IN THE HIGH COURT OF SWAZILAND

THE PROPERTY COMPANY (PTY) LTD

T/A MGENULE HOTEL

AND TWO OTHERS

VS

SWAZILAND ELECTRICITY BOARD

Civ. Case No. 2407/98

Coram	S.W. Sapire, CJ
For Applicant	Du Toit S C instructed by Bheki Simelane
For Respondent	Patrick Flynn instructed by Robinson Bertram

JUDGMENT

(15/03/99)

The Property Company (Pty) Ltd., Mackay Investments (Pty) Ltd. and Dumisa Corporation (Pty) Ltd. are engaged in litigation with The Swaziland Electricity Board.(SEB). The dispute arises from the action of SEB in cutting off electricity supplies from the applicants. This board claimed to be acting in terms of the powers given to it in terms of Sec 29(1) of the Electricity Act 10 of 1963. The applicants contest this right asserting that the indebtedness of more than El 900 000 claimed by SEB in respect of charges for power is disputed. Whether there is a genuine and bone fide dispute is the central issue at this juncture.

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When the SEB terminated the supply the applicants immediately applied to this court for urgent relief seeking an order requiring SEB to reconnect the supply of electricity. This application came before me in chambers as a matter of urgency. I initially granted relief relying on the assurance of applicants' attorney who moved the application, that the respondent had been properly and timeously served. As an interim measure and to avoid the inconvenience and possible damage to which the Applicants alleged they were being put, I ordered the restoration of the electrical supply to the Applicants pending the outcome of the application, which was postponed to a later date.

The respondent, in terms of leave granted at the time, anticipated the return date and adduced evidence that it had not been served timeously and given any real opportunity to be represented at the initial hearing. It was also argued that the applicants had in fact not indicated in the founding affidavit any dispute regarding the large overdue amount, which would disentitle the respondent from stopping the supply of power. It followed that the applicants had not made out a case even for interim relief. I therefore withdrew the interim relief and ordered the respondent to pay the costs on an attorney and client scale largely because when the application was first made it was wrongly and misleadingly indicated that adequate service had taken place.

The applicants renewed the application on augmented papers. After hearing the parties I made an order that pending the hearing of the application the electricity supply was to be restored subject to the applicant providing security for future charges and maintaining payment of current charges on presentation of account therefor. If at all I erred in Applicants' favour in not fixing the security in the total amount of applicants' indebtedness as claimed by the Respondent. The relevant section reads "29. (1) The Board may discontinue the supply of electricity -(a)to a consumer who-

(i) fails to pay any sum (not being the subject matter of a bone fide dispute) due by him for electricity supplied to him by the Board under this act:

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Provided that where the consumer has given the board a deposit as security for a supply of electricity, the board shall not discontinue such supply unless the sum due for that supply exceeds the sum so deposited and payment of the sum due has been demanded."

It seems that the legislature intended that the full amount of the indebtedness should be secured, if severance is to be avoided. On the other hand the right to discontinue the supply only exists where there is no bone fide dispute as to the amount in the first place. I have given the Applicants the opportunity to state on affidavit what the dispute is and to indicate and particularise the issues.

I also directed that the parties file their affidavits within time periods agreed to by them.

It is this latter portion of the order, which has given rise to the present application. It is for an order compelling the respondent to comply with a notice served. The notice requires the Respondent to make available documents, which are said to be referred to in the respondent's affidavits. Without these documents, so their attorney says, the applicants cannot file affidavits, as they are entitled and required to do in terms of my order.

The applicant also seeks an extension of the time for the filing of the applicants' replying affidavit to a date after compliance with the notice in terms of which these documents are called for.

In terms of the order of court the applicants were to have filed their replying affidavits by the 8th November 1998. Rule 35(20) reads

"35(20) Any party in any proceeding may at any time before the hearing thereof deliver
a notice as near as may be in accordance with Form 16 in the First Schedule to any other party in whose pleadings or affidavits reference is made to any document or tape recording to produce such document or tape recording for his inspection and to permit him to make a copy or transcription thereof

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On the 5th November 1998 the Applicants served and filed a notice in terms of Rule 35(20) calling on the Respondent to produce what appears to be a large number of documents for inspection. These documents were said to have been referred to in the Respondents answering affidavits. The Applicants wished to have access thereto as contemplated by the Rule. The notice specified the 13th November as the date by which the notice was to be complied with.

On the 9th day of November 1998 the applicants filed and served an application which was said to be urgent and certified as such by Counsel seeking an order extending the time for the filing of their affidavits and an order for costs on the attorney and own client scale. It would be most unusual to make such and order as to cost when the applicant is seeking the indulgence, on questionable grounds, and the opposition is reasonable. No case for urgency appears to be made out. The urgency aspect of the matter is now academic, but there is much to be said for the argument advanced by the respondent that it is contrived.

In regard to compliance with the notice there is no need to enqire whether the party serving the notice needs the documents specified therein. The question to be answered is "Is the document referred to in the affidavit of the party on whom the notice is served?"
In this connection see Molded Components and Roto moulding South Africa (Pty) Ltd v Coucourakis and another 1979 (2) SA 457 (W)

Once this question is answered in favour of the party serving the notice, the party receiving the notice will be subject to the penalties or disadvantages of non-compliance described in rule 35 (21). It does not seem prima facie that any party can be compelled to comply with the notice, as Rule 35(21) reads

"(21) Any party failing to comply with such notice shall not, save with the leave of the court, use

such document or tape recording in such proceeding but any other party may use such document or

tape recording.

It may be argued that failure of a party to comply with the notice is no reason for the party serving the notice to withhold (as in the present case) the filing of its own replying

affidavit. The question is not free from doubt. However, there are decisions in South African Courts going both ways and one has to compare the decisions Cf. Moulded Components and Rotomoulding South Africa (Pty) Ltd v

Coucourakis and another 1979 (2) SA 457 (W) and Norman & Co (Pty) Ltd v Hansella Construction Co (Pty) Ltd 1968 (1) SA 503 (T)

The provisions of Rules 35(20) and 35(21), read together, it may be argued and in fact it had been argued do not appear afford an avenue, alternative to the other provisions of Rule 35, for obtaining discovery or for obtaining material to enable the party serving the notice, to formulate, enunciate, or investigate, its own case

The Applicants may not be entitled as of right to an extension of time for the filing of their affidavits because of what they regard as the unsatisfactory answer, amounting to non-compliance, given by the respondent to the notice. The practicalities of the matter however may dictate that the Applicants be afforded reasonable additional time within which to file their affidavits, whether or not and order for compliance is made.

I was however not called upon to consider these issues, the interpretation of the rules, or what extension, if any, should be allowed the applicants for the filing of their affidavits.

On an earlier occasion when this application had been on the roll for hearing by me, Mr Du Toit who was briefed, for the Applicants together with Mr Flynn who represented the Respondent called on me in chambers. Mr Du Toit informed me that his client wished to make an application for my recusal, but that no papers had yet been prepared. He would not or could not inform me on what grounds recusal was sought, but stated that the Applicants were seeking a postponement of the then pending application so that a formal application could be presented. The matter was then called in court and Mr Du Toit made his application for a postponement but as he did not give any indication of the basis of the recusal application, the postponement was refused. Mr Du Toit thereupon withdrew and departed from the courtroom leaving the application unmoved and unargued.

For a number of reasons although the application for the extension of time and the associated order for compliance with the notice appeared on the roll, the matter was not ready for argument until 17th February 1999. At the commencement of the hearing Mr Du Toit delivered a written application for my recusal.

The application invites me to recuse my self from presiding in and hearing the instant application on the grounds that the applicants "humbly believe that Your Lordship is biased against them and that they will not get a fair hearing and adjudication in the matter". Affidavits which Dumisa Mbusi Dlamini and the applicants' attorney one Bheki Goodwill Simelane, have attested, support the application. I understand the application is not confined to my sitting in the interlocutory proceedings, but also to the main application.

I believe my approach to the application for my recusal has been in accordance with the tests of propriety considered in

Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service 1996 (3) SA 1 (A)

The application was not unexpected, in view of the previous intimation that it would be made. On reading the affidavit I soon came to the view that I should not accede thereto

As far as the main application is concerned, it is not presently possible to forecast which of the three judges of this court may eventually hear the matter. To this extent the application is premature. The issues as far as the instant interlocutory application is concerned, relate to a reading and interpretation of the rules, and fixing of a period for the filing of affidavits. These are scarcely matters, where even any non-existent but perceived bias on my part could operate. It also raises the question as to why this application for recusal has been brought at this stage.

Mr Du Toit, in making the application, was at pains to assure me that there was no allegation of actual bias on my part and I accepted his assurance unequivocally. The basis of the application he stated was that Dumisa Dlamini, the director and shareholder of the applicant companies, had reasonable grounds to fear that the applicants would not receive a fair hearing from me.

The applicants, in support of the application, filed affidavits of which I have already made mention.

In paragraph 5 of his affidavit Dumisa Dlamini says

"From time to time various of my companies and I have become engaged in litigation in the above Honourable Court. In a number of matters in which the Honourable the Chief Justice has presided I have been unhappy with what I perceive to be his attitude towards me personally and my companies and I began to suspect that he was biased against me and my companies."

This is an assertion of a very general and unspecific nature. It is correct that I have heard a number of matters in which Dlamini was concerned. Apart from the fact that I was constrained to rule against him on a number of times, I have no idea what could have given rise to his professed suspicion. He has at all times been treated with courtesy and patience. I recall specifically one occasion on which he had parted company with senior counsel from Johannesburg, who had been briefed, on his behalf to argue a matter in which I presided. Counsel informed me when the matter was called that his brief had been withdrawn and that Dlamini would argue the matter in person. This was the first time as far as I recall that I saw Dlamini. He presented his argument in a manner that one would not expect or tolerate coming from an attorney or counsel. In the end his contentions had to be rejected. He was however given a fair hearing. All reverses he may have suffered at my judgments which are the cause of his unhappiness are attributable to the weakness of his cases and the untenability of his arguments; not any ill will on my part.

The contents of paragraph six of Dlamini's affidavit is an incomplete, misleading, and distorted account of what took place. The background to the matter is that at the time mentioned by Dlamini, he was, and may as far as I am still aware be involved in litigation with the sugar association. An interlocutory application in those proceedings came before Mr Justice Matsebula. The judge ruled against Dlamini on the issues before him.

Some short time thereafter that Judge, together with Mr Justice Maphalala reported to me that Dlamini had, shortly after the judgment, and, on the national

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television commented on the matter in terms most grossly insulting to the judge, and contemptuous not only of him but of the whole court. Mr Justice Matsebula informed me that the allegations of bias made by Dlamini were fatuous, and he considered that he should not hear any further matters in which Dlamini was concerned until the question of the contempt had been resolved. I accordingly instructed the Registrar that no matter involving Dlamini or his companies should be enrolled for hearing by any judge until such time. Dlamini's attorneys were informed of this.

I, who had not seen or heard the television broadcast immediately called for the tape from Swazi TV but this tape was no longer available as it had been used for a later recording, which erased the material, which I required to see. Without this evidence the matter of contempt could not be dealt with summarily in the high court

I accordingly referred the matter of the contempt to the Director of Public prosecutions for his attention. I understand that a prosecution in the subordinate court may be pending. I considered this course preferable to summoning Dlamini to appear before the High Court to answer for his alleged contempt, if for no other reason than that the only evidence was not available and it is undesirable for the judges to come and give evidence. The director of Public Prosecutions however I believe should have been in a position to marshal any number of witnesses from the thousands who had seen and heard the broadcast.
Not long after instructing the Registrar not to enroll any of Dlamini's matters Pending the outcome of the contempt proceedings, it was brought to my attention that such suspension was unfair to other parties to the litigation in which Dlamini was involved. It also became clear that the matter of the contempt would not be dealt with and concluded expeditiously. I accordingly reversed my instructions to the Registrar and I believe Dlamini's attorneys were so informed. There the matter rested.

Dlamini says in paragraph 6 of his affidavit

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"On or about the 24th day of September last year, 1998, the Honourable the Chief Justice unexpectedly invited me to his house. He summon (sic) me through the Minister of Justice."
This is a complete distortion. Shortly after reversing my instructions to the Registrar regarding the enrolment of litigation in which Dlamini was concerned, the Minister of Justice, telephoned me. He informed me that he had been instructed to intercede on Dlamini's behalf to secure the reversal of my instruction to the Registrar. I told him that there was no need for this as this had already been done. The Minister then said that the remaining question of the contempt should be resolved quickly and that Dlamini was anxious to "set things right." He suggested that I meet privately with him and Dlamini, for this purpose. I told him that I would see him and Dlamini in my chambers. He explained that he thought it better, if he were not seen coming to my chambers with Dlamini. To meet this reluctance, I agreed that the meeting would take place at my home. He then said he would come at the agreed time and bring Dlamini with him. I accepted the bone fides of the Minister's request for a meeting, as a genuine intervention to ease Dlamini out of an embarrassing position in which he found himself as a result of the broadcast. I did not then see it and I still do not see it as an attempt by the Minister to interfere in the case pending in the Court or to interfere with the administration of Justice. On reflection, it may have been better for me to refuse to meet the Minister and Dlamini at all, in view of the interpretation some reports have put on the incident. My doing so however cannot be seen as evidence of bias against Dlamini. Quite to the contrary.

As I understood that Dlamini was coming to make a suitable apology, I prepared what I considered to

be an appropriate statement for him to make.

At the appointed time Dlamini and the Minister arrived at my house. A third party, one Moi Moi Masilela, whose presence I had not invited or been led to expect, accompanied them. I had previously made his acquaintance on other matters, but received no explanation of his presence at the meeting. By repute he was known to me be a person of influence in the seats of power. He acted throughout the meeting

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as some sort of advisor or supporter of Dlamini but did not add anything to what was discussed.

Dlamini's affidavit seems to suggest that he was alone at my house, and that I attempted to take advantage of his awe and defenselessness to prevail upon him to put his signature to an incriminating document. This is far from the truth. I explained to Dlamini and his aides, that in order to undo the damage of the broadcast nothing less than an unequivocal apology was required. The apology could not be private but that I expected it to receive as much publicity as the offending broadcast. At that stage I handed to him the draft statement which I had prepared and indicated that it was what I had in mind. He showed the document to his companions and then informed me he was not prepared to sign it. He questioned me as to what it was alleged he had said, and I explained that I had not heard or seen the broadcast. He then said he would take up the matter with Mr Justice Matsebula in what he termed the "Swazi way."

As far as I was concerned the meeting came to an end when he refused to apologize either by signing the statement or in any other way. He at no time attempted to deny that he made a broadcast grievously defaming and insulting Judge Matsebula and he has not done so in the present affidavit.

The meeting took place as far as I am concerned without acrimony or rancour. Nothing that transpired there could possibly give rise to a suspicion, reasonable or otherwise, that I entertained any antipathetic feelings towards Dlamini. In meeting with Dlamini at all at the request of the Minister who professed to be his intermediary I went further than may have been wise in an effort to dispose of the situation arising from Dlamini's broadcast.

No affidavit attested by the Minister has been produced, to substantiate the allegation that I summoned Dlamini through the Minister. I do not want to speculate on what the Minister may have told Dlamini. I certainly do not know what went on

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between Dlamini the Minister, but any suggestion that the meeting took place at my instigation or initiative is, wrong.

What is of major significance is that the present litigation between the Dumisa Dlamini companies and the Swaziland Electricity Board commenced in early October with the urgent application for the restoration for the reinstatement of the power supply to the several consumers who were the applicants. This was shortly after the meeting to which Dlamini has referred. The Applicants then did not object to my hearing of the matter. Nor did they raise any objection when the matter came before me on subsequent hearings, until Mr Du Toit informed me of the intention to apply for me to recuse myself without informing me of the grounds, why such application was being sought. On that occasion I attempted to inform Mr. Du Toit that if the events of 24th September, (that occasion being the only one on which I have had contact with Dlamni outside proceedings in open court), were to be the basis of the application the Applicants advisors should be fully appraised of what took place. Mr Du Toit refused to be informed by me of what had taken place. This took place in the presence of the Respondent's counsel.

The question arises as to why the applicants waited until the hearing of a technical interlocutory

application to apply to me to recuse myself when they raised no objection to my hearing the main application. The answer may be in the remaining circumstances recounted by Dlamini in the succeeding paragraphs of his affidavit.

In paragraph 7 Dlamini claims that the applicants and their associated companies make a significant contribution to the economy of Swaziland implying that this may have some bearing in the matter. This may be so. The respondent as the sole supplier of electricity in the Kingdom makes no less a contribution. On this count there can be no suspicion that I favour either side.

In paragraph 8 Dlamini describes the commencement of this litigation. Evidence of grounds for suspicion of bias on my part cannot be found in my granting the interim relief claimed by the applicants. The Applicants seem to think that I acted irregularly or unfairly in allowing the Respondents to anticipate the postponed hearing of the application on 2 hours notice. I fixed this short period, (which was agreed to by the attorney who moved the application), because.

(a) The apparent purpose of the provision permitting the respondent to sever power supplies to customers who do not pay their accounts is to prevent the respondent from sustaining further increasing losses, by continued supply to customers in undisputed default. It is not, except perhaps in an indirect way a method of enforcing payment.
(b) The amount claimed by the Respondent from the Applicant in respect of unpaid charges, already incurred and overdue is very substantial.
(c) The applicants appear to consume electricity rapidly in large quantities.
(d) the Applicants themselves had come to court on short notice,, and should have been able to deal then with the objections to and criticism of the founding papers

The Applicants cannot see in this any evidence of antipathy on my part. They alleged the urgency and came to Court on less than 2 hours notice to the Respondents.

The application was dismissed when it was heard because the Applicants had as it was pointed out failed in their papers to describe, or indicate a bone fide dispute in relation to the amount claimed. This Applicants appear to concede because I understand that in appealing against my order they seek to adduce further evidence in the Court of Appeal on the question of the dispute.

The illusory service was the reason for the special order of costs. Had the Respondent been given proper notice and sufficient opportunity to present the arguments advanced on the anticipated return day, the initial interim relief may not have been given. The short time given to the Respondent to anticipate the postponed

hearing, despite the assertions to the contrary, did not occasion the Applicants any prejudice. If any prejudice was suffered it was because of the defective papers on which they came to court in the first instance.

I do not see that in this a ground for suspicion of bias on my part. Is to be found.

When the application again came before me on augmented papers, which on a reading generous to the Applicants could be said to disclose, pima facie a bone fide dispute in regard to Respondent's claim, I again ordered the reinstatement of the power supply.

In order to protect the Respondent against further unpaid accounts, I determined that this order should be subject to the Applicants providing security by way of a deposit of an amount roughly equal

to an average month's consumption and payment of all succeeding months accounts on presentation.

As the matter could not be finalised on the day of the hearing the application was postponed until the following day. In order to meet the Applicants' insistence that the power supply be restored immediately, they agreed that an amount of E 250 000,00 would be deposited forthwith, and the electricity supply thereupon restored. The applicants were not able, that afternoon, to produce any greater amount at the time.

The following morning the terms of the interim relief were settled on the basis of a draft which I prepared overnight and the amount of E 300 000 was stipulated as the deposit. The draft was presented to the parties in open court, debated by them and agreed to before the matter was concluded

Dlamini did not make me aware of any objection to the amount. In paragraph 12 of the affidavit reference is made to a newspaper report of my meeting with the chief executives of the media in Swaziland. Although invited the representative of the Observer did not attend. The purpose of the meeting was to remind the press, television, and broadcasting services of their role in the administration of justice. One of the topics discussed was the undesirability of the media affording

publicity to scurrilous statements concerning and immoderate criticism of the High Court and its judges. A prime example of this was Dlammi's appearance on Television, and the subsequent reports of this in the press.

Annexure B is the report of the meeting, which appeared in the Times. Some of the statements incorrectly attributed to me are in fact a dramatised account of what happened in the reporter's own words and reflect his own interpretation of what was in fact said. On the whole and by the relaxed standards of accuracy which have been set in the past the article may be said to be a fair reflection of what took place. Of Dlamini I did say that while his reputed wealth did not entitle him to make such statements, and his lack of legal education could not be an excuse so doing, greater responsibility is expected and required from the media in publicising and reporting thereon. I made no reference to Dumisa's solvency or that of his companies. Comment on this aspect is that of the reporter. Dlamini, if he chooses to criticise the High Court and Judges thereof publicly, in abusive and contemptuous terms cannot be heard to point to reaction thereto and discussion thereof at a meeting of concerned persons, as evidence of bias against him. The same considerations operate with reference to the report, which is annexure C to the affidavit.

From paragraph 15 onwards matters are raised which did Dlamini himself not witness. The suspicion he says he has, that he will not receive a fair hearing from me, in so far as these incidents are concerned, can only arise from the manner they were recounted to him by his attorney Simelane. Simelane's own interpretation of the events therefor has to be examined.
The first incident, which is the subject matter of paragraph 15, is when Simelane announced from the bar in the course of the proceedings to which he there refers, that the respondent was in breach of the interim order, and that it had once again disrupted the supply of power. As there were no affidavits before the court alleging the breach, nor yet any notice of motion claming relief in respect thereof, I told Simelane that I could not deal with the matter but would entertain an application as

soon as the papers could be served and placed before the court. I observed that "his client" and the attorney himself were well aware of the procedures by which orders of court were enforced, and that I could not act on ex parte statements from the bar. Simelane seems to consider that this indicates bias on my part. I cannot see it as such.

The next paragraph raises another trivial complaint. My observation that the notice could have been a fishing expedition is taken out of context. Mr. Flynn for the Respondent had first used the expression to describe the procedure adopted by the Applicants. I pointed out to him that it may well be a fishing expedition but the question remained "Were the documents to which access was required referred to in the affidavit?" This has nothing to do with bias, perceived or actual.

The complaint made in paragraph nineteen is firstly that although the matter had been placed on the roll of Mr. Justice Matsebula, I had the matter called in my court. What is not said is that at the previous hearing I had agreed with the concurrence of the parties that because I had read the papers I would hear the matter on the Friday notwithstanding hat I was not scheduled to hear motion court matters on that day. Mr. Justice Matsebula has declined to hear Dlamini's cases until the question of the contempt and insult to him has been dealt with. This application among others was placed before me without me calling for it.
This was the day when Mr. Du Toit first informed me in chambers of the intended recusal application. As no basis for the intended application was disclosed I consider that I acted correctly in refusing the postponement.

In paragraph 20 Dlamini turns to the events, as related to him by Simelane, of 12th February. Simelane had on 4th February served a notice once again enrolling the interim application for hearing on 12th February. The Respondents filed an answering affidavit in reply on 11th February. Simelane then says he then advised the Respondent's attorney by letter that the

"Applicants would apply for a week's postponement of the matter in order to file a reply". Simelane does not suggest that any postponement be agreed to, yet presume that by delivery of the letter, the matter that he had set down for that day would somehow not be on the roll. In recounting this incident Dlamini, again obviously reciting what Simelane must have told him says

"Since the matter was not on the Roll on Friday, 12th February 1999, and in the circumstances it was unnecessary to retain Counsel to apply for a postponement, however, I am advised that the matter was nevertheless called in front of the Honourable the Chief Justice"

The matter was called simply because Mr. Simelane required the matter to be set down and there is nothing to suggest that the matter should not be enrolled. The matter was called because Simelane had enrolled it. Clearly Simelane misinformed Dlamini. As I had been allocated the contested roll, the matter naturally came before me and the file was one of the many which I read in preparation. When I saw the file, only Applicants' notices of motion (with founding affidavit attached) and notice of set down, were relevant and were in the file. The issues were clearly defined in the affidavit and its annexes. I gave no thought to the absence of a replying affidavit and in preparing myself assumed that argument would be on the basis of the documents in the file. There was no indication that the matter had been removed from the roll, as Dlamini seems to have been told?

When the matter was called Mr. Themba Simelane announced his appearance on behalf of the applicants and he told me that a replying affidavit had been filed and that the Applicants required time in which to reply. This came as a surprise, for there was nothing in the court file. The affidavit, which had been served the previous day, was then produced and there was nothing in the affidavit, which, as far as I could see, added anything to what was already in the file. In this context I asked Mr. Simelane "what is there to reply to". This is a perfectly legitimate question in the circumstances and in any event I postponed the hearing for the 17th February 1999 at 8.00a.m, The time is not unusual, as because of the shortage of judges in this Court the practice has arisen of dealing with matters of capable of

swift adjudication before or outside normal court hours. I did so after consulting the convenience of those appearing before me and in the absence of any demur.

I have dealt with the factual aspect of this matter in greater detail than usual. I was satisfied at the time the application was made, that there was no real basis for the application. The impression has to be avoided, especially in this jurisdiction where there are few judges, that a litigant can pick and choose the judge who is to hear his case, by applying recusal, on the flimsiest grounds in so far as the judge who is not his first choice. In so far as the application is concerned the affidavit did not in fact add anything to what was already before the court because the respondent's reply to the notice was annexed to the affidavit in support to the application. As I have observed the matter is not one requiring the filing of affidavits as the answer lies in comparing the notice with respondent's affidavit to determine whether the documents are referred to therein.

When the matter was called this application for recusal was presented. After hearing Mr. Du Toit, I refused to accede to the application and informed him that my reasons will be furnished later. These are the reasons.

On my refusal Mr. Du Toit and Mr. Simelane left Court leaving the application for extension of time once again unargued and unmoved. Mr. Flynn who appeared for the respondent did address me and asked me for the application to be dismissed with costs. I reserved my decision thereon and I have decided that the as the application was on the roll but not moved, I have no option but to dismiss it with costs. I leave it to the respondent or any parties concerned to make any further representation as to the order of costs.

S.W. SAPIRE

CHIEF JUSTICE