IN THE HIGH COURT OF SWAZILAND

Civ. Case No. 2654/95

In the matter between:

BARCLAYS BANK OF SWAZILAND Plaintiff

and

THANDI DLAMINI Defendant

CORAM: S.W. Sapire A.C.J.

FOR THE PLAINTIFF Mr. L. Khumalo

FOR THE DEFENDANT Mr. P.R. Dunseith

Judgment

(23/7/96)

This is an application for summary judgment. The notice of application is accompanied, as required by the rules of court, by an affidavit in support of the application. It is attested to by one William Garland Price. The affidavit is an essential part of the application and without it the application is fatally incomplete.

The affidavit was attested before a Commissioner of Oaths whose name cannot be ascertained from his signature which consists of a number of repeated loops resembling a series of "w"s. There is no other indication of his identity. The Commissioner whatever his name may be, also indicated his office and the source of the authority he claimed to take an oath, by the impression of two inked rubber stamps on the document.

The first inked impression indicates that the signature which is to be inserted in the appropriate place as part of the legend is: "For Barclays Bank of Swaziland". Then follows a series of dots under which appears the words "Recoveries Manager". This stamp is obviously not intended for use by a Commissioner of Oaths in the exercise of his office and should be used only where the signatory places his signature in the space above the dots as part of the composit signature of the bank.

The second rubber stamp imprint reads as follows "Commissioner of Oaths by virtue of my office as Manager of Barclays Bank of Swaziland Head Office".

The defendant has objected to the proprietary of this affidavit is not acceptable as the Commissioner of Oaths is patently an employee or officer of the plaintiff, and as such a person with an interest in the matter.

The affidavit in my view is subject to a further objection namely, that in signing, the Commissioner of Oaths purported to act as agent for the plaintiff and in a representative capacity. The signature to the affidavit is not that of the Commissioner of Oaths at all but that of Barclays Bank itself.

The point raised by the defendant has recently been dealt with in the Appeal Court in Civil Appeal No.

28 of 1995, THE DIRECTOR OF PUBLIC PROSECUTIONS VS THE LAW SOCIETY OF SWAZILAND.

In that case, affidavits filed on behalf of respondents 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 for the appellant submitted that all the affidavits so attested 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 the event, the Court of Appeal in a judgment delivered by Browde J.A. and which Schreiner and Leon J.J.A. concurred, it was held that the affidavits of the respondent society were inadmissible and that the application brought by the Society should have been dismissed on that ground.

In coming to that conclusion, the court made reference to the position under the English law, as there is no statutory provision in Swaziland which governs the inadmissibility of affidavits attested in this manner. This reference to England law is sanctioned by Section 43 of the Civil Evidence Act of 1902 (Swaziland). There appears to be nothing in the Commissioner of Oaths act which came into force in July 1942 in Swaziland which has any bearing on the problem. The court also considered the cases of Magagula vs The Town Council of Manzini and others 1979 - 1981 SLR (291) and F.N. Dlamini vs J.N. Dlamini 1982 - 1986 Vol.11 SLR page 416.

The judge In the court aquo had not dealt with the question and the apparent conflict in these two decisions. He saw himself as relieved from this task as both sides had been guilty of the same error, in having the affidavits attested by a Commissioner of Oaths who was an attorney for the party on whose behalf the affidavits were filed.

The appeal court took a different view and held that a culpa compensatio did not apply making a ruling on the point raised was necessary. The reasoning of the Court of Appeal was that if the applicant's affidavit were held to be inadmissible having been attested before a Commissioner of Oaths, precluded by his interest in the matter from taking the deponent's oath, the fact that the respondent's

affidavits were also similarly improperly attested did not detract from the objection to the applicant's affidavit. The court held that 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.

The relevant provision in the Commissioner of Oath's Act 1899 which was in force in England in 1902 and the provisions of which are accordingly applicable in Swaziland, provided specifically that "a Commissioner for Oaths shall not exercise any of the powers given by this section in any proceeding in which he is the solicitor to any of the parties to the proceeding, or clerk to any such solicitor, or in which he is interested". I lay special stress on the last words.

It is the last words of the quotation which are of relevance in the present case. The Appeal Court found that the "obvious reason" for the requirement is that a person attesting in an affidavit must be completely objective and have no interest of any kind in the contents or import of that affidavit.

Several South African cases were referred to in which this principle was accepted and for the purpose

of illustration reference need only be had to Louw vs Riekert 1957 (3) SA 106. In that case it was observed that the court requires the scrutiny of an independent Commissioner of Oaths; and that no attorney who is a member of a firm which is the attorney of record can be said to be completely independent.

If the required independence of the Commissioner of Oaths is absent when the Commissioner is an attorney for one of the parties, how can it be argued that there is any less a breach of the requirement where the Commissioner of Oaths is an employee or other officer of the litigant on whose behalf the affidavit is filed?

5

His Lordship, the then Chief Justice, Mr. Justice Nathan in Magagula vs Town Council of Manzini and Others did not exclude affidavits which had been attested to by the Commissioner of Oaths who was in service as an employee of one of the litigants. This decision was distinguished by Chief Justice Hannah in a later case of F.N. Dlamini vs J.M. Dlamini (opcit). The distinction found was that, in the case before Hannah C.J., the Commissioner of Oaths was an attorney representing the party concerned while this was not so in the case decided by Nathan C.J. where the Commissioner of Oaths was in the service of the Town Council. The Court of Appeal, and Hannah C.J. were concerned with cases where the Commissioner of Oaths whom the affidavits were attested was an attorney of one of the litigants; but I do not find anything in their judgments to indicated that had the Commissioner of Oaths been an employee of the litigant, the decision would have been different.

The distinction found by both Hannah C.J. and the Court of Appeal was unnecessary for the decision in the case. This distinction for the present purposes between an oath taken before an attorney of the litigant and an oath taken before a servant of the litigant does not in my view exist. Clearly the employee no less than the attorney has an interest in the subject matter of the affidavit. I find that in view of the decision of the Court of Appeal and the reasoning which led to its decision, it would be wrong for me to follow the decision in MAGAGULA VS TOWN COUNCIL OF MANZINI.

Furthermore as I have pointed out, the Commissioner of Oaths whoever he may be, who attested the affidavit signed on behalf of the plaintiff in this case. The plaintiff itself is not a Commissioner of Oaths.

The indication that the signature in a representative capacity is completely inappropriate to the signature by a Commissioner of Oaths.

The affidavit must be rejected.

6

This is an application for summary judgment where the affidavit is an essential part of the application.

In view of the judgment of the Court of Appeal, it appears that the correct course is to dismiss the application or to strike it off from the roll with costs. The applicant is of course at liberty to launch a new application based on a properly attested affidavit. There is little to be gained in allowing the applicant to substitute a properly attested affidavit for that which has been rejected.

For these reasons, the application for summary judgment is dismissed with costs.

S.W. SAPIRE

ACTING CHIEF JUSTICE