



IN THE HIGH COURT OF SWAZILAND

Held at Mbabane

Case No. 1665/06

In the matter between:

MOSES SHONGWE

Plaintiff

And

THE ATTORNEY-GENERAL

Defendant

Neutral citation: *Moses Shongwe vs The Attorney-General (1665/06) 2016*
SZHC 92 (08th June 2016)

Coram: Hlophe J

For the Plaintiff: Mr. M. Nkomondze

For the Defendant: Mr. S. Khumalo

Date Heard: 06th April 2016

Date Handed Down: 09th June 2016

Summary

Civil law – Action Proceedings – Plaintiff’s claim for personal injury to the motor vehicle Accident Fund honoured by the Fund which paid him a sum of E402, 603.00 as compensation – The whole sum paid into an attorney’s Trust Account which happened to be overdrawn by millions of Emalangenzi with the result that no money is paid to the Plaintiff – Attorney concerned and his firm sequestrated and or dissolved with no sufficient funds found to pay Plaintiff the proceeds due to him– Plaintiff sues the Attorney-General for the sum paid into his then Attorney’s Trust Account less what he calls reasonable costs and fees to the Attorneys on the grounds that the Attorney-General allegedly failed to perform his duties in supervising the attorneys’ Trust Accounts as required by Section 24 quat of the Legal Practitioners Act – Whether the Attorney-General has a duty to supervise Attorney’s Trust Accounts – If he has such a duty, what is the nature of such a duty and – When is the Attorney-General required to exercise it – Whether in the present matter Defendant breached any duty – Whether Defendant liable to pay damages to the Plaintiff – Court finds that owing to the current position of the law, no case has been made against the Defendant – Plaintiff’s case therefore dismissed with costs.

JUDGMENT

- [1] Plaintiff, acting through his then attorneys, Bheki G. Simelane and Company, instituted action proceedings against the Defendant claiming payment of a sum of E374, 087.00 together with interest at 9% from the day of judgment and costs of suit. The amount claimed is for alleged damages arising from an incident in which the Plaintiff was paid a sum of E402, 603.00 by the Motor Vehicle Accident Fund for personal injuries arising from a Motor Vehicle Accident involving him. The amount claimed is the difference between the sum paid by the Fund and the sum alleged to be reasonable fees due to the Plaintiff's then attorneys from the Plaintiff.
- [2] It is not in dispute that when the Fund paid Plaintiff the sum mentioned above, it deposited same into his attorneys' Trust Account. It is common course that when the compensation sum was so paid, it was all swallowed up following that the said attorneys' Trust Account was in a deficit amounting to millions of Emalangeni. This resulted in no monies being paid to the Plaintiff by the said attorneys.

[3] When the situation of the Plaintiff's Attorneys' trust Account became a matter of public knowledge, the Law Society of Swaziland moved an application before this court for the liquidation of the said firm together with a sequestration of its individual partners both of which was successful. It however turned out that even after the sale of all the Firm's assets and those of the Partners constituting it, no sufficient funds could be realized to settle the Attorneys' indebtedness to the Plaintiff and many other Trust Account Creditors.

[4] It is common course that when the compensation due to the Plaintiff was paid into his then Attorneys' Trust Account; same had not been inspected or examined by the Attorney-General in order to determine its compliance with the provisions of the Legal Practitioners' Act of 1964. It is in fact not in dispute that according to the Legal Practitioners Act, every attorney practising in Swaziland is obliged to open with a Bank operating in Swaziland, a Trust Account in which he is obliged to keep all moneys belonging to other people including his clients. Such attorneys are further required to keep proper books of account with regards such moneys. This is in accordance with Section 24 (1) of the Legal Practitioners Act.

[5] Section 24 (2) of the Act provides as follows:-

“(2) The Attorney-General may himself or through his nominee at public expense inspect the books of account of any such attorney, notary or conveyancer to satisfy himself that subsection (1) is being observed” (underlining mine).

It is important to observe that the subsection concerned is not couched in a language that suggests an obligation on the Attorney-General to inspect the books than one that suggests a discretion on his part to do so. The subsection does not expressly provide under what circumstances the said discretion may be exercised by the Attorney-General. It further does not put in place the time frames within which the said discretion should be exercised. It is no doubt couched in very wide terms with the Attorney-General being the one to decide when or under what circumstances he is to exercise the said discretion.

[6] Section 24 ter. on the other hand places an obligation or duty on a legal practitioner in Swaziland to cause his books of account to be examined at his own expense, at least once a year by an auditor registered under the Accountants Act of 1985. An observation to make from the language of this section is that no discretion, unlike in the case of the Attorney-General in Section 24 (2), is given the Legal practitioner in having an auditor examine his books of account at least once every year. There is in

fact placed an obligation on the part of an attorney to cause his books of account to be examined by a registered auditor.

[7] According to Section 24 (8), an attorney who failed to comply with section 24 (1) (that is the opening of a Trust Account and keeping all Trust Monies therein) commits a criminal offence punishable upon conviction with a fine not exceeding five hundred Emalangeneni or imprisonment for a period not exceeding eighteen months. He may also be guilty of professional misconduct which could lead to him being struck off the roll or being suspended from practice.

[8] It perhaps also merits mention that according to section 24 *bis* (1), every Legal Practitioner is obliged or given a duty to extract a list of trust account balances at intervals of not more than three months and keep them prominently in a clear ledger account. These balances are required to be kept for a period of not less than five years from the date of their extraction according to Section 24 *bis* (2).

[9] Section 24 *quat* (1) of the Legal Practitioners Act places a duty upon a Legal Practitioner to provide an accountant's certificate once every year to the Attorney-General. The said section provides as follows verbatim:-

“24 *quat* (1) Every practising legal practitioner shall, once in each year, or at such other time as the Attorney-General may require, furnish him with a certificate signed by the Public Accountant or other person referred to in Section 24 *ter*”.

[10] According to Section 24 *quat* (2), the said certificate shall reflect certain specific information such as that, after having carried out an examination of the books of account among other things, for the period under review, it was found that the attorney concerned was keeping proper books of account and that all moneys received by such attorney were regularly and promptly deposited into the trust account by such attorney. He was also required among other things to certify that, he had examined as well the trust bank statement of such legal practitioner for a week, and that statement had reflected that no negotiable instruments had not been met except in circumstances which appeared to him to be satisfactory.

[11] Section 24^{sext}, makes it a Criminal offence as well as professional misconduct for an attorney to fail to comply with Section 24 *bis, ter, quat or quin* of the Legal Practitioners Act. A Legal Practitioner who fails to comply therewith is liable upon conviction to a fine of five hundred Emalangeni or imprisonment for eighteen months or to both and is also taken to be guilty of professional misconduct whose result is that he could be struck off the role of attorneys or to a suspension from practice.

[12] It was obviously with the factual and legal background set out in the foregoing paragraphs that the Plaintiff instituted the current action proceedings. In these proceedings the Plaintiff, alleging or contending that the Attorney-General had negligently failed to perform his duties in terms of section 24 *quat* (1) and (2) of the Legal Practitioner's Act, sought to be paid damages in the sum of E374, 087.00 being the balance left from the sum of E402, 603.00 paid to his former attorneys by the Motor Vehicle Accident Fund as compensation less what he termed the reasonable costs or fees to the said firm together with interest at 9% and costs of suit.

[13] According to the Plaintiff the duty placed on the Attorney-General in terms of Section 24 *quat* was to ensure that every practicing attorney complied with section 24 of the Act and thereby protected the monies of trust creditors held in the Legal Practitioner's Trust Accounts. The attorneys concerned allegedly failed to furnish the Attorney-General with an Accountant's Certificate in terms of Section 24 *quat* of the Act for a period of at least three years prior to the date when the Plaintiff's compensation was paid into the law Firms Trust Account.

[14] For these reasons it was contended by the Plaintiff that the Attorney-General was liable to pay him the sum of money claimed and referred to above together with interest at 9% from the date of Judgment to that of payment and costs.

[15] The Defendant denied that he was liable to pay Plaintiff the sum of money claimed together with interest and costs. This was allegedly because, firstly, the Plaintiff's claim had not been preceded by a letter of demand as envisaged by Section 2 (1) (a) of the Limitation of Proceedings Against the Government Act 21/1972, which compels anyone who intends instituting legal proceedings against the Government

to start off by issuing a demand within a specified period. Secondly, it was contended that the sections of the Legal Practitioners Act relied upon by the Plaintiff as placing a duty or obligation upon the Attorney-General to inspect or examine an attorney's books including his Trust Accounts, do not in reality place such a duty or obligation upon the Attorney-General but merely place a discretion on him to do so. It was alleged further that the said Section did not provide under what circumstances the Attorney-General would be required to exercise his discretion in determining whether or not there was compliance with the Sections of the Legal Practitioners Act referred to.

[16] The Defendant also pleaded that it had no liability to the Plaintiff's claim because the latter had allowed the Motor Vehicle Accident Fund to pay his compensation into a Trust Account he knew had a deficit and had thereby knowingly assumed the risk of the loss of its said compensation. I must say that there did not seem to be any merit in this contention by the Defendant. Other than its being a bare assertion, no basis had been pleaded to ground or support it. That is, there was no assertion on how it was alleged the Plaintiff had knowingly allowed the fund to deposit his compensation into a trust Account that had a deficit. It was not surprising therefore that when the matter was heard, this point was expressly

abandoned by the Defendant together with the contention that there had been no demand filed and served before the institution of the proceedings in accordance with the Limitation of Proceedings against The Government Act of 1972. It was conceded on this latter point that in fact a demand had been issued before the institution of these proceedings.

[17] It was otherwise agreed between the parties on the hearing day that although the proceedings had been commenced by way of summons which presupposed the leading of oral evidence, there was none to be led from either side, given that the matter turned on a simple point of law namely whether the Attorney-General had any duty or obligation to inspect the Attorneys or legal practitioner's books of account or he merely had a discretion.

[18] Whereas the Plaintiff's counsel contended that the Attorney-General had a duty to examine or cause to be examined an attorney's books of account in order to ascertain compliance with Section 24 and 24 *quat* of the legal Practitioners Act, the Defendant contended otherwise. Defendant's counsel maintained that that the Act merely placed a discretion upon the Attorney-General without even specifying under what circumstances it was to be exercised.

[19] I was referred by both counsel, each for his purposes, to *Da-Silva And Another vs Coutinho 1971 (3) AD 128* as well as to *Callinicos v Burman 1963 (1) SA 489 (AD)*. It was contended on behalf of the Plaintiff that the statute had imposed a duty on the Attorney-General and not merely a discretion. For this reason, the contention went, in the event of failure by the Attorney-general to exercise such duty, then he was liable as his said failure would be indicative of negligence. It was further argued for the Plaintiff with regards the *Callinicos v Burman* case that no remedy had been provided against the Attorney-General yet a duty had allegedly been placed on him. Since a duty had allegedly been so placed against the Attorney-general he was therefore civilly liable to a person in the Plaintiff's position.

[20] The Defendant on the other hand relied on this case to support the contention firstly that the statute did not place a duty upon the Attorney-General than it did a discretion to examine attorney's Trust accounts. Furthermore, the sections had also provided a particular remedy against those it had imposed a duty upon to perform certain acts, such as an attorney who ran a firm and kept a Trust Account. In this case, so the contention went; the duty was against the Attorney concerned to provide

the Attorney-General with the certificate envisaged in terms of the Act and that if he failed to do so there was a remedy provided by the Act against the said attorney, which included such Attorney being fined or imprisoned or both and also being possibly struck off the role or being suspended from practice.

[21] It is of paramount significance to note that both parties are agreed that the liability of the Defendant hinges on whether or not the section concerned placed a duty on him or gave him a discretion. This position is developed to say that civil liability is fathomable against a Defendant only in a case of a duty placed upon the said Defendant having been violated and that if there was a remedy provided for a failure by the person on whom a duty to act adhered then that person could only be punished in terms of that remedy.

[22] According to the Fourth Edition of Hallisbury's Laws of England, 2001 Re-issue, a book I was referred to by Mr. Nkomondze for the plaintiff, where a public officer exercises discretionary power, he does not attract liability by failing to exercise such a discretion as opposed to failing to exercise a duty placed on him which envisages civil liability in the event

of failure to so perform. The position is put as follows at page 349 paragraph 190 of the said reissue of Hallisbury's Laws of England:-

“Persons upon whom discretionary powers are conferred by statute for specific purposes are under no obligation to exercise them and no liability ordinarily attaches for not doing so. If they do exercise such powers they must do so strictly in accordance with the terms of the statute; but it does not follow that, because a statute confers powers the exercise of which might prevent injury to persons who would otherwise be injuriously affected, the donees of such powers are liable in damages for failure to exercise them. Where a statute imposes a duty to exercise the power or entrusts control over an activity in such a way as to carry with it an implied duty, any person or any member of a class of persons for whose benefit the duty is imposed may maintain an action for injury arising out of failure to fulfil the duty”.

[23] Given that according to Section 24 (2) of the Legal practitioners Act, the Attorney-General **may** inspect an attorney's books of account and that he **may** at anytime require to be furnished with the accountants certificate envisaged in terms of Section 24 *quat* (1), I have no doubt that there is only placed a discretion on the Attorney-General and not a duty. It follows therefore that in such a case there would be no liability against the defendant for failure to exercise his said discretion as stated in the

excerpt from Hallisbury's Laws of England referred to above. Of course it would in my view be different if an issue that would justify him in exercising his discretion had been brought to his attention but he failed to act. It is true there was no suggestion this was the case in this matter.

[24] It only puts it beyond doubt that in so far as a duty was imposed against the attorneys operating trust accounts to perform certain acts together with certain appropriate penalties being put in place in the event of failure to comply, which includes the drastic measure of having the said attorney struck off the role of attorneys or suspended, there can be no civil liability placed on the Defendant for failure to exercise his discretion. In *Da-Silva and Another vs Continho 1971 (3) AD 123 at 128F*, the position is expressed as follows:

“If it be clear from the language of a statute that a Legislature in creating an obligation, has confined the party complaining of its non-performance or suffering from its breach to a particular remedy, such party is restricted thereto, and has no further legal remedy, otherwise the remedy provided by the statute will be cumulative”.

[25] I am convinced that couched in the manner it is, the statute in question does not place a duty upon the Attorney-General to examine the Trust Accounts of attorneys than it does a discretion. It also does not say when and how and under what circumstances he is required to exercise the said discretion. In this sense it gives the Attorney-General a wide or an open ended discretion let alone whether such circumstances were met in the present matter. It may be that the Legislature needs to revisit the applicable provisions and create a duty in that regard if in its wisdom that is what would be required to resolve the problem concerned. I am also convinced that liability against the Defendant is not feasible when considering that there is the provision of a penalty against an attorney who fails to yield or adhere to the requirements of the statute vis-à-vis his duties.

[26] Consequently, I have come to the conclusion that the Plaintiff's claim cannot succeed and it is accordingly dismissed with costs.

N. J. HLOPHE
JUDGE - HIGH COURT