



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Civil Case No. 2457/2010

In the matter between:

**THULI GEMBE**

**Applicant**

**vs**

**SWAZILAND GOVERNMENT**

**Respondent**

**Neutral citation:** *Thuli Gembe vs Swaziland Government (2457/2010)*  
*[2014] [SZHC 131] (4<sup>th</sup> July 2014)*

**Coram:** **MAPHALALA PJ**

**Heard:** 2<sup>nd</sup> July 2014

**Delivered:** 4<sup>th</sup> July 2014

**For Applicant:** Mr. B. Simelane

**For Respondent:** Mr. V. Kunene

**Summary:** (i) *The Plaintiff after the Defendant has called two (2) witnesses and Plaintiff had closed her case now apply to re-open her case and call a witness crucial to her case.*

- (ii) *Defendant oppose the Application on a number of grounds, more importantly that when Plaintiff close her case there was no mention of this witness at all that he could not give evidence because he had to travel to South Africa on business.*
- (iii) *In the result, this court after hearing the arguments of the attorneys of the parties has come to the considered view that grave prejudice will be caused to the Defendant who also has to recall two other witnesses. The Application is accordingly refused in the circumstances of this case.*

**Decided cases referred to:**

1. **Hladla vs President Insurance Company Ltd 1965(1) SA 614.**
2. **Koster Ko-op Landboumpy v SA Spoorwee en Hawens 1974(4) SA 420.**
3. **Oosthuizen vs Stanley 1938 AD 322 @333.**
4. **Rex vs Thembekile Kate Dlamini, High Court Case No.241/08.**
5. **Rex vs Vusumuzi Dlamini, High Court Case No.375/09.**
6. **Mkhwanazi vs van der Merwe 1970(1) SA 609.**
7. **Barclays Western Bank vs Gunas & Another 1981(3) SA 91.**
8. **Rex vs Zonke Thokozani Tradewell Dlamini and Bhekumusa Bheki Dlamini, High Court Case No.165/10.**
9. **Rex vs Celani Maponi Ngubane and 8 Others, High Court Case No.46/2000.**

**JUDGMENT**

**The issue for decision**

- [1] The only issue for decision is that of the recalling of a witness for the Plaintiff after the Plaintiff had closed her case and the Defendant had called two witnesses in its defence. The said witness is one Mr. Simon Motsa.

[2] The Defendant opposes the Application and has filed an Answering Affidavit deposed to by the National Commissioner of Police, Mr. Isaac Magagula advancing a number of grounds. I shall revert to them later on in my analysis of the issues in this matter.

### **The arguments of the parties**

#### **(i) Plaintiff's arguments**

[3] The attorney for the Plaintiff, Mr. B. Simelane advanced arguments for the Plaintiff and filed Heads of Arguments for which I am grateful.

[4] The kernel of the argument for the Plaintiff is based on the legal principle that a trial court has a judicial discretion to exercise when considering an Application to re-open a case. In this regard this court was referred to cases of **Mkhwanazi vs van der Merwe 1970(1) SA 609** at 616 and the case of **Hladla vs President Insurance Company Ltd 1965(1) SA 614** at 621 where **van Blerk JA** stated the following **dictum**:

**“A trial court has the power at its discretion to re-open the case and allow the witness to be recalled even after the Defendant had closed its case. In Oosthuizen v Stanley 1938 AD 322 Tindall JA said:**

**‘There is no doubt that the trial Court has the power to allow a Plaintiff to call a fresh witness after Defendant has closed his case and that exercise of power is in the discretion of that Court. I see no reason why if a fresh witness could be called, the trial Court should have no power to recall a witness who has already given evidence. As pointed out by Tindall JA several considerations have a bearing on the exercise of such discretion for instance the reason for Plaintiff’s failure to call the witness before, the danger of prejudice to the opposite party owing to his being no longer able to bring back his witness and the materiality of the evidence.’”**

[5] It is contended for the Plaintiff that a party seeking to re-open its case must show:

- (i) Proper diligence has been used to procure evidence at the trial; and
- (ii) The evidence proposed to be led is material to the case.

[6] That regarding proper diligence, Plaintiff has stated in her Founding Affidavit that Steven Motsa was in South Africa on business and was therefore unavailable to be led as a witness. Applicant could not have been expected to do more, it was a matter that is simply beyond her control. The explanation given shows that it is not a matter of remission on the part of the Plaintiff. In support of this proposition Mr. Simelane for the Plaintiff cited what is stated by the learned author **Harms, Civil Procedure in the Supreme Court, 2001 Edition** at paragraph N10 of page 401 to the following legal formulation.

**“An Application for re-opening must show that the evidence was not available before closing his case or could not have reasonably have obtained it or should advance an acceptable explanation why it was not addressed before closing his case.”**

[7] The court was also referred to the South African case of **Korster Ko-op Landboumpy v SA Sopoorewe en Hawens 1974(4) SA 420.**

[8] Regarding the materiality of the evidence it is contended for the Plaintiff that the evidence is material, particularly because there was a meeting held which was attended by the Plaintiff, the Station Commander, Mr. T. Hlophe and Steven Motsa. In that meeting, Plaintiff alleges that the Station Commander apologized stating that the police were not trained to investigate in this manner. That the evidence of Steven Motsa will seek to clarify what really happened in that meeting.

[9] Further, Steven Motsa is the person who actually paid on behalf of the Plaintiff at Medisun Clinic. That he will testify to the court how much he paid and why.

[10] Furthermore, Steven Motsa will testify to this court on the condition of Siyabonga Mdlovu when he saw him the following day after the assault

and that these facts of the case are very material for the determination of the whole case. In support of this argument the attorney for the Plaintiff cited the cases of **Oosthuizen vs Stanley 1938 AD 332** and that of **Barclays Western Bank vs Gunas & Another 1981(3) SA 91**.

[11] The attorney of the Plaintiff in his final paragraph of his Heads of Arguments cited the case of **Barclays Western Bank vs Gunas (supra)** to the legal proposition that the consideration of materiality of evidence, the explanation of failure to give evidence timeously and the prejudice to either party, are nothing rather than fixed principles and what is paramount and decisive is what is fair and just to the parties.

[12] It is contended for the Plaintiff that the Plaintiff has made out a case for re-opening her case on the above arguments.

**(ii) Defendant's arguments**

[13] The attorney for the Defendant, Mr. V. Kunene, Senior Crown Counsel advanced arguments for the Defendant and later filed comprehensive Heads of Arguments for which I am grateful.

[14] The prelude of the arguments of the Defendant is that the Plaintiff wants a second bite of the cherry, having noticed the resultant loopholes in its case and cited what was decided by this court in a criminal case of **Thembekile Kate Dlamini vs The King, Case No.214/08** at paragraph 16 thereof to the following legal proposition:

**“The Court’s power should not, in that eventuality, be used to assist a party which deliberately took a decision not to call a witness merely because the decision it made has returned to haunt it or it has since had a change of mind or heart and has discovered a stone in its shoe after all evidence is in and desires the court to call a witness in order to remove the stone from its shoe. No greater injustice would be done than for the court to use this power to lend its weight and support to such a party. In other words, a party who has neglected to call a witness should not attempt to use the Court as a cat’s paw so to speak by asking the court to use its power to assist it in holding and cementing together fragments of its crumbling case” per Masuku J in the matter of The State/Vusumuzi Dlamini (alias Virus) High Court Case No.375/09 at page 26 paragraph 39 thereof (my emphasis)**

[15] It is contended for the Defendant that the present Application by the Applicant to re-open her case by calling a new witness Mr. Motsa is an afterthought. That during the course of the trial when Plaintiff was giving evidence the name of Mr. Motsa was mentioned on several occasions, however, instead of the Plaintiff calling Mr. Motsa to corroborate the Plaintiff’s evidence, she decided to close her case. That the Plaintiff’s

case took two (2) days but at no stage was there a mention of another witness who was not available at the time.

[16] The court was never informed that there was another witness by the name of Mr. Motsa whom they wanted to call but was not available at that time. That instead, after leading three (3) witnesses being the Plaintiff and her two (2) sons, they decided to close the case without any indication that there was another witness.

[17] That it was only after the Defence has started leading their defence that Plaintiff discovered that she made a mistake by not calling Mr. Motsa as a witness and now wants the court to come to her assistance. That it was after the first defence witness Mr. Hlophe, who denied most of the allegations involving Mr. Motsa that the Plaintiff discovered a “stone in their shoe” and now wants the court to come to her assistance.

[18] In support of the above arguments, Mr. Kunene for the Defendant cited a *plethora* of cases being that of **Rex vs Zonke Thokozani Tradewell Dlamini and Bhekumusa Bheki Dlamini, High Court Case No.165/10** and that of **Rex vs Celani Maponi Ngubane and 8 Others, High Court Case No.46/2000** and that of **Rex vs Thembekile Kate Dlamini (supra)**.



[19] The final submission advanced for the Defendant is that if the court were to come to the assistance of the Plaintiff and allow the reopening of the Plaintiff's case, such would lead to prejudice on the part of the Defendants in that already the Defence has called and excused the witness Mr. Hlophe who is the only witness who has a bearing on the evidence that will be led by Mr. Motsa and this means that Mr. Hlophe would have to be recalled as well to rebut the evidence of Mr. Motsa.

[20] In this regard the attorney for the Defendant cited what was stated in the case of **Thembekile Kate Dlamni (supra)** where the following **dictum** was enunciated:

**“4.2 In the case of Thembekile Kate Dlamini/The King, High Court Case No.24/2008 supra, Her Ladyship Justice Ota stated the “it is a fundamental principle of administration of justice that there must be an end to litigation, that is why there are set times for each step in the proceedings. If the court continues to be dragged back and forth and forth and back as each party pleases, then no case will ever end.”** At paragraph 14 thereof. (my emphasis)

[21] It is contended for the Defendants that the above fundamental principle of justice be applied in the present case.

### **The court analysis and conclusions thereon**

[22] Having considered the papers filed in this matter and the arguments of the parties regarding the Application by the Plaintiff to recall a witness Mr. Steven Motsa after the defence has called two (2) witnesses to rebut the Plaintiff's case in these circumstances I am inclined to agree with the arguments of the Respondent as follows.

[23] Firstly, before the close of the Plaintiff's case there is no evidence before court that Mr. Simelane for the Plaintiff intended to call Mr. Steven Motsa but that he was away in South Africa. For an important and vital witness as contended for the Plaintiff it should have been put on the record that Plaintiff wanted to call this witness who was away in South Africa on business. The absence of this mention by the attorney for the Plaintiff lends credence to the argument by the Defendant's attorney that this Application by the Plaintiff is merely an afterthought.

[24] Secondly, I have considered the averments of the Defendant in the Answering Affidavit of the National Commissioner of the Police Mr. Isaac Magagula that the averments in paragraph 4 thereof have not been answered by the Plaintiff in a Replying Affidavit and therefor stands uncontraverted.

[25] In the said paragraph 4 of the Answering Affidavit a number of important issues are raised **inter alia** that Plaintiff has failed/refuted to attach proof to the effect that Mr. Steven Motsa was in South Africa during those dates when the matter was heard. That the Plaintiff has not attached copies of Mr. Steven Motsa's passport as proof of entry and exit in those dates when the matter was heard.

[26] Further the name of this witness was mentioned in a number of incidences in this case leading to the point that he was a material witness who ought to have been called for the Plaintiff but Plaintiff decided to close her case.

[27] Furthermore, this court has come to the unfortunate conclusion on the facts that Plaintiff having considered the evidence of the Defendants seeks to redeem the case for the Plaintiff.

[28] Lastly, the recalling of a witness is in the court's discretion which it has to exercise judiciously upon the facts and circumstances which will demonstrate that it is just and equitable to do so. It is my considered view that such recalling would lead to prejudice on the part of the Defendant's in that already the Defence has called the witness Mr.

Hlophe who is the only witness who has a bearing to the evidence that will be led by Mr. Motsa and this means that Mr. Hlophe would have to be called as he will rebut the evidence of Mr. Motsa. In this regard I refer to what is stated at paragraph 14 **supra** in the case of **Rex vs Thembekile Kate Dlamini (supra)** to be apposite on the facts of this case. For emphasis what was pronounced in that case is reproduced hereunder:

**“The Court’s power should not, in that eventuality, be used to assist a party which deliberately took a decision not to call a witness merely because the decision it made has returned to haunt it or it has since had a change of mind or heart and has discovered a stone in its shoe after all evidence is in and desires the court to call a witness in order to remove the stone from its shoe. No greater injustice would be done than for the court to use this power to lend its weight and support to such a party. In other words, a party who has neglected to call a witness should not attempt to use the Court as a cat’s paw so to speak by asking the court to use its power to assist it in holding and cementing together fragments of its crumbling case”** per Masuku J in the matter of The State/Vusumuzi Dlamini (alias Virus) High Court Case No.375/09 at page 26 paragraph 39 thereof (*my emphasis*)

[29] In the result, for the foregoing reasons the Application to re-open the Plaintiff’s case to call Mr. Steven Motsa is refused with costs.

**STANLEY B. MAPHALALA**  
**PRINCIPAL JUDGE**