IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO.157/98

In the matter between

DARLY WYNE SMITH	APPLICANT
And	
THE KING	RESPONDENT
Coram	S.B. MAPHALALA - J
For Applicant	MR. P. SHILUBANE
For Respondent	MISS S. NDERI

JUDGEMENT

(25/11/98)

The matter came before court with a certificate of urgency for an order in the following terms:

1. Dispensing with the forms and service and the time limits prescribed by the rules of court and hearing this matter urgently.

2. That rule nisi be hereby issued returnable on a date to be determined by the court calling upon the respondent to show cause, if any, why?

2.1 The respondent should not be ordered to release the following property to the applicant.

a) One viking boat and trailer

b) Fishing equipment

c) Registration and sale agreement in respect of a Nissan Sani 4 x 4.

d) Applicant's identification document.

2.2 The respondent should not be ordered to pay the costs of this application.

3. Alternative relief.

The application is supported by the founding affidavit of the applicant. The crown opposes this application and has filed respondent's grounds of opposition and filed an opposing affidavit of one Assistant Superintendent Jomo Mavuso. The respondent raised four points in limine. Firstly, that applicant is not entitled to bring the present

application by way of notice of motion and his application is incompetent in as much as the application for release of the items was made in the Magistrate's court. The applicant's recourse is either by way of review or appeal. Secondly, the applicant's application is not urgent nor does it disclose any cogent

reasons of urgency. The applicant's attorney on record have represented the applicant and show every indication of continuing with the same. The payment of their fees is therefore not urgent and in any event cannot properly be determined before the services are rendered and attorneys see applicant through his defence. Thirdly, the applicant is charged with a non-bail-able offence and will have to await trial in custody, it is unlikely that he be receiving his pension from the South African Defence Force while incarcerated. Lastly, that the items have evidential value crucial to the crown's case and are therefore exhibits properly held by the police. Their return would jeopardize the interest of justice in the intended trial. The interests of the applicant cannot override those of justice.

The matter came before me for submissions on the 12th November 1998. Miss Nderi maintained the crown's stance as reflected in their opposing papers in arguing the points in limine.

On the other hand Mr. Shilubane for the applicant submitted that the affidavit by police officer Mavuso was defective in that it was attested before an officer of the Attorney General and that this created a conflict of interest. Secondly, he contended that the Magistrate did not make a final order and that the applicant could re-open the application for the return of the exhibits on the 23rd November 1998. Thirdly, that the procedure followed at the Magistrate's Court was wrong, as it is not sanctioned by law. In this regard he directed the court's attention to Lansdown and Campbell on "South African Criminal Law and Procedure (Vol. (v)) at page 173 and to the case of Dobringer vs Minister of Justice 1969 (1) S.A. 65. Mr. Shilubane also referred the court to Section 51 of the Criminal Procedure and Evidence Act (as amended) No. 67 of 1938. He contends that the crown has not shown that the items had to do with the offence applicant is charged. Further that the affidavit of the police officer who deposed to the opposing papers is inadmissible more particularly paragraph 8 which is hearsay and should be strike out in terms of the law. He referred the court to Herbstein and Van Winsen "The Civil Practice of the Supreme Court of South Africa (4thED) at page 369 to buttress this point.

On points of law Miss Nderi submitted that the authorities cited by counsel for the applicant are irrelevant as here we are not talking of money but we are dealing with items which are connected with the commission of the offence. She contended further that the affidavit of the police officer was properly attested in terms of the law. To support this proposition she referred the court to the case of Bhekwako Dlamini vs Attorney General Civil Case No. 3111/96 were Dunn J was confronted with a similar question and he ruled as follows:

"The office of the Director of Public Prosecutions was established by the Director of Prosecution Order 1973. The office is concerned with the institution and prosecution of criminal proceedings. The interest which the Commissioner Mr. Nduma, may have in the present litigation arises from his employment by the Swaziland Government on the strength of the decision in Magagula's case (Supra). The Commissioner was not precluded from

attesting the affidavit of Simelane. The decision in Dlamini case (supra) in the present case for reason that the Commissioner is not the government's attorney (in the case the office of the Attorney General) or an agent, partner or clerk of such attorney".

She argued furthermore that in interlocutory proceedings hearsay evidence can be admitted. Lastly, that this matter is still under investigation.

These are the issues before me. It is my view that the issue of paramount importance is whether or not the application before court is proper in terms of the law. In the event the court finds that it is proper the court will then be obliged to consider the other points raised. However, in the event the court finds that the application was not brought in accordance with the law the court will be obliged to dismiss the application forthwith.

I have perused through the papers before me and also considered the submissions made by both counsels. My view in the matter is that the application before court is incompetent in that the Magistrate

court is still seized with the matter as evidenced by the Magistrate ruling in Case No. B.613/98. The Magistrate ruled that as the investigations were still underway it would not be proper for the court to order the release of the said exhibits and ruled further that the applicant was at liberty to approach the same court on the 23rd November 1998. In other words the matter is still pending before the learned Magistrate. The Magistrate had not made a final ruling in the matter to entitle applicant to appeal or apply for review of the Magistrate's decision. It is also noteworthy that the application before the Magistrate was moved by the same applicant being represented by Mr. Shilubane and I find it strange that Mr. Shilubane would argue that the procedure adopted at the magistrate court was wrong when they are the ones who initiated it. It is clear to me that the applicant has compromised the doctrine of "clean hands" by adopting a double-burrel approach.

For this reason alone I dismiss the application and order that the applicant approach the Magistrate who is still seized with the matter.

The applicant to pay costs of the respondent.

S.B. MAPHALALA

JUDGE