IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No.383/2014

In the matter between:

SIKHUMBUZO M. SIMELANE	**Applicant**
vs	
STEALTH SECURTIY (PTY) LTD	**1st Respondent**
ANITA C. HAYES-ROETS	**2nd Respondent**
MANUELLA SIBERHUIS	**3rd Respondent**
FIRST NATIONAL BANK (SWD) LTD	
(MATSAPHA BRANCH)	**3th Respondent**
STANDARD BANK (SWD) LTD	
(MATSAPHA BRANCH)	**4th Respondent**
MASTER OF THE HIGH COURT	**5th Respondent**
ATTORNEY GENERAL	**6th Respondent**

Neutral citation: *Sikhumbuzo M. Simelane vs Stealth Security (Pty) Ltd and 6 Others (383/13) [2014] [SZHC 44] (20th March 2014)*

Coram: **MAPHALALA PJ**

Heard: 14th March 2014

Delivered: 20th March 2014

For Applicant: Mr. M. Simelane

For Respondent: Mr. S. Nkosi

Summary: *(i) Applicant has brought an* ex parte *Application for* inter alia, *prayer 3.7 to operate as a* rule nisi *as a preservation order.*

(ii) The attorney for the Respondents, Mr. Nkosi in the main Application happened to be in court and as a result, opposed the granting of the order advancing various arguments as points in limine.

(iii) More, importantly that the dispute between the parties has been the subject to negotiations between the parties for a considerable period where the Applicant was represented by Mr. Madau an attorney of this court.

(iv) Secondly, that the Applicant who is an attorney before this court has acted unethically in the circumstances of the case.

(v) In the result, the court agrees with the arguments of the 2nd Respondent that Applicant has acted in an unethical manner in pursuit of this Application brought ex parte *in these circumstances.*

Legal authorities cited

1. Venter vs Prest [1930] AC 558.

2. ***Shabangu Sithembile Dorah vs Mdluli Phathaphatha and 3 Others, High Court Case No.10/2002.***
3. ***E.A.L. Lewis, A Guide to Professional Conduct for South African Attorneys, Juta, 1982 at page 290.***

RULING

Introduction

[1] The Applicant has brought an *ex parte* Application before this court for *inter alia*, an order that the 1st Respondent be placed under provisional judicial liquidation. This being the main Application.

Point *in limine*

[2] The attorney for the Applicant in the main matter appeared to be in court when the matter was called *ex parte* and raised a point *in* limine that the matter has been subject to negotiations between the parties and was ripe to be heard under the rubric of provisional judicial liquidation, that it is impossible to grant this order for the following reasons:

> *"a) The Applicant was until the 7th March 2014, the attorney representing 1st, 2nd and 3rd Respondents under civil case No.400/2013;*

b) The 1st, 2nd and 3rd Respondents in that case are the 1st and 2nd Respondents in the current case. The 3rd Respondents in case No.400/2013 is the Application in this case.

c) Case No.400/2013 is an Application brought before this Honourable Court by one Ivan Groening for and an order, in inter alia, *that the 1st Respondent be wound up in terms of the provisions of the Company's Act No.8 of 2009.*

d) In terms of section 291 of the Company's Act the winding up of a company shall be deemed to commence at the time of the presentation to the court of the Application for the winding up.

e) The Applicant with full knowledge of the above facts has commenced his own proceedings seeking judicial management of the same company or alternatively seeking that he be made an executive director by the court."

[3] In paragraphs 6.2 to 7 various arguments are advanced which touches on the issues of conflict of interest and whether the conduct of the Applicant who was advancing arguments himself as an attorney and a litigant in the present Application is proper in the circumstances.

[4] The attorney for the Respondent then cited the case of *Venter and Prest [1930] AC 558* where *Lord Atkin* as quoted by *E.A.L. Lewis* "in legal

ethics" *A Guide to Professional Conduct for South African Attorneys, Juta, 1982* at page 290 stated the following:

> *"Confidential communications passing between solicitor and client are doubly guarded in law... In the first place they are protected from disclosure whether by production of documents, or in oral evidence. This protection is part of the law of evidence... The right to have such communications so protected is the right of the client only. In this sense it is a privilege, the privilege of the client...."*

[5] The attorney for the Respondent further contended that there are more instances in Applicant's affidavit which contravene and breach the basic principle of confidentiality. That the Respondent shall outline these breaches in their answering affidavit. That despite having withdrawn as attorney for the 1st and 2nd Respondents, the Applicant's duty not to disclose are not abated by such withdrawal. In this regard the attorney for the Respondent advanced arguments in paragraph 7.8, 7.9 to 7.10 and cited rules 7, 10, 11, 12, 13 and 14 of the *BA International Code of Ethics* as reproduced in *Lewis (supra)* at paragraph 317 to 319.

[6] It is contended to the Respondents that given the above submissions the Application for an interim order in terms of prayer 3.7 of the Notice of Motion should to be dismissed with costs.

The opposition

[7] The attorney for the Applicant also filed brief submissions in support of the interim relief on the 17th March, 2014. However, I received his Heads of Arguments on the morning of the 18th March, 2014.

[8] The first argument advanced for the Applicant is that Mr. Nkosi who appeared for the Respondents should not have been allowed to advance the argument which he did on account that he did not have a Notice of Appointment as an attorney of record in accordance with Rule 6(4) (11) of the High Court Rules. Further, it is contended for the Applicant that Mr. Nkosi had no right of appearance in the matter on account of the fact that he neither filed a Notice of Intention to oppose nor a Notice of Appointment as an attorney to appear and represent the 1st Respondent in this matter. As such, Mr. Nkosi has no authority to act for the 1st Respondent, whatsoever.

[9] The attorney for the Applicant then contended that in the event that the court is inclined to consider the arguments by Mr. Nkosi in court when opposing granting of the interim order he made submissions at paragraphs 4.1, 4.1.1, 4.1.2, 4.1.3, 4.1.4 up to 45 of his Heads of Arguments. I shall

revert back to some pertinent arguments in my analysis and conclusions later on in this ruling. The attorney for the Applicant insisted that he be granted an interim order aforesaid.

The court's analysis and conclusions thereon

[10] Having considered the arguments of the attorneys of the parties I am inclined to agree with the submissions advanced by Mr. Nkosi for the Respondents on all fronts.

[11] Firstly, on the first argument of the Applicant that Mr. Nkosi should not have been allowed to make any submissions on account that he has not filed a Notice of Appointment in accordance with the Rules of this court. I disagree with the Applicant argument on the simple basis that Mr. Nkosi is an attorney of record in the main matter. It would have been unjust to prevent Mr. Nkosi from advancing arguments for a proper resolution of the granting or otherwise of prayer 3.7. I must say a point *in limine* on a matter brought *ex parte* where he has been involved heavily in the negotiations between the parties.

[12] Secondly, I agree with Mr. Nkosi's argument at page 10.1 of his Heads of Arguments that given that in any event there is animosity between the

Applicant and the 1st Respondent, the Applicant's prayer 3.7 is impractical and will only grind the operations of the company to a halt. The Applicant does not deny the hostility and readily agrees as to its existence. How then can the company operate if the Applicant is enabled to refuse with his signature?

[13] Thirdly, it also appears to me as stated by the Respondent's attorney in paragraph 10.3 thereof that this court has no power to grant such an order as this will change the status of the Applicant from that of non-Executive Director to Executive Director.

[14] Fourthly, this court agrees with the arguments of the Respondent's attorney as advanced in paragraphs 10.4, 10.5, 10.6 and 11 of the Heads of Arguments.

[15] Lastly, it appears to me that the attorney for the 2nd Respondent is also correct that until the final determination of the Application for winding up of the 1st Respondent by this court the Applicant is estopped from continuing with this Application. Section 303(1) of the Company's Act stipulates that:

"In any winding up by the court, all the property of the company concerned shall be deemed to be in the custody and under the control of the master until a provisional liquidation has been appoint."

[16] The Applicant has failed either in his papers or in submissions before me to substantiate as to why the court should deviate from the current status of the 1st Respondent and grant the Applicant powers which hitherto he did not have.

[17] In the result, for the aforegoing reasons the Application in terms of prayer 3.7 of the Notice of Motion is dismissed with costs.

[18] I rule further that the Respondents be allowed to file their opposing affidavit and the Applicant to file his replying affidavit in accordance with the Rules of this court and the matter thereafter be enrolled for hearing as a matter of urgency in respect of the other prayers.

STANLELY B. MAPHALALA

PRINCIPAL JUDGE