

IN THE HIGH COURT OF SWAZILAND

CIVIL CASE NO 784/08

In the matter between:

**SHILUBANE, MASEKO AND PARTNERS
PLAINTIFF/EXCEFIENT**

AND

ZIPORAH NEVES

DEFENDANT

CORAM: ANNAND ALE J

FOR THE PLAINTIFF/EXCEFIENT: MR. P.M. SHILUBANE

FOR THE DEFENDANT: MR. M. SIMELANE

**JUDGMENT (ON EXCEPTION)
29th OCTOBER 2008**

[1] The Plaintiff herein is a firm of attorneys based in Mbabane whereof attorney Paul Mhlaba Shilubane is a partner. In October 2001 one Peter Frank Barbosa, in his *capacity* as executor in the deceased estate of Frank Carlos Neves, passed a general power of attorney whereby Mr. Shilubane was duly appointed to be his attorney and agent, to attend to the administration of the deceased's estate.

[2] Annexure "B", filed by the Defendant sets out the details of what was to be done on behalf of the executor. It comprehensively covers all matters usually required to be done in the administration of a deceased estate, fully empowering Mr. Shilubane to attend to all relevant aspects as an executor dative could otherwise personally have done including an undertaking to ratify whatsoever his attorney and agent lawfully could do. Of importance is that the appointment is person specific - it refers to the appointee as "Paul Mhlaba Shilubane".

[3] The power of attorney does not make any mention of remuneration for services done but in the *summons*, the Plaintiff avers "***Barbosa orally agreed to pay the plaintiff the sum of E28 160-00 in respect of fees and disbursements for services rendered by the plaintiff (sic) to the estate***".

[4] Annexure "A", filed by the Defendant, is a copy of the First and Final Liquidation and Distribution account in the estate of the late Neves, endorsed by the Deputy Master in May 2004. Therein, an amount of E1 5 000 is listed under the liabilities section as a "***claim for legal costs P.M. Shilubane and Associates***", substantiated by voucher no. 15. No further details of the nature and origin of that claim, or of voucher no. 15 are available.

[5] At the foot of account, under the heading "Executor's Remuneration", an amount of E9 537 is recorded as being "1/4%" on assets 1,2 and 3. Three immovable properties are referred to in the account, with a total value of E763 000. According to my own calculation, the percentage remuneration is at 1 1/4%, not VA%, but it is not presently an issue to determine.

[6] Also of importance in the particulars of claim is the averment that "Barbosa engaged the services of the Plaintiff which was represented by Paul Mhlaba Shilubane to act as his attorney in the administration of the said estate of the late Frank Neves".

[7] In plain language, the Plaintiff thus says that itself, the law firm of Shilubane, Maseko and Partners, was represented by Mr. Shilubane in 2001 when he himself (Shilubane) was engaged by the executor to act as his attorney in the administration of a deceased estate, on the oral agreement by the executor to pay some E28 000 fees and disbursements for services rendered by the Plaintiff.

[8] Otherwise and even more simply put - the Plaintiff, a partnership of attorneys, says that it rendered services to

the estate, to attend to the administration thereof, through a power of an attorney in favour of Mr. Shilubane, who represented the partnership at the time, and that the executor orally agreed to pay E28 166 to the Plaintiff.

[9] The Plaintiff further avers that it acted as mandated until the Defendant terminated its services in January 2008 when she was appointed as executrix dative.

[10] The claimed amount of E28 166 plus interest and costs sought from the Defendant, *nomine officio* as executrix.

[11] In response to the summons, the Defendant caused both a plea and a special plea to be filed. It is against these two pleadings that the Plaintiff in turn filed two notices of exception. The Defendant seeks "the suit" and "the action" to be dismissed on strength of its special plea as well as the plea on the merits, whereas the Plaintiff seeks both plea and special plea to be dismissed.

[12] The issue to be decided is therefore whether the special plea and/or the plea on the merits fall to be dismissed as being exceptible, or not.

[13] In her plea to the particulars of claim, the Defendant pleads that she denies the averments in paragraph 4 and in turn, avers that if there was any agreement to pay any fees from the estate, it was illegal.

[14] Paragraph 4 of the particulars of claim has been referred to above - it refers to the allegation by the Plaintiff that Mr. Shilubane was mandated by the erstwhile executor to administer the deceased estate for an orally agreed sum of money for fees and disbursements rendered by the Plaintiff to the estate.

[15] To the averment by the Plaintiff that it acted until termination of its services by the new executrix, the Defendant pleads a denial thereof, putting the Plaintiff to "strict proof" and adds that even if the Plaintiff "thinks" it did act on behalf of the estate, it is "advised" that it is a misconception that the estate ought to pay its fees as it was for the account of Barbosa. Any indebtedness by the Defendant towards the Plaintiff is thus denied and challenged.

[16] In the ordinary cause of events, the matter would

have gone to trial on these averments and be *decided* in due course. However, the Plaintiff takes an exception against the plea itself, stating that it does not disclose a defence. It says:

"1. On the defendant's own papers Peter Barbosa who was at the time the executor dative in the estate of the late Frank Neves signed a power of attorney for the Plaintiff to act for him in his aforesaid capacity in the administration of the estate.

2. On Defendant's admission the estate account that is annexed to Defendant's plea was filed by Plaintiff

3. The agreement between the Plaintiff represented by Paul Mhlaba Shilubane and Peter Barbosa is binding because at the time the agreement was entered into he was duly appointed executor dative in the estate as it appears from annexure B to Defendant's plea.

4. The person with whom the said Peter Barbosa contracted was a member of the firm PM Shilubane & Associates and is also a member of the firm Shilubane;, Maseko & Partners the

change of name did not affect the legal existence of the firm Shilubane, Maseko & Partners.

5. The Defendant admits in her plea that the liquidation and distribution account was filed by a member of the Plaintiffs firm and does not dispute the validity of the power of attorney annexed to the plea which clearly states that the said Peter Barbosa signed it in his capacity as executor in the estate of the late Frank Neves".

[17] The further issue to become involved is the special plea in which the Defendant says that:

"1. The action is premature because the Distribution Account filed by PA UL MHLABA SHILUBANE has not been approved.

2. The Plaintiff has failed to join the Master of the High Court who has to approve the distribution account which was filed by PAUL MHLABA SHILUBANE on the 31st of May 2004 attached hereto for ease of reference marked "A". The application constitutes unfair advantage over other debtors.

3. The Plaintiff has failed to join PETER BARBOSA who had a personal agreement with PAUL MHLABA SHILUBANE which agreement did not

bind the estate and the latter's fees are to be paid by Peter Barbosa personally and not from the estate per the attached POWER OF ATTORNEY marked "B".

4. The Plaintiff has no locus standi because it has no interest in the estate of FRANK NEVES and in any event it was not in existence in the year of our Lord2001".

[18] The object of an exception is to dispose of the case or a portion thereof in any expeditious manner. An exception founded upon the contention that a plea or a special plea lacks averments necessary to sustain a defence, is designed to obtain a decision on a point of law which will dispose of the case in whole or in part, and avoid the leading of unnecessary evidence at the trial. If it does not have that effect the exception should not be entertained. See DHARUMPAL TRANSPORT (PTY) LTD V DHARUMPAL 1956(1) SA 700 (A) at 706-E, MILLER V BELLVILLE MUNICIPALITY 1971(4) SA 544 (C) at 546-D and ERASMUS, SUPERIOR COURT PRACTICE (JUTA) SERVICES 1996atB1~151 and various other relevant authorities there referred to in footnotes 4 to 6.

[19] ***In*** [casu](#) the Plaintiff asserts that the plea and special

plea should both be dismissed because they do not disclose a defence. The rules refer to a lack of averments, which are necessary to sustain a defence, both being essentially the same. The point is that in the event the pleader to the action files a plea, accepting for the moment that the allegations in both the plea and the special plea are true, it requires of the court, prior to the matter going on trial, whether this plea could indeed, if substantiated and found to be correct, disclose a defence. The Plaintiff says it does not do so, wherefore the exceptions were noted.

[20] Turning to the facts of the matter, as reflected in the pleadings, the exceptions should be upheld only if it would dispose of the pleas on the basis that they do not raise valid defences. Is this so?

[21] Turning to the plea, the Defendant says that no agreement exists between the Plaintiff and the estate to pay any fees to it, and if there were such agreement, it would be illegal.

[22] If the Defendant persuades a trial court that it is indeed so, it would be a valid defence to the claim. Therefore, *prima facie* it indeed discloses a defence.

[23] The same applies to the plea that the Plaintiff never acted for the estate and if it thought it did so, any fees due would be due by Barbosa, the erstwhile executor, not by Ziporah Neves, in her nominal capacity, as the current executrix of the estate.

[24] Again, without pre-empting the matter if the Defendant indeed persuades the court that indeed it is as pleaded, it could be held as a valid defence.

[25] The exception that was taken against the plea seeks it to be dismissed, as it does not disclose a defence, for the aforementioned reasons. However, the points raised by the exceptient may equally well be construed as argumentative which require determination in due course, not that it deals a final blow to the plea as matters now stand.

[26] Similar considerations apply to the special plea and the exception against it. To some extent both stand to be marked as argumentative and dependent upon factual findings by a trial court.

[27] Concerning joinder, if the Plaintiff failed to sue the original executor as the person who orally agreed to pay, it is not open for the Plaintiff to take exception to it in the manner it did. If the estate is not liable for fees relating to the administration thereof, it remains so. It is not now for the Plaintiff to except to a defence, which if upheld at a trial, may dispose of a part or the whole of the claim. The Defendant is entitled to file a special plea and in my judgment, it indeed raises more than just one defence.

[28] Issues in dispute are various, but for instance, it begs decisions on whether the Plaintiff indeed is as cited, or whether it is personal to Mr. Shilubane only, in the absence of cession. Also, whether the estate itself is liable for oral agreements to pay amounts in excess of the usual executor's portion on the basis of a power of attorney. Also, whether the payment, if enforceable, is due prior or after approval of the distribution account by the Master, and whether this has yet been done or not. The list goes on.

[29] In my judgment, this matter should go on trial in order for a court to adjudicate the various disputes between the parties, *contra* to now upholding the exception.

[30] An exceptient is to make out a very clear and strong case before he should be allowed to succeed - vide LEVITAN V NEWHAVEN HOLIDAY ENTERPRISES CC 1991(2) SA 297 (C) at 298-A and COLONIAL INDUSTRIES LTD V PROVINCIAL INSURANCE COMPANY LTD 1920 CPD 627 at 630.

[31] As stated above, in my view, the exceptient does not make out a very clear and strong case, sufficiently so to now dismiss the plea and special plea.

[32] It is therefore ordered that the two exceptions noted by the Plaintiff be dismissed. The matter is to proceed and be adjudicated upon in the ordinary course of events. Costs attendant to the exceptions and resistance thereto are ordered to be costs in the cause.

T.P. ANNANDALE
Judge of the High Court