



## IN THE HIGH COURT OF SWAZILAND

Held at Mbabane

Case No.: 1294/2012

In the matter between

**NOMATHEMBA GAMEDZE**

**Applicant**

And

**COCA COLA SWAZILAND LTD T/A**

**Respondent**

**COCA COLA SWAZILAND**

**In Re:**

**COCA COLA SWAZILAND LTD T/A**

**Plaintiff**

**COCA COLA SWAZILAND**

And

**NOMATHEMBA GAMEDZE**

**Defendant**

**Neutral Citation:**

*Nomathemba Gamedze Vs Coca Cola Swaziland Ltd T/A  
Coca Cola Swaziland (1294/2012)*

*[2017] SZHC 52 (22<sup>nd</sup> March 2017)*

**Coram:** Hlophe J.

**For the Applicant:** Mr M.T.Mabila

**For the Respondent:** Mr Z.D.Jele

**Date Handed down:** 22<sup>nd</sup> March 2017

### **Summary**

*Application Proceedings – Interlocutory application –Applicant applying for an order recalling two witnesses who had testified on behalf of the Plaintiff in the main matter –Whether a case has been made for the relief sought –What such a relief entails –Position of the law – Case not made for the relief sought – Application dismissed –Costs to be costs in the course.*

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## **JUDGMENT**

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### **Introduction**

[1] This case brings into sharp focus the question when a witness who has already testified may be recalled at the instance of an opposing party for such a party to put its case to the same witness so that an adverse inference may not be drawn against the said party on the grounds that the evidence of

the witness was not challenged. In other words, the recalling of the witnesses we are dealing with in this matter is said to be to ensure that the case of the opposing party is put to the witness of the other side.

[2] The current applicant is the Defendant in the main matter where she is being sued by the Plaintiff, who is the Respondent herein, for the recovery of a sum of E707 597.58 the former is alleged to have defrauded the latter at the time she was employed in its Finance Department as a Disbursement and Employee Receivable Accountant.

[3] After all the papers had been exchanged with the matter now on trial and with the Plaintiff having closed its case, the Defendant, now Applicant, approached the court by means of a notice of motion supported by the affidavit of the Defendant herself, seeking an order of this Court that the two Plaintiff's witnesses who had already testified, be recalled so that an aspect of the Applicant's or Defendant's case may be put to them. It is said the case was not put to these witnesses because the Attorney of record then failed to do so and the newly appointed one advised it was necessary to

recall the witnesses so that aspect of the Applicants case not put to the said witnesses was so put.

[4] The application is opposed by the Plaintiff, the Respondent herein, who contends that the Application by the Applicant to recall the two Plaintiff's witnesses is ill - conceived and is actually aimed at delaying the finalization of the matter than being realistically aimed at what is alleged. The thrust of the Respondent's case is that the case the Applicant contends was not put to the witnesses was as a matter of fact put to them and further that what is now sought to be put to the witnesses concerned is not material to the determination of the matter so much so that it is irrelevant to its determination. This Court is then asked not to exercise its discretion in favour of the Applicant.

[5] The case by the Plaintiff as pleaded and as established in the evidence of the three witnesses who testified is in summary to the effect that the Applicant, who was between the period April 2011 to July 2012, employed by the Respondent herein as a Disbursement and Employee Receivable Accountant, had whilst under her aforesaid employ, fraudulently abused

certain credit cards of the Respondent which were meant for the convenience of its senior staff members particularly when they had travelled outside the country. In particular Applicant was accused of having fraudulently abused the cards that had been issued to Mr R.T.Kunene, Miss K.E.Simelane and Miss L.G.Skhosana.

[6] Whilst Miss L.G.Sikhosana and Miss K.E.Simelane had allegedly left the employ of the Respondent and should therefore not have benefitted from the usage of the Respondent's credit cards anymore, Mr R.T.Kunene, whilst still an employee, had declined to accept a newly revived credit card on the grounds he did not need it. This he had allegedly communicated personally to the Applicant, who had tried to hand over to him the revived credit card.

[7] It so happened that contrary to the said position it was discovered that all the three credit cards had not only continued to be used secretly and fraudulently to the prejudice of the Respondent but had actually had their credit limits secretly being raised from say E40,000.00 per month to E60,000.00 or more per month. The letters seeking the renewed credit cards limits were alleged or appeared to have been signed by one Mbongeni Mashinini who gave

evidence as PW 1. He however denied having done that in his evidence and contended that the said letters were fraudulently prepared by someone using his name to make the said letters appear authentic. He clarified in his evidence that he could not have done so given that two of the people in whose names the credit cards had been issued, had already left the employ of Coca cola Swaziland while the third one, Mr R.T.Kunene, although still employed by the company, it turned out he had deliberately declined the credit card after it had either been renewed or revived. He had in fact communicated that to the Applicant herein (the Defendant in the main matter).

- [8] It is not in dispute that in terms of the operative procedure, the Applicant, who at the time held the position of the Disbursement and Employee Receivable Accountant was required, after receipt of the monthly credit cards statements from Standard Bank with which bank the Respondent had an arrangement, to allocate the amounts revealed thereon to the relevant employee accounts who were required, to settle same.

[9] It was alleged that notwithstanding that the three people concerned (L.G.Skhosana, K.E.Simelane and R.T.Kunene) had in reality no credit cards to utilize for the reasons above stated, it was discovered that monthly credit cards statements would monthly be received by the Applicant in the capacity referred to above. Apparently and for some reason, obviously aimed at perfecting the fraud, those meant for the Finance Manager and Accounting Manager had been blocked or were no longer being received.

[10] The amounts reflected thereon would then be recorded into the company accounts particularly into the accounts of the users by the applicant. The contentious allocations would however be transferred into the losses account through a document called a Journal Voucher. This gave a false impression that the amounts so allocated were a genuine loss to the company yet it was just a ploy to hide away the fraudulent amounts.

[11] The person whose duty it was to do these allocations procedurally was the Applicant. The falsification of the books in this matter went on for at least a year and some months without being detected. Notwithstanding that this was one of her primary duties, the Applicant never reported this anomaly to

her superiors nor did she reveal to any of them that she was no longer able to perform her duties because perhaps somebody else was doing so.

[12] The anomaly came to be detected when on a certain date, the correspondence sent the Respondent by the Bank's Relationship Manager fell on the hands of PW1, Mbongeni Mashinini, the Accounting Manager to whom the Applicant reported in terms of the company structure. In terms of this structure, Mr Mashinini himself reported to PW2, Marriana Healy.

[13] The correspondence sought clarity on the increase of the credit card limit. It had as an annexure to it a certain letter which requested the increase of the credit card limit of Mr R.T.Kunene. It suggested on the face of it to have been signed by PW1, Mr Mashinini. As he claims not to know anything about the letter, Mr Mashinini allegedly investigated its origins. Questions posed to the Applicant as the person responsible for that portfolio did not yield immediate answers as she instead disappeared when asked to bring the credit card of R.T.Kunene.



[14] From the ensuing investigations it was uncovered that in fact Mr R.T.Kunene had declined a credit card when offered one by the Applicant herself. L.G.Skhosana and K.E.Simelane were no longer entitled to use the said credit cards because they had already left the Respondent's employ. The Bank also gave the Respondent the letters seeking to increase the credit card limits of the latter two employees, who were no longer even entitled to use the credit cards, thus revealing that the rot was much deeper.

[15] It was to transpire however that the credit cards in question had been used for over a considerable period. The expenditures related thereto were as stated earlier, first allocated into the names of other innocent company employees and later transferred into the losses account through the use of the journal voucher. This function was, as recorded above, a natural task of the Applicant. She had reported to no one about the anomalies which were glaringly obvious and had gone on for a considerable period.

[16] An investigation allegedly indicated that the journal vouchers had been prepared and posted into the system by her as her private and confidential code or pin number had been used. Some of the expenditures done in the

names of the two former employees referred to above and Mr R.T.Kunene, were found to have actually benefitted the Applicant. An example in this regard was an invoice paid for her car at Allan Hudson VW Garage in Nelspruit where it was being serviced or repaired amounting to a sum of E18,686.07.

[17] The reality is that PW1 and PW2 were cross examined at length for at least a day and some hours each. In my view and as contended by counsel for the Respondent, the cross examination was long, intense and exhaustive. I agree and did note that at all times, the Applicant was personally in attendance in Court and seated next to her attorney. I agree that no reason has been given why she could not have given full instructions to enable her Attorney put same to the witnesses concerned.

[18] In its papers, the reasons Applicant wants to have the witnesses recalled are the following ones:

18.1. The Court had allegedly been informed she was the one responsible for fraud as she allegedly carried out her duties

negligently and thus exposed the company to such a loss and that she was an authorized signatory.

18.2. The witnesses had allegedly clarified that it was difficult to pick up the fraudulent transactions attributed to her because she was allegedly concealing the amounts and clearing them off in the loss exchange accounts.

18.3. It was allegedly not put to the witnesses that the SAP or the Conco system, can and was accessible to the Accounting Manager and Finance Manager who were themselves in a position to detect any anomaly or fraud which could be pinned on the applicant.

18.4. The credit card statements were allegedly sent to Conco's other managers who received them and should have detected any fraud thereon.

18.5. It was allegedly not put that all journal vouchers posted are signed for in hard copies and same are filed with the company for giving them to auditors.

18.6. It was allegedly not put to PW2 that Applicant was not present at all material time when investigations were made. The system

she contends was allegedly accessed in her absence. These could allegedly not be accepted as correct versions. It was allegedly necessary therefore that she challenges these under cross examination to avoid them having to stand as uncontroverted.

18.7. The Standard Bank email that prompted the investigations was allegedly sent to PW1 (Mbongeni Mashinini) which should not have happened if she was allegedly an authorized signatory responsible for the fraud as it would have been sent to her instead.

18.8. There was allegedly a Financial Specialist at Conco responsible for checking all documents posted into the SAP, and that person should have been able to detect the alleged fraud.

18.9. It was allegedly not put to the Respondent's witnesses that the journal vouchers could have been manipulated to implicate the Applicant and link her to the fraudulent transactions.

18.10. There was allegedly no prejudice to be suffered by the Respondent if the application was allegedly allowed.

[19] As indicated above, I agree with Respondent's Counsel that an intense, lengthy and exhaustive cross examination of the Respondent's witnesses was done during the trial of the matter. A case to the general effect that the Applicant was not responsible for the alleged fraud, a possibility that PW1 could be responsible for the alleged fraud, a possibility that PW1 knew about the fraud, that applicant was probably framed and many more versions were put to the Respondent's witnesses aforesaid, even if it was in different words to those now being suggested. I do not think that to put the case in different words detracts from the fact that such a case was, as a matter of fact put to the Respondent's witnesses. Otherwise the case made by the Plaintiff's aforesaid witnesses was never that the Applicant had negligently carried out her duties thus exposing the company to losses. They also did not say it was difficult to pick up the fraud in the manner suggested by the Applicant. Their version was otherwise that the Applicant had fraudulently caused the losses as opposed to negligently doing so. They had said the difficulty was in them as the supervisors to the Applicant to pick the fraud because she was fraudulently hiding the fraudulent amounts in the losses account.

[20] A Court has a discretion whether or not to allow the recall of a witness or witnesses. This discretion will be exercised in favour of a grant of the

application in those instances where there has just cropped up new evidence calling for a rebuttal or where a material aspect of the case was not put to the witnesses through no fault of that party. This is where there is an element of surprise in the Applicant's case or where it will not be in the interests of Justice not to put the case. See in this regard **Mlambo Vs Fourie 1964(3) SA 350**.

- [21] It is important to observe that in the present case there has not been an allegation that new evidence had just cropped up nor are there any allegations of a surprise in Applicant's conduct of its case. As it turns out, the Applicant was in attendance throughout the testimony of the said witnesses including their cross examination. She wants to suggest that she had given the instructions she now seeks a recall to put to the witnesses but the Attorney had failed to put them to the said witnesses. This court cannot lose sight of the fact that an Attorney is an expert in the conduct of cases and is trained on how to handle them. What he does in Court during trial is also subject to certain ethical duties he holds towards the Court as its officer. He therefore owes it to his training which instructions to put and which ones not to put in line with the case of the party he is representing.

[22] If the Attorney fails to put a version that he should be putting, he would obviously be committing negligence from which his client may not be excused as was observed in **Saloojee And Another Vs Minister of Community Development 1965 (2) SA 135 (A) at 141B-H**. Where the position was put as follows:

“There is a limit beyond which a litigant cannot escape the results of his Attorney’s lack of diligence....he cannot sit passively by, without so much as directing any reminder or inquiry to his Attorney...and expect to be exonerated of all blame; and if the .... explanation offered to this Court is patently insufficient , he cannot be heard to claim that the insufficiency should be overlooked merely because he has left the matter entirely in the hands of his Attorney. If he relies upon the ineptitude or remissness of his own Attorney, he should at least explain that none of it is to be imputed to himself...”

[23] From the evidence tendered in Court including what the Applicant's Attorney hitherto is alleged not to have put to the witnesses, one can see that what he is accused of not having put to the witnesses aforesaid may not have been material or he may have been negligent. Both of these would not in my view justify a recall of a witness in law and in the circumstances.

[24] The thrust of the case against the Applicant is that she is accused of having defrauded the Respondent through the use of credit cards supposedly belonging to former employees of the Respondent and another one which was not being used by the employee in whose name it was issued. The person who worked with all these cards according to Respondent's witnesses was the Applicant and she had the duty to, upon receipt of the bank statements, allocate the amounts expended to the card users.

[25] Notwithstanding a consented effort to conceal that these cards were being used as their expenses were being allocated into other employee's names and thereafter immediately transferred or dumped into the losses account, the Applicant alerted none of her superiors of the glaring anomaly she should have picked. It was put to the witnesses she knew nothing about the fraud



and that in actual fact she was sent by PW1 to communicate the letters raising the credit limit to the Bank. It was also put to these witnesses that she was being framed as her particulars were entered into the system to frame her.

[26] The person linked to the raising of the credit card limits is the Applicant herself. Firstly the e-mail communicating about such with the application for the limit raise was addressed to her and there is an indicator from such emails she had initially embarked upon some detailed discussion of same with the bank officials. It was on the face of this discovery that she resigned from her employment. As indicated above her version controverting that was put to the crown witnesses concerned.

[27] The investigations later revealed that the person who conducted the concealment of the illegitimate transactions borne by the credit cards in the SAP system was the Applicant as her confidential User ID and PIN Code were used. She is the one who has a duty to tell the Court that these were being abused including how they had been obtained as they were allegedly confidential to her.

[28] Some of the illegitimate transactions conducted through the usage of the Credit Cards in question are shown to have been done for her benefit. A good example is the Allan Hudson Garage payment through the card belonging to L.G.Skhosana which is shown to have settled an invoice issued against the Applicant for the repair of her motor vehicle there and given that she was at the time driving a motor vehicle allegedly purchased from the same garage. Furthermore at about the same time she used a courtesy car from Allan Hudson when her own vehicle had been taken to that garage for repairs.


[29] In her instructions put to the Respondent's (Plaintiff's) witnesses in the main matter it was alleged that the letters seeking the raising of the credit cards limit, had been given to her by PW1. Although this begged the question why she would not bring same to the attention of her otherwise unconflicted superiors that the said PW1 was utilizing cards belonging to employees who had left, that version of hers was put to the said witnesses. It was also put to the said witnesses that someone else could have abused her ID and Pin codes.

[30] On the other hand it seems to me that relevant and or material questions will only be those that seek to challenge the foregoing pieces of evidence against the Applicant. I have no doubt that a case was put to the Plaintiff's witnesses challenging such a case. Any other challenge outside these relevant aspects of the matter is not material. Given that this Court has to exercise a discretion in deciding whether or not to allow a recall of the witness, I am of the view this Court cannot exercise its said discretion in the Applicant's favour if the case sought to be put to the said witnesses concerns an immaterial aspect of the matter. The same thing should apply in my view where what is sought to be put would be to merely emphasize a case that has already been put to the witnesses of the other party or to put the same case differently. For the proposition that the recall should relate to evidence that is material or cogent, the Court was referred to **Barclays Western Bank Ltd Vs Gunas 1981 (3) SA 91**, with which position this Court agrees.

[31] Having carefully considered all the circumstances of the matter, I am of the considered view that it will not be in the interests of justice that these witnesses be recalled as there is very little if anything that they will be putting to them which has not already been put. Further still, what is sought to be achieved should be material to the issues in the matter. The Court

should also ensure that it does not re open a matter where it does not need to, given that it is also important that a matter should at some point be finalized and where this is possible it should be without unnecessary delays.

[32] For the foregoing considerations I have come to the conclusion that the Applicant's application does not succeed and it is accordingly dismissed with costs having to be costs in the course.



**N. J. HLOPHE**  
**JUDGE – HIGH COURT**