obfuscate the issues by bare denials in his affidavit.

Although it is clear that the allegations sought to be denied should have properly been made common cause; Mr. Fine who, as I said, appeared for the 1st respondent, could not explain the validity of some of the bare denials that I have referred to. It is clear to us that the 1st respondent has received a great deal, if not the whole of the consideration of E300 000 pursuant to the agreement between the parties and that it would be quite unacceptable for him now to seek adversely to affect the practice of the appellant by using the same Post Office Box as the latter has the right to use. This joint use can lead only to great confusion to the serious prejudice of the appellant and consequently we find that the appellant is entitled to the interdict sought by it, namely, an order interdicting and restraining the 1st respondent from interfering with the applicant's exclusive control, access to and use of its Post Office Box Number A93 Swazi Plaza.

The appeal must therefore succeed with costs. We find it painful that the 1st respondent has seen fit to conduct himself as he has done. If there is anything in his suggestion that the agreement is not binding between the parties that can be decided, if he so wishes, in another forum in another suit.

Suffice it to say that we have come to the reluctant conclusion that in this matter the 1st respondent has made submissions to this Court which are disingenuous and unworthy of him. Had they been asked for, we would have given serious consideration to the granting of an order for costs on an attorney and client basis. In the result the appeal is upheld with costs. The ruling of the judge a quo is set aside and the following order is substituted therefore. The order is granted:-

1. directing and ordering the 1st respondent to restore the exclusive control, possession,

access to and use of post office Box A93, Swazi Plaza to the applicant forthwith ante omnia;

2. Interdicting and restraining the 1st respondent from interfering with the applicant's exclusive control, access to and use of its post office box number A93 Swazi Plaza. The costs of the appeal are to include the costs of the application made for condonation, which notice of application is dated the 9th October, 1997.

J. BROWDE, JA

I AGREE

G.P.C. KOTZE, JP

AND SO DO I

I.W. SCHWARTZMAN, AJA