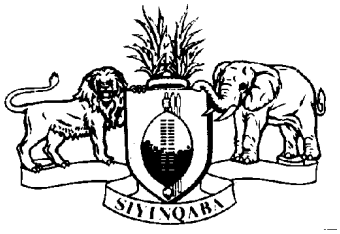

IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO.18/99

In the matter between:

DUMISA MBUSI DLAMINI	**1ST APPELLANT**
SWAZI INN (PTY) LTD	**2ND APPELLANT**
DUMISA SUGAR CORPORATION (PTY) LTD	**3RD APPELLANT**
THE NEW GEORGE HOTEL (PTY) LTD	**4TH APPELLANT**
MACKAY INVESTMENTS (PTY) LTD	**5TH APPELLANT**
UNCLE CHARLIE HOTEL (PTY) LTD	**6TH APPELLANT**
THE PROPERTY COMPANY (PTY) LTD	**7TH APPELLANT**
AND	
SWAZILAND DEVELOPMENT & SAVINGS BANK	**DEFENDANT**

CORAM	**:**	**BROWDE JA**
	:	**STEYN JA**
	:	**TEBBUTT JA**
FOR THE APPELLANTS	**:**	**MR. MAGAGULA**
FOR THE RESPONDENT	**:**	**ADVOCATE FLYNN**

JUDGMENT

Browde JA:

The background to the present proceedings is briefly the following. The first appellant and the appellant companies, which he controls, were for many years customers of the respondent bank (the bank). In June 1995 the appellants instituted an action against the bank in the High Court in which they sought statements of account and other relief. Alternatively to the claim for the statement of account the appellants sought "a declarator indicating the amount or

amounts due to (the bank) in respect of each account, in which case the plaintiffs (appellant) tender payment to defendant (the bank) of the amount or amounts found to be due." In its plea the bank accepted the tender.

Prior to the commencement of that trial an application brought by the appellants against the Swaziland Electricity Board was heard and was dismissed by the Chief Justice. Before the hearing of the application the appellants applied to Sapire CJ for his recusal on grounds which it is unnecessary to set out in this judgment. That application was dismissed and, as I have said, the Chief Justice heard the matter and delivered judgment in favour of the Electricity Board.

Before the commencement of the trial against the bank an application for the recusal of the Chief Justice, since it was he who was to hear the matter, was again made on the same grounds as the earlier application. It was once again refused. This time after the refusal of the recusal application, the legal representatives of the appellants withdrew from the proceedings which then continued in their absence. Evidence was presented by the bank and judgment was ultimately given in favour of the bank which had proved that most of the appellants were indebted to it in many millions of Emalangeni.

Subsequent to the conclusion of the application and action above referred to, the appellants lodged appeals not only against the refusals by the Chief Justice to recuse himself from presiding in both proceedings but also on the merits of the case against the bank. What may conveniently be referred to as "the recusal appeals" were in due course heard in this Court. The appeal concerning the bank was **APPEAL CASE NO.18/99** and the 'Electricity Board' case was **APPEAL CASE NO.5/99**. Both of these appeals were preceded by an urgent application brought by the appellants for an order from this Court in, ***inter alia***, the following terms.

> ***"2. determining the date, trial (sic) and place of sitting of the above Honourable Court to hear the appeals against the refusal of the Honourable Chief Justice to recuse himself in the action under Case Number 1292/95 (the bank case) and the application under Case Number 2407/98 (the Electricity Board case) as a matter of urgency;***
>
> 3. ***granting the applicants (i.e. the seven applicants in the Bank case and the four applicants in the Electricity Board case) leave to appeal against the refusal of the Honourable Chief Justice to recuse himself in the action under Case Number 1292/95 as well as in the application under***

Case Number 2407/98 to the extent and in the event of the above Honourable Court holding such leave to be necessary;

4. ***ordering the applicants to pay such costs and expenses incurred as a result of the hearing of the present application and the aforesaid appeals out of term and as a matter of urgency, as the above Honourable Court may deem just."***

The application was based on the facts and submissions set out in the affidavit of the first applicant namely Mr. Dumisa Mbusi Dlamini himself. From his affidavit it is perfectly clear that Mr. Dlamini was seeking to appeal against the refusal by the Chief Justice to recuse himself in both matters. I need go no further than to cite the prayer at the end of the affidavit. This reads, "I humbly pray that the above Honourable Court grant the applicants request that the appeal with regard to the refusal of the recusal application in the action as well as the application be heard as soon as conveniently possible for the Honourable Judges of Appeal to do so."(emphasis added)

The two appeals came before this Court in the June 1999 session and were heard together. The judgement of Schreiner AJP in which Leon JA and Beck AJA (both as they then were) concurred and which was delivered on 3rd September 1999 commences with the sentence,

"There are two appeals in the present matter which were heard together."

Different counsel were briefed to appear for the appellants in the respective appeals and the judgment analyses in detail the merits of the recusal application in relation to the events in the Electricity Board case. The judgment concludes with the following paragraph:-

"In the light of the above which deals with events of the Electricity Board case, I can see no reason for a different conclusion in the Swaziland Development and Savings Bank matter. The applications for recusal were all based upon an apparent bias on the part of the Chief Justice against Mr. Dlamini as a person and he was the moving spirit in both matters. It is not possible to draw a fine distinction between the two cases. It is nowhere suggested that the Chief Justice was for some reason or another particularly well disposed to the Swaziland Electricity Board. It is a case of an alleged prejudice against Mr. Dlamini and his companies which is applicable also to the case of the Swaziland Development Bank. I conclude that there has been acquiescence in respect of both applications and that they should fail on this ground.

The result is that:

1. ***The appeal against the refusal of the Chief Justice to recuse himself in the matter of DUMISA MBUSI DLAMINI AND OTHERS VS SWAZILAND ELECTRICITY BOARD (APPEAL CASE NO.5/99) is dismissed.***
2. ***The appeal against the refusal of the Chief Justice to recuse himself in the matter DUMISA MBUSI DLAMINI AND SIX OTHERS VS SWAZILAND DEVELOPMENT AND SAVINGS BANK (APPEAL CASE NO.18/99) is dismissed.***
3. ***The appellants in each case are to pay the costs of the appeal in which they were involved jointly and severally, the one paying the others to be absolved."***

From the facts set out thus far in this judgment I am of the opinion that it is inconceivable that any person involved in the matters in issue (and thus far I refer particularly to Mr. Dlamini and his then attorney Mr. Bheki Simelane) could have had any doubt whatsoever that the "recusal appeals" had been finally determined in both matters.

I have already referred to the fact that Sapire CJ heard evidence concerning the merits of the claim by the first appellant and his six companies in the bank case. The effect of his judgment in that matter was that the appellants were indebted to the bank in an aggregate of many millions of Emalangeni. An appeal against this judgment was brought before this Court and was heard in the November 1999 session. Apart from some variations in the sums due to the bank, the appeal was dismissed. It is significant that although the question of the Chief Justice's refusal to recuse himself was raised as a ground of appeal in the notice of appeal (as supplemented) dated 20th April 1999 and filed in this Court apparently in respect of both recusal appeals and the appeal on the merits of the bank case, this argument was not pursued before this Court in November due, no doubt, to counsel being aware that that issue had been finally disposed of in Schreiner AJP's judgment. I should perhaps mention that in the November matter Mr. Dlamini withdrew counsel's mandate when counsel was in the process of arguing the case and Mr. Dlamini concluded the argument himself. Neither counsel nor Mr. Dlamini alluded to the question of the recusal of the Chief Justice. My judgment in the appeal, which was concurred in by Van den Heever JA and Shearer JA, contains the following passage in regard to the application for recusal,

> ***"When the matter was called an application was made for the recusal of the learned Chief Justice. The application was refused. As nothing is made of that by the appellants in this appeal the merits of the application need not be dealt with in this judgment, save to say that I agree entirely with the approach to the application adopted by the learned Chief Justice. It seems to me that the application was a***

stalling tactic which in the words of Sapire CJ "can legitimately be seen as no more than a further ploy to delay and obfuscate the course of justice."

I made those remarks and my learned colleagues concurred therein because at the time the judgment was delivered we had not seen the written judgment of Schreiner AJP. Had we known of it, it would not have been necessary to advert to the question at all. Nevertheless it is abundantly clear that by November 1999 all the issues between the appellants on the one hand and the bank and the Electricity Board on the other hand had been finally adjudicated upon by this Court.

In October 1999 the firm of J.S. Magagula and Company was appointed as the attorneys to Mr. Dlamini and the six companies who were involved in the bank case. Notice of this appointment was received by the bank's attorneys, Robinson Bertram, on 21st October 1999 under the heading "APPEAL NO.18/99" which was the number of both the appeal in the bank recusal appeal and the subsequent appeal on the merits. Mr. J.S. Magagula acted for the appellants in the appeal heard in the November 1999 session and in the events thereafter. On 16th February 2000 there was served on Robinson Bertram and on the Registrar of the High Court an application bearing the heading "APPLICATION FOR LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL (PRIVY COUNCIL.)" It bears a cover-sheet which purports to be in the Court of Appeal of Swaziland in Appeal No.5/99 and in Appeal No.18/99. It also contains the following:-

"***In the appeal of:***

DUMISA MBUSI DLAMINI	***1ST APPELLANT***
THE PROPERTY COMPANY (PTY) LTD	***2ND APPELLANT***
MACKAY INVESTMENTS (PTY) LTD	***3RD APPELLANT***
DUMISA SUGAR CORPORATION (PTY) LTD	***4TH APPELLANT***

against the refusal of the Honourable the Chief Justice of Swaziland to recuse himself in the matter of:

THE PROPERTY COMPANY (PTY) LTD AND TWO OTHERS	***APPLICANTS***
AND	
SWAZILAND ELECTRICITY BOARD (under Case No.2407/98)	***RESPONDENT***
AND	

DUMISA MBUSI DLAMINI ***1ST APPELLANT***
SWAZI INN (PTY) LTD ***2ND APPELLANT***
DUMISA SUGAR CORPORATION (PTY) LTD ***3RD APPELLANT***
THE NEW GEORGE HOTEL (PTY) LTD ***4TH APPELLANT***
MACKAY INVESTMENTS (PTY) LTD ***5TH APPELLANT***
UNCLE CHARLIE HOTEL (PTY) LTD ***6TH APPELLANT***
THE PROPERTY COMPANY (PTY) LTD ***7TH APPELLANT***

against the refusal of the Honourable the Chief Justice of Swaziland to recuse himself in the matter of:

DUMISA MBUSI DLAMINI & SIX OTHERS ***PLAINTIFF***

AND

SWAZILAND DEVELOPMENT AND SAVINGS BANK ***DEFENDANT"***

The application papers served on the bank's attorneys commence with the following introduction:-

> ***"BE PLEASED TO TAKE NOTICE that Appellants hereby apply, to the extent that it may be necessary, for leave to appeal to Her Majesty in Council (the Privy Council) against the whole of the judgment including the order for costs delivered in the above Honourable Court on Friday, 3 September 1999 and more particularly upon the following grounds."***

There then follow 14 paragraphs criticising the judgment of Schreiner AJP which clearly deal with both recusal applications. Thus, for example, paragraph 11 reads:

> ***"The Court erred in not dealing with the manner in which the learned Chief Justice had handled the applications for recusal, more particularly as his behaviour during such hearings both of which were subsequent to 29th January 1999 constituted further grounds for his refusal." (emphasis added)***

The application was signed by Mr. Magagula personally. The service of this application produced an almost immediate response from Robinson Bertram who, on 21st February 2000 served on J.S. Magagula and Company a notice which reads as follows:-

> ***"NOTICE OF INTENTION TO OPPOSE LEAVE TO APPEAL TO THE PRIVY COUNCIL.***
>
> ***Be pleased to take notice that the respondents hereby give their notice to oppose the application for leave to appeal to the privy council (sic) and appoint the offices of Robinson Bertram whose address is fully set out herein below as its address for purposes of service of notices, correspondence and all processes in connection with these proceedings."***

It is dated 18th February 2000. In my view I have said sufficient thus far to demonstrate beyond doubt that Mr. Magagula, when he brought the application for leave to appeal to the Privy Council, knew full well that both recusal applications had been the subject matter of Schreiner AJP's judgment. The contents of the application are inconsistent with any other inference. Despite that, however, on 16th March 2000 Mr. Magagula addressed a letter to the Registrar of this Court which, I regret to say, can at best for Mr. Magagula be described as disingenuous. This letter is headed. **DUMISA M. DLAMINI AND OTHERS/SWAZILAND DEVELOPMENT AND SAVINGS BANK: APPEAL CASE NO.18/99.** The body of the letter reads:

> ***"You will realise that although all documents including the full record were timeously prepared and filed, the appeal against the decision of the Chief Justice by which he refused to recuse himself in the above matter was never enrolled in the June, 1999 session of the Court of Appeal where it was supposed to be dealt with. It was also not dealt with in the November, 1999 session.***
>
> ***Although this appeal was apparently mentioned when Appeal No.5/99, to wit, the Swaziland Electricity Board matter, it is not clear how it was mentioned at all as it was not on the roll for that session and there was never a consolidation of appeals. (sic)***
>
> ***Kindly ensure that the matter is placed on the roll for the coming session of the Court of Appeal."***

In the light of the manner in which the appeals were argued before this Court in June 1999, the briefing by the appellants then attorneys of separate counsel for each appeal and the introduction to and the contents of the application to appeal to the Privy Council, the letter written by Mr. Magagula on 16th March was calculated to mislead – and, in fact, appears to have succeeded in misleading - the Registrar who set down on the roll for hearing by this Court in this (May 2000) session **"CIVIL APPEAL NO.18/99 DUMISA M. DLAMINI AND OTHERS VS SWAZILAND DEVELOPMENT AND SAVINGS BANK."** The letter of 16th March is false in various respects namely:-

(i) The decision of the Chief Justice was never enrolled in the June session of the Court of Appeal."

Not only was it enrolled, but counsel appeared and argued the matter on behalf of the appellants.

(ii) It was also not dealt with in the November, 1999 session."

It was not dealt with (apart from the ***obiter dictum*** already referred to above) only because it was not argued despite being in the notice of appeal referred to above.

(ii) The whole of the second paragraph.

This is palpably untrue since, as I have pointed out, separate counsel were briefed for each appeal by the appellants' attorneys and argued the appeals which were heard together.

The Registrar was obviously misled into believing that Mr. Magagula had good reason for wanting Case No.18/99 to be enrolled and accordingly did so.

Advocate Flynn, who appeared before us on behalf of the bank, filed heads of argument which dealt exclusively with the question of whether an appeal still lay from this Court to the Privy Council. He has informed us that because all other issues between the parties had already been decided upon by this Court he was of the belief that the only possible issue still remaining was that of the Privy Council's jurisdiction. It appears obvious to me that Mr. Flynn was fully justified in his belief.

In a circular from the Deputy Registrar of the High Court dated 4th April 2000 and addressed to all practitioners it was recorded that there would be a roll call of all cases in this Court on the 23rd May 2000 and that all practitioners were required to attend. It was pointed out in the circular that the roll would, as far as possible, be continuous and practitioners were required to be available at all times. A roll was attached which reflected Civil Appeal No.18/99 as being scheduled for Tuesday 30th May.

The roll call duly took place and it became clear that there were several postponements which would result in cases being heard earlier than scheduled. When Case No.18/99 was called at the roll call only Mr. Flynn appeared. He informed the Court that he did not know what Mr. Magagula's attitude to the appeal was nor could he explain Mr. Magagula's absence from the roll-call. The heads of argument filed on behalf of the appellants and apparently signed by Mr. Magagula dealt once again with the recusal applications which was perplexing, not only to Mr. Flynn but also to this Court, in the light of all the events which I have described in this judgment. For that reason Mr. Magagula was sent for and was interviewed by us in chambers on the morning of 24th May at about 9.30am. He informed us that he believed that Case No.18/99 would be heard on 30th May because it was so reflected in the roll which was attached by the Registrar to the circular; that he had not read the circular and that he did not think it necessary to attend the roll-call. When it was pointed out to him that he had filed heads of argument dealing with issues that had already been disposed of by this Court he

replied that he had briefed Advocate de Beer of the Durban Bar to argue the matter. In regard to the application for leave to appeal to the Privy Council, of which he had given notice, and in respect of which Advocate Flynn had filed heads of argument for this May session, Mr. Magagula said that he intended that to be argued only at the next session of this Court towards the end of 2000. It was made clear to Mr. Magagula that the proposed delay was unacceptable to this Court and that he should immediately communicate with Advocate de Beer to ensure his attendance on Friday 26th May at 9.30 when both the appeal and the application for leave to appeal to the Privy Council would be heard. This date, incidentally, was earlier announced at the roll-call on Tuesday 23rd May.

On Friday 26th May the appearance for the appellants can only be described as bizarre. Mr. Dlamini appeared in person apparently assisted by Mr. Magagula who sat next to him. The latter; who is an attorney of this Court, had difficulty in explaining the role which he was expected by his client to play. He had no comprehensible explanation for how a matter which had been decided upon by this Court was again on the roll, nor could he articulate any justification for the respondent's attorneys and counsel and the Registrar having been misled, as they were, into the belief that the issue to be argued was a new one i.e. the question of an appeal to the Privy Council. He consistently failed or declined to answer questions put to him by this court and in those instances where he did so, his replies were evasive and inaccurate.

It is hardly surprising that Mr. Dlamini's argument, for it was he who argued on behalf of all the appellants, was confused, repetitive and illogical. He did, however, ultimately acknowledge that he understood for the first time why he could not again argue the recusal appeals. One can only wonder why Mr. Magagula who, must have known that those appeals were ***res judicata,*** did not explain it to his client earlier.

Mr. Dlamini informed us that he was not able to argue the Privy Council question but that he had five professors working on it and that he understood from them and from Senior Counsel in Johannesburg that such an appeal was possible.

We decided to hear Mr. Flynn on the Privy Council issue which we considered to have been enrolled for hearing by Mr. Magagula's machinations which I have referred to in this judgment. It must be borne in mind that the application for leave to appeal was served as

long ago as February 2000. There was, therefore, no reason why it should not have been enrolled for this session and why appellant could not have been prepared to have it argued before us. It is unacceptable to expect this Court to be manipulated so as to hear appeals or other procedures when it suits the parties, or worse still, as in this case, one of them. The reason for Mr. Magagula suggesting to us that we postpone the Privy Council question to the November 2000 session is that, in my opinion, Mr. Magagula has made himself a party to an attempt to delay matters as long as possible and in this way to assist the appellants to escape the consequences of the judgments I have referred to. We accordingly decided to hear Mr. Flynn on the subject he came prepared for i.e. whether there still remains in this Kingdom's judicial procedure the right of appeal to the Privy Council. He referred us to the Swaziland Independence Order, 1968 in which Her Majesty, Queen Elizabeth II in Council, ordered that "The Swaziland (appeals to Privy Council) Order 1967(f) is revoked with effect from the commencement of this Order." Counsel also referred us to an article in the South African Law Journal (1969) page 495. The article is entitled, "THE HISTORY AND NATURE OF THE JUDICIAL SYSTEM OF BOTSWANA, LESOTHO AND SWAZILAND – INTRODUCTION AND THE SUPERIOR COURTS." It was published in two instalments in the journal and concludes with the following:

> ***"The 1968 Swaziland Independence Constitution abolished the right of appeal from Swaziland to the Privy Council."***

Mr. Flynn has also brought to our attention the King's Proclamation of 12th April 1973. This proclamation repealed the Constitution of the Kingdom which commenced on 6th September 1968, but specifically retained with full force and effect those chapters of the 1968 Constitution which provided for the jurisdiction of the Court of Appeal.

We have not had the benefit of argument from the appellant on this issue. On what is before us, however, it seems clear that there is no longer any right of appeal to the Privy Council, or any right of appeal at all against judgments of this Court. For this reason the application for leave to appeal to the Privy Council is refused. Even if there were, one must assume that the Privy Council would only entertain an appeal if there were some prospect of success. In the case of the appellants there is no prospect of success whatsoever and even if we were in a position to grant leave to appeal to the Privy Council I would, without hesitation, refuse it.

The appeal of the appellants is therefore dismissed and leave to appeal is refused. Both in his argument before us and in his heads of argument served on the appellant Mr. Flynn submitted

that this case calls for an exemplary order of costs against Mr. Magagula personally. On his present approach the attorney intended to lodge an appeal in matters which, to his knowledge, had finally been adjudicated upon by this court. That smacks, as I have already said, of purely dilatory tactics and an inexcusable connivance with his clients to avoid the effects of the judgments of the High Court. On the basis that Mr. Magagula intended the recusal appeal application to be argued, as he says he did, he neglected to read the circular addressed to him (although there must also be some doubt about the truth of this statement since the roll on which he admittedly relied, was attached to it.) He furthermore deliberately refrained from attending the roll-call and also failed to ensure the attendance of counsel when the matter was called. Finally he made himself party to the degrading scene for an attorney, of sitting in court, apparently as an advisor, while his client, protesting that he had difficulty in arguing the matter as he is a layman, addressed largely incomprehensible submissions to us.

For the above reasons I am of the view that this is a case for an exemplary costs award against Mr. Magagula and the appellants.

The appeal and the application for leave to appeal are dismissed with costs on the attorney and client scale. One half of such taxed costs are to be paid by the appellants jointly and severally, the one paying the others to be absolved and one half of such taxed costs are to be paid by Mr. Magagula ***de bonis propriis.***

I trust that this judgment signals the end of all the litigation between the appellants and the bank. The bank has a valid judgment sounding in money and is entitled to recover what is due to it. Efforts by the appellants to avoid that, and which can only be described as vexatious and an abuse of the process of court, should now be regarded as futile and at an end.

_____

J. BROWDE JA

_____

J.H. STEYN JA

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P.H. TEBBUTT JA

Delivered in open Court on this …… day of May 2000.