THE HIGH COURT OF SWAZILAND

TIMOTHY BHEMBE

Vs

COMMISSIONER OF POLICE & ANOTHER

Civil Case No. 2719/97

Coram S.B. MAPHALALA – J

For the Plaintiff ADVOCATE L.

MAZIYA (Instructed by Q.M. Mabuza) For the Defendants MR. P. MSIBI

RULING

(Application to re-open the defence case after judgment was reserved)

(04/06/2004)

This is an extra-ordinary application where the Defendants apply to be allowed to make late discovery of statements of one Mdabula Mazibuko and Mpembe Simelane after the court has heard arguments and reserved judgment in a long trial where Plaintiff is suing Government for false imprisonment.

The application is for the following relief namely;

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1. Allowing the Applicant/Defendant to make a late discovery of the statements of Mdabula Mazibuko and Mpembe Simelane, so that two statements can be part of the record of trial.
2. Allowing the policemen who recorded the statements to hand in the statements to the Honourable Court.
3. Allowing the makers of the statements to come to court and verify their signatures on the said statements
4. And Further/or alternative relief.

The Defendants in the trial were represented by the late Advocate E. Thwala who filed the present application and also deposed to the founding affidavit therein. In the affidavit he deposed that the application was being brought in terms of Rule 35 (5) of the High Court Rules. He makes the following averments from paragraph 2 to 4 of the founding affidavit, thus:

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In the year 2002 I was assigned the present case during my short tenure as special state counsel in the Attorney General Office.

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One of things I noticed as being unusual and would eventually lead to some problems was the fact that two statements which positively Finger the Respondent/Plaintiff as having been seen carrying a gun during the fight were not discovered during the discovery process and this worried me.

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I later tried to negotiate with my learned fried Advocate Lucas Maziya not to oppose an application for late discovery and he refused on the grounds that the late discovery is advantageous to me. I deny that and I say it is advantageous to the administration of Justice.

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He then reminded me of the fact that in this case I had opposed his application for late discovery of a document he said would show how much Bhembe earned from his so called Commercial Farming. He did not then say that the documents would also show

his transaction with the bank in Nhlangano on the 16th February 1996. He is on record telling the court that be is surprised that I am saying his client has failed to prove a vital part of his alibi i.e. that he withdrew from the bank in Nhlangano on the 16th February 1996 a sum of El, 300-00. I have told him and the court that I did know that the document contained such information and I would be a fool to oppose such an application for a matter, which goes to the root of the matter. In any case he never gave me the document to peruse and make up my mind. In any event I have told Mr. Maziya through the court that he can bring the document anytime before judgment. I still stand by this submission/undertaking.

The Plaintiff opposes the granting of the application on two grounds. Firstly, that the opening of the case at this stage would greatly prejudice the Plaintiff in that the statements which are sought to be discovered are at the root of the case. Secondly, a technical point was advanced that the founding affidavit deposed to by the late Advocate Thwala was defective ab initio. The point taken in this regard is that the said affidavit was deposed to before a Desk Officer and thus in view of the ratio decidendi in the case of the Director of Public Prosecutions vs The Law Society of Swaziland Civil Appeal No. 28/1995 (unreported) the Commissioner of Oath is an interested party in the proceedings. Consequently, the said affidavit is a nullity.

When they came for arguments Mr. Msibi who then appeared for the Defendants submitted that the interest of justice in the present case demand that the case be reopened. On the issue of the affidavit he contended that the deponent thereto has died therefore the court should invoke the doctrine of necessity and receive the said affidavit irregardless of its imperfections.

It is clear therefore that there are two issues for determination in this case viz whether the Defendant has made a case to be allowed to discover in terms of Rule 35 and whether the founding affidavit by Advocate Thwala is valid in law. It appears to me that the second question determines the first.

I thus proceed to examine the admissibility of the said affidavit. The affidavit forms the basis the application by the Defendants. The Defendants' application stands or falls on this affidavit.

It is common cause that the affidavit was deposed to before the Desk Officer of the 1st Defendant. The former is a Police Officer under the Commissioner of Police. The question therefore is whether the affidavit sworn in before the Desk Officer as Commissioner of Oaths is admissible evidence. A case in point is that of the Director of Public Prosecutions vs The Law Society of Swaziland (supra) where a similar question was decided by the Court of Appeal. In that case the then President of the Law Society Mr. Paul Shilubane deposed to the founding affidavit in the application. The said affidavit was attested to by an attorney who was a professional assistant in the office of the President of the Law Society. The question came for decision before the Court of Appeal in the form of a point in limine where the contention was made that the affidavit of Mr. Shilubane was inadmissible in law as the affidavit was not properly attested to. Browde JA giving the judgment of the Court after an extensive review of the authorities pertinent in such cases embraced the ratio decidendi by Hannah CJ in the case of F.N Dlamini Vs J.M. Dlamini 1982 -1986 Vol. IIS. L. R. 416. In the latter case it was held that affidavits sworn before the Respondent's own attorney or agent, partner or clerk of that attorney, are not admissible in evidence.

The learned Judge of the Court of Appeal stated the following at page 15 in fin 17: and I quote: (per Browde JA):

"It is now necessary to deal with the two relevant cases which have been decided in the courts in this country and which were referred to by the learned Judge a quo namely Magagula vs Town Council of Manzini & others (supra) and F.N. Dlamini vs J.M. Dlamini (supra). It appears that in the former case Nathan CJ held that an affidavit sworn to before a Commissioner of Oaths who may have had an

interest in the matter should not be excluded as being inadmissible. The learned Chief Justice was not, however, dealing with a case in which the Commissioner having an interest in the matter was the deponent's own attorney firm. To that extent the case is clearly distinguishable from the present one and was the basis for the distinction drawn by Hannah CJ. in the Dlamini case. At page 418 of the report Hannah CJ. in dealing with Section 43 of the Act, refers specifically to the necessity for looking at the English law in order to decide the admissibility of evidence. After referring to Section 13 of the Commissioner of Oaths Act 1889 which provides that a Commissioner of Oaths or a solicitor must not administer any oath or take any affidavit in any proceeding in which he is solicitor to any party to the proceeding or clerk to any such solicitor or in which he is interested, the learned Chief Justice stated that:

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"The result of the statutory prohibition is that the Supreme Court of Judicature refuses to accept as sufficient any affidavit which is sworn before the solicitor of. the party on whose behalf the affidavit is to be used or before any agent, partner or clerk of that solicitor".

He then referred to Order 41, Rule 8 of the rules of the Supreme Court of England which is to the same effect. It seems to me that F.N. Dlamini vs J.M. Dlamini is a case directly in point in the instant matter, and that it was correctly decided. In the result, therefore, in my judgment the affidavits of the Respondent society should have been held to be inadmissible and that the application brought by the society should have been dismissed on that ground".

It would appear to me that the facts in the Law Society case (op cit) are at all fours with the present case. The Desk Officer has an interest in this matter and therefore the affidavit attested before him constitutes inadmissible evidence. It follows therefore that if the affidavit is inadmissible then there is no proper application before court and the application should then be dismissed. I also find that the doctrine of necessity has no application in the present case as the admissibility of affidavits is governed by a statute viz Section 43 of the Civil Evidence Act, 1902, and the court cannot act ultra vires the said statute. Even if I had found that the affidavit was admissible the Defendants would not succeed on the merits of the application. I say so because there would be irreparable prejudice visited on the Plaintiff if leave is granted to receive these statements at this stage in the proceedings. The scenario in the present case is governed by Rule 35 (4) of the High Court Rules.

The sub-rule provides as follows:

"A document not disclosed as aforesaid may not, save with the leave of the court granted on such terms as to it may seem meet, be used for any purpose at the trial by the party who was obliged but failed to disclose it, provided that any other party may use such documents".

According to Erasmus, Superior Court Practice, Juta at B1 - 257 by the phrase "save with the leave of the court" it has been held that leave should not be lightly granted for the use of documents not properly discovered. Leave should be granted only where there is no prejudice and the defaulting party has given adequate and satisfactory reasons for its failure to make discovery in compliance with the rules (see also Mlaula vs Marine and Trade Insurance Co, 1978 (I) S.A. 401 E).

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In the present case as I have already mentioned there would be irreparable prejudice if the Defendants were allowed to introduce new documents at this stage. The introduction of these documents will mean the trial will have to be started afresh. The two statements go to the root of the matter. All in all in this regard I agree with the submissions made by Mr. Maziya for the Plaintiff.

It follows therefore from the afore-going that there is no proper application before the court and the application ought to be dismissed, and it is so ordered.

The issue of costs to stand over for arguments by the parties.

JUDGE