IN THE COURT OF APPEAL OF SWAZILAND HELD AT MBABANE

CIVIL APPEAL NO. 28/95

In the matter between

THE DIRECTOR OF PUBLIC PROSECUTIONS Appellant

and

THE LAW SOCIETY OF SWAZILAND Respondent

Coram:

Schreiner JA

Leon JA

Browde JA

JUDGMENT

Browde JA:

On the 20th of October 1995 the Respondent was granted an order on urgent application in terms of which the present Appellant and the Commissioner of Police (the Respondents in the application) were called upon to show cause on 24 October 1995 why:-

1. the Respondents or their agents or their employees should not be interdicted from arresting any member of the Applicant in connection with an alleged contempt of court and/or defeating the ends of justice that allegedly, occurred at the Manzini Magistrate's Court on the 9th October 1995.
2. Respondent should not be ordered to pay the costs of the application.

The Respondents in the application duly filed answering affidavits in which certain points in limine were raised as well as allegations on the merits of the matter. On the return day, and after the filing of replying affidavits by the Applicant the matter came before Dunn ACJ (as he then was) and on 3rd November 1995 the Rule Nisi granted on 20th October was confirmed with an amendment which is not material to this judgment. It is against the confirmation of the Rule Nisi that this appeal has been brought by the Director of Public Prosecutions hereinafter referred to as the Appellant against The Law Society of Swaziland hereinafter referred to as the Respondent.

There is no material dispute on the facts of the matter. On 11 October 1995 the Principal Magistrate at Manzini Mr Maphalala addressed a memorandum to the Registrar of the High Court referring to a newspaper report of October 1995 regarding an incident which occurred at the Magistrate's Court, Manzini on 9 October 1995. The relevant portion of the memorandum reads as follows:

1. ... The true position is that last week on Thursday we arranged . with Senior Magistrate Mr Bwononga that we were going to alternate weekly in doing civil work in this magistracy. We adjusted our diaries accordingly and was I (sic) to draw up the roll. The 9/10/95 was his turn and I had advised the Clerk prior to making proper arrangements ;
2. On 9/10/95 at 10.30 a.m. I was in my office doing some administrative work when I heard some people talking in loud voices outside. I went out to investigate where I was confronted

by a large group of lawyers numbering between 10 to 20 demanding a Magistrate. I could gather from their mood that they did not want to appear before Mr Bwononga. On assessing the situation I beckoned them to my chambers with a view to solve the problem in private to protect the dignity of the Court, I must say that the group was rowdy. They were led by Attorney Mr Thulani Masina to my office and I was walking leading the way. A large group entered my chambers and I asked them what their problem was whereupon they told me that they are not prepared to place their cases before Mr Bwononga as they expressed doubts about his competence in both criminal and civil matters. We had a short discussion where I tried to reason but could not make headway. Mr Masina purported to be the group's spokesman. I could gather that the rest were acting in concert.

3. At this point I decided to attend to these cases in order to protect the dignity of the Court.

Moreso, it was then 11.00 a.m. way past the scheduled time for the Court sitting at 9.30 a.m. and Mr Bwononga had not arrived. Just before 1.00 p.m. Mr Bwononga came to Mazini and I appraised him of what had transpired and he explained that the reason he was late is that he had to attend on his residence permit at the Ministry of Home Affairs.

I hope the above account will help clearing the air in this rather unfortunate incident."

It appears that this memorandum was brought to the notice of the Appellant on 11 October 1995 but it is not clear under what circumstances that occurred. However, on 17 October 1995 the Appellant wrote the following memorandum to the Commissioner of Police:

"PROTEST BY A GROUP OF LAWYERS AT MANZINI MAGISTRATE'S COURT ON 9TH OCTOBER 1995.

Enclosed hereto is a copy of memorandum to Acting Registrar of the High Court by the Principal Magistrate Mr S.B. Maphalala to the Acting Registrar of the High Court (sic). It is an account of certain events that occurred at Manzini Magistrate (sic) Court premises on the 9th October, 1995, which were given wide publicity and coverage by the mass media in the country and abroad. It gives an account of a rowdy behaviour by a group, which behaviour cannot be condoned in any way. In fact if any act unlawfully and intentionally violated the dignity, repute or authority of the judiciary in this country, that was it.

The said conduct by this mob should be investigated and the alleged perpetrators brought to book as a matter of urgency. I hereby direct you to open investigations to find the persons who were involved in this shameful conduct which has brought the administration of justice into disrepute and submit a docket to me for prosecution.

At least the alleged leader and spokesman of the group, a certain Mr Thulani Masina, is clearly identified in Mr Maphalala's report. The identity of the rest of the group should also be established, after which they should all be arrested and charged jointly and severally with Contempt of Court, and alternatively, with Defeating or Obstructing the course of justice. The docket should then be forwarded to me without delay for prosecution.

Kindly expedite action.

A.K. Donkoh

Director of Public Prosecutions".

Mr P.M. Shilubane the President of the Respondent Society deposed to the founding affidavit in the application. He stated that he had been informed of the impending arrest of 20 members of the Respondent and that it was his opinion there was no basis for arresting them. He was supported in

the affidavit by Mr Thulani Masina who, after giving his version of the incident at the office of the Principal Magistrate, stated that at no stage was it intended to show any contempt to the Court nor was the conduct of the attorneys calculated to defeat the ends of justice.

As I have said there were several points in limine raised by the Appellant one of which is contained in paragraph 3.1 of the answering affidavit which reads as follows:

"The contents of paragraphs 4 (four) and 5 (five) of his Affidavit (i.e. the affidavit of Mr Shilubane) are inadmissible in law and the Affidavit is not properly attested to. Application would (sic) be made at the hearing hereof to strike it off."

In regard to this particular point Mr Kilukumi, in his very able argument on behalf of the Appellant, informed us that despite protestations by him in the Court a quo he was initially not permitted to argue the question of the validity of the attestations and the effect thereof on the admissibility of the affidavits filed on behalf of the Respondent society. It appears from the record of the proceedings in the Court a quo that the learned judge was anxious to deal with the merits of the matter. In this regard there appears the following exchange between judge and counsel:

"Judge: Well, that is it, that ... he is giving the directives, he is the person who has to be joined with the Commissioner, it is on his instructions, that turns on an interpretation of the letter. That is the point that I say is one on the merits. It is a matter on the merits, in which event I will not hear you on this point in limine which you have raised. All that I will hear is the application on the merits.

Crown: Your Lordship, we have raised six questions of law, and if your Lordship is not inclined on hearing the first one . . .

Judge: No ...no ...we get straight into the merits. We get straight into the merits of it all."

It then appears that the learned judge, albeit reluctantly, heard arguments on certain of the preliminary points including the question of the authority of Mr Shilubane to bring the application, the locus standi of the Respondent in the application and the question whether the Respondent was acting ultra vires its objects and functions as set out in the Legal Practitioners Act. Ultimately Mr Kilukumi informed the Court a quo that he also wished to argue the question as to whether the application was based on inadmissible evidence or not. It appears from the record that the learned judge was under the impression that what was intended to be argued was that the application was based on hearsay evidence. Mr Kilukumi attempted to inform the Court that he was not dealing with hearsay at which point he was cut off by the learned judge saying "look, let me inform you. I can condone that if necessary, call the people who are mentioned, or call on the Law Society to put those in the witness box now and verify whatever is said here. It is not my intention to prolong the action by that. Let's get to the merit of this action. "

After argument on behalf of the Respondent society the Crown was called upon to reply and it was in that reply that Mr Kilukumi advanced the argument that the affidavits filed on behalf of the Respondent namely those of Mr Shilubane, Mr Maphalala and Mr Masina, were all attested to by one J.M. Mavuso who was a professional assistant at the office of the attorney of record for the Law Society. Counsel submitted that all the affidavits were inadmissible in law because the attestation of those affidavits "violates a basic rule that a deponent cannot swear an affidavit before his attorney, a professional assistant of that attorney or a clerk of that attorney". In his judgment Dunn ACJ referred to the authorities which were placed before him in the following terms:

"In the case of Magagula v Town Council of Manzini & Others 1979-81 SLR page 291 Nathan CJ held that in regard to the attestation of affidavits there is no statutory provision to the effect that a

Commissioner of Oaths shall not administer an oath or affirmation relating to a matter in which he has an interest. In the later case of F.N. Dlamini v J.N. Dlamini 1982-1986 Vol. II SLR page 416, Hannah CJ held that affidavits sworn before the Respondent's own attorney or agent, partner or clerk of that attorney, are not admissible in evidence. A ruling on these two decisions will be no doubt necessary by an appropriate Court. It is not necessary for me to deal with the issue in this application for both sides are guilty of the same error. "

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It is common cause that the attorney who attested the affidavits filed on behalf of the Respondent society was a professional assistant in the office of Mr Shilubane whose office was cited in the application as being the attorney for the applicant. It seems to me that if the submission that this rendered those affidavits inadmissible is correct it is no answer to say that because both sides are guilty of the same error it is not necessary for the Court to decide the matter. If the affidavits were inadmissible then there was no proper application before the Court and the application should then have been either dismissed or struck from the roll. In my view the fact that the Respondent's affidavits might have suffered from the same defect could not, in the circumstance of the case, make the Respondent's position weaker than it would have been had no answering affidavits been filed at all. It therefore becomes necessary to decide whether or not the Respondent society's affidavits were admissible in evidence.

The admissibility of evidence in civil trials {which would include an application brought on notice of motion) is governed by the Civil Evidence Act, 1902 which I refer to below as "the Act". The Act has no express provision dealing

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with admissibility in relation to the attestation of affidavits. Section 43, however, provides:

"In any case not provided for in this Act, the law as to admissibility of evidence ... in force in the Supreme Court of Judicature in England shall be followed in like cases by the Courts of Swaziland".

Since, as I have said, the question of the admissibility of evidence with which we have been confronted is not a case expressly provided for in the Act, it seems that what we must look at is the law in force in England at the relevant time unless it can be shown that the Act should not be applied. In this regard Mr Fine, who represented the respondent, has referred us to the Commissioner of Oaths Act which came into force in Swaziland on 3 July 1942. Section 4 of that Act, after laying down the powers and jurisdiction of Commissioners of Oaths, adds the proviso "that (the Commissioner of Oaths) shall not administer an oath or take a solemn or attested declaration in respect of any matter in which he has not, or does not believe himself to have, cognizance or authority". Mr Fine submitted that since that section deals specifically with the powers and jurisdiction of Commissioners of Oaths there was no need for this Court to consider the ambit and effect of section 43 of the 1902 Act.

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I cannot agree with that submission. The Commissioner of Oaths Act does not, either expressly or by implication, deal with the question of the admissibility in evidence of affidavits attested before a Commissioner of Oaths. It is therefore necessary, in my view, to apply the law applicable in the Supreme Court of Judicature in England. It appears that that law did not change materially if at all between 1902 when the Act was passed and the present day, which makes it unnecessary to decide whether to apply the English law as it was when the Act was passed or as it was when the application was brought in casu.

See, however, in this regard -

S v Wagner 1965 (4) SA 507 (A) at 513;

Van der Linde v Calitz 1967 (2) SA 239 (A);

Gentiruco AG v Firestone SA (Pty) Ltd 1972 (l) SA 589 (A) at 617.

In 1902 in England there was in force the Commissioner of Oaths Act, 1889. In that Act it was provided specifically "that a Commissioner for Oaths shall not exercise any of the

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powers given by this section in any proceeding in which he is solicitor to any of the parties to the proceeding, or clerk to any such solicitor, or in which he is interested." In dealing with this section Halsbury's Laws of England 4th Ed. contains the statement that this section and a similar section in the Solicitors Act 1974 section 81(2) mean that no affidavit is sufficient if 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. It refers, inter alia, to the cases of Ross v Shearman (1820) 2 Coop temp Cott 172 and Duke of Northumberland v Todd (1878) 7 ChD 777. In the latter case objection was taken to the admissibility in evidence of affidavits attested to by a partner in the firm of solicitors of record who, so it was submitted, had nothing to do with the case. It was held that the basis of the objection was not confined to the solicitor himself but extended to his clerk or agent. At page 779 Hall VC said:

"My present impression is that the objection must be sustained and these affidavits are within the principle acted upon by the Court of Chancery with reference to the necessity of having the evidence taken before persons who are unbiased in the matter. That conclusion is fortified by the Rules of Common Law referred to in argument . . . and I think the case is within the principle of the rule that the Clerk of the Solicitor on the Record cannot be allowed to be the Commissioner to take the evidence."

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Later Hall VC reaffirmed his view that the affidavits could not be admitted in evidence and referred to the case of Ross v Shearman (supra). In that case reference is made to authorities dating back to the 18th Century in England and it is stated that "it is a rule as old as Lord Hardwicke's time, that an affidavit, sworn before the solicitor of the party in the cause, cannot be used. The rule prevails in all the Courts of Westminster Hall." It then goes on to say that the reason for this rule is "sufficiently obvious". I take this "obvious reason" to be the crucial requirement that a person attesting an affidavit must be completely objective and have no interest of any kind in the contents or import of that affidavit. It is of passing interest to note that very early in the 19th Century a Court in England found in the case of The King v Wallace (referred to in a footnote to Ross v Shearman and undated) that if it were possible to make any distinction in cases in which affidavits were attested before an attorney who had an interest the Court should be more ready to admit them in the case of habeas corpus because the Court was particularly called upon to preserve the liberty of the subject by every means in its power. But, so it was held, the rule was invariable, and was founded on the "wisest and most obvious principle" . This principle has been adopted in South Africa in several cases to which we have been referred by Mr Kilukumi. In Louw v Riekert 1957 (3) SA 106 at 111 the learned judge said:

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"According to English law, affidavits sworn before a Commissioner of Oaths, who was the clerk of the attorney of the litigant, who intended to use such affidavits, were not admissible as evidence from as far back as 1754; see Re Thomas Hogen (1754) 3 Atk 813. The reason for the rule appears from the judgment of Kay J in the case of Bourke v Davis (1889) 44 Ch.D. 110 at p. 126 where he remarked as follows:-

'The Commissioner's duty before he administers the oath is to satisfy himself that the witness does thoroughly understand what he is going to swear to; and he should not be satisfied on this point by anyone but the witness himself. For this reason it has been the rule since the time of Lord Hardwicke that the Court does not accept an affidavit sworn before the solicitor in the cause, nor his clerk, although he may be a Commissioner.

The learned judge then went on to say that he had not been referred to nor had he been able to find any authority in the English law which would justify the Court in drawing a distinction, based on the

nature of the clerk's employment, in applying the rule that no affidavit is acceptable as evidence if sworn before a clerk of the party's attorneys. He stated, and it seems to me correctly, that the Court requires the security of an independent Commissioner of Oaths and that no attorney who is a member of the firm which is the attorney of record can be said to be completely independent.

In Papenfus v Transvaal Board, Peri Urban Areas 1969 (2) SA 66 the Court drew a distinction between, on the one hand, the power of the Commissioner of Oaths in that particular case to attest the affidavits and, on the other hand, whether such affidavits were receivable in evidence. While holding that the "interest" of the Commissioner of Oaths in that case was too remote to fall within the general prohibition that "no Commissioner of Oaths shall attest any affidavit or declaration relating to a matter in which he has any interest" that the affidavit so attested would not be admissible in evidence since the Commissioner of Oaths must be independent of the office in which the affidavit to be attested by him is drawn. He cannot be regarded, so it was found, as independent if his partner, employee or employer is the draughtsman or deponent. I agree with that view.

It is now necessary to deal with the two relevant cases which have been decided in the Courts of this country and which were referred to by the learned judge a quo namely Magagula v Town Council of Manzini & Others (supra) and F.N. Dlamini v 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 or was a member of his attorney's 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 p. 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:

"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 v 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.

Mr Kilukumi has asked for the costs, not only of the appeal but also of the application in the Court a quo. In deciding this question I think it is permissible to look at the circumstances in which the application was brought and the facts giving rise thereto. Without going into detail it seems to me that the Appellant seriously over-reacted to the memorandum of the Principal Magistrate of Manzini. His reference to "a mob" and his direction to the police to arrest members of the Respondent Society were uncalled for since it would have been the simplest matter to call upon the members of the Society to appear in Court and show cause why they should not be found guilty of contempt of Court.

While not in any way wishing to appear as condoning the conduct of the members of the Society, the

order to arrest them reveals a relationship between the Director of Public Prosecutions and the Law Society which is most unfortunate and which can

only be inimical to the interests of the administration of justice in this Kingdom. Because the matter was brought on an urgent basis and because I am prepared to assume, without deciding, that the learned judge a quo was correct in finding that the affidavits of the Appellant suffered from the same defect as those of the Respondent, that it would be fair that both in this Court and in the Court a quo there should be no order as to costs. I would therefore uphold the appeal and alter the order of the Court a quo to read "the application is dismissed". There will be no order as to costs either in the Court a quo or in this Court.

BROWDE AJA

I agree and it is so ordered

Schreiner Ja

I agree

LEON JA

DELIVERED AT MBABANE ON THE DAY OF MAY 1996.