IN THE HIGH COURT OF SWAZILAND
IN THE MATTER BETWEEN:
MUHLE ONEWAY SERVICES (PTY) LTD APPLICANT
AND
PHILLIP KHUMALO RESPONDENT
CORAM : MASUKU J.
FOR APPLICANT : MR B.G. SIMELANE
FOR RESPONDENT : MR S. C DLAMINI
JUDGEMENT
10/9/1999

This is an application brought under a Certificate of Urgency in which the Applicant seeks an Order inter alia

1. Condoning the non-observance of the Rules of this Honourable Court in so far as they relate to form, service and time limits and hear (sic) this matter as one of urgency.
2. Issuing a Rule nisi calling upon the Respondent to show cause on a date to be determined by the above Honourable Court why the Respondent should not sign all relevant transfer document and surrender all relevant documents to effect transfer of the ownership of a certain Mercedes Benz Bus, 1992 Model SD 488 HS to Richard Genesis LaNgwenya.
3. That the Rule be an interim order pending the return date.
4. Granting the Applicant costs of this application on a scale as between Attorney and his own client in the event that this application is opposed.

2

The Applicant's case is that it entered into a written loan agreement with the Respondent in terms of which the Applicant lent and advanced the Respondent an amount of E45,000.00 for purchasing the bus whose particulars appear in prayer 2 above. The agreement was subject to certain conditions, namely, that the capital was to be repaid in monthly instalments of E5,000.00, commencing on the 20th July, 1995 and thereafter on or before the last day of each and every month. It was further agreed inter paries that the Respondent would pledge the bus set out in prayer 2 of the Notice of Motion to the Applicant as security for the loan.

The agreement further stipulated that the Respondent was to furnish the Applicant with a certificate of road worthiness and registration book of the bus on the further condition that the Applicant shall keep the registration book in its possession until loan is repaid in full. It was further agreed that should the Respondent fail to pay any instalment on due date or should he commit any act of insolvency, then the whole balance shall become due and payable including compounding (sic) interest.

It is common cause that the Respondent failed to make payments in the terms set out in the agreement. In or about January, 1998, the Respondent surrendered the bus in question and it was agreed inter partes that the Applicant should sell the bus to another purchaser in order to recover the amount loaned to the Respondent. The Applicant, in pursuance of the later agreement then sold the bus to one Genesis Richard LaNgwenya. On the 9th March, 1999, the Respondent signed the change of ownership documents for transfer of the vehicle to the said LaNgwenya but refused to sign the Police Clearance and also refused to submit himself or his identity documents to the Police. The Application is to compel the Respondent to do the above.

The Respondent raised a point in limine to the effect that the application is fatally defective in that the Applicant has not shown any vested interest in the subject matter.

There is no merit in this point because the Respondent concedes that it was agreed that the Applicant should sell the bus and recover the proceeds of the sale. This gives the Applicant a vested interest to move this application to give effect to the agreement between the parties.

3

The proper thing for the Respondent to have done would have been to apply for paragraph 17 of the Founding Affidavit to be struck out on the grounds that it contains inadmissible hearsay evidence because it makes reference to allegations personally known to the said LaNgwenya but his affidavit is not annexed. No such Notice of Motion to Strike Out has been served. Even if that paragraph is struck out, it does not affect the Applicant's right to bring this Application. I thus dismiss the point in limine.

On the merits, the Respondent admits most of the material allegations by the Applicant. The only point worth mentioning that is raised by the Respondent is that he only signed the documents of ownership because Mr Bheki Simelane promised to advance an amount of E40,000.00 to him in order to purchase another bus. This in my view does not constitute good grounds for refusing to sign the documents of ownership as the parties are agreed that the bus must be sold and delivered to the purchaser. The Respondent's action amounts to him running with the hares and hunting with the hounds at the same time; approbating and reprobating as it were.

The Respondent continues to allege that Mr Simelane, the Applicant's attorney has reneged on the agreement to advance him with the amount in question. In reply, two letters are attached which confirm that an amount of E38,000.00 is in the trust account of the Applicant's attorneys and is ready for collection or may be paid to the supplier of the bus that the Respondent intends to purchase. No response to these letters was forthcoming from

the Respondent and/or his attorneys. Even if it were to be held in the Respondent's favour, that the Applicant reneged on the agreement, this could be the basis of a claim for specific performance but is not a good basis for refusing to sign the documents.
There is absolutely no defence to the Applicant's case in my view and practitioners have an ethical duty to properly advise their clients if they have no case. The Courts must not be inundated with matters in which it is clear that there is no case or where it appears that the legal position has not been properly explained to a litigant. If a litigant insist on proceedings to Court not withstanding advice to the contrary, the practitioner may properly Withdraw. In this connection, I cite with approval the
4
dictum of my MYBURGH A.J. IN BARLOW RAND LTD v LEBOS AND ANOTHER 1985 (4) 341 (see head note) where he cited C.H. Van Zyl "The Theory of the Judicial Practice of South Africa (1921) at 42.
"This duty on the part of an attorney is not a servile thing; he is not bound to do whatever his client wishes him to do. However much an act or transaction may be to the advantage, profit or interests of a client, if it is tainted with fraud or is mean, or in any way dishonourable, the attorney should be no party to it, nor in any way encourage or countenance it.... The law exacts from an attorney uberimma fides - that is the highest possible degree of good faith. He must manifest in all his business matters an inflexible regard for the truth.... He must not act in a case which he knows from the beginning to be unjust or unfounded. He must abandon it at once if it appears to him to be such during its progress. "
It is my considered view that the Respondent should have been advised that there is no case in this matter from the onset.
In the result, I grant the application as prayed. Due to the Respondent's persistence in defending the indefensible and in view of his general conduct in this matter, I am of the view that the Applicant is entitled to costs on the punitive scale as prayed for and it is so ordered.
T. s Masuku

JUDGE