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IN THE HIGH COURT OF SWAZILAND

CASE NO. 3354/97

IN THE MATTER BETWEEN

THE COMMISSIONER OF CO-OPERATIVES

APPLICANT

VS

BUNYE BETFU BUHLE BETFU SAVINGS AND

CREDIT SOCIETY LIMITED

RESPONDENT

CORAM:

S.B. MAPHALALA - A J

FOR APPLICANT:

MR P. FLYNN

FOR RESPONDENT:

MR D. MAZIBUKO

JUDGEMENT

(28/06/98)

Before court is an urgent application for an order in the following terms:

1. Compelling the respondent to comply with section 45 (3) A and 46 of the Cooperative Society Proclamation of 1964,
2. Directing applicant to hold a general meeting within 14 days to hold elections.

When the matter came before me for arguments in the contested roll of the 22nd May, 1998 Mr Mazibuko raised two points in limine from the bar. The points raised are two pronged. The first leg of respondent's point in limine is that the founding affidavit of the applicant was deposed of before one Jabulani Maseko who is employed by the office of the Director of Public Prosecution which is a government department. The Attorney General who is representing the applicant is an employee of the Swaziland Government. Jabulane Simelane who signed the founding affidavit as a commissioner of oaths is an employee of the Swaziland Government. That this creates a conflict of interest which renders the affidavit fatally defective.

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Mr Mazibuko referred the court to the case of Barclays Bank of Swaziland vs Thandi Dlamini - Civil Case No. 2654/95 to buttress his arguments.

On the second prong of the points in limine it is Mr Mazibuko's contention that the applicant has no locus standi in judicio to institute the present application and obtain the relief sought. The applicant describes himself as a Commissioner of Co-operatives in his notice of motion yet the Co-operative Societies Proclamation No. 28 of 1964 mention a registrar who has a right in terms of section 45 to inter alia carry out yearly audits, or cause such audits. A commissioner in terms of the 1964 Proclamation is defined under the interpretation section as follows:

The Commissioner" - means Her Majesty's Commissioner for Swaziland.

And a registrar is defined thus:

"Registrar" means Registrar of Co-operative Societies appointed in terms of section three or person exercising such powers of the Registrar as may have been conferred on him under that section;

Mr Mazibuko contended that the Commissioner in the present suit has assumed the powers of the Registrar and this act is ultra vires the said Proclamation. The Proclamation in sections 47 (6) and section 37 (4) provides punitive measures for co-operative societies who fail to comply with its provisions inter alia to submit for audits by the Registrar and not the Commissioner. Mr Flynn who represented the Swaziland Government in this instance gave the court a historical background on what happened to the Proclamation No. 28 of 1964 when Swaziland assumed its independence status. He submitted that the parliament of Swaziland which was under the Westminster - type constitution at independence promulgated the Statutes of Swaziland Act No. 14 of 1970 which gave the Attorney General powers of revision with the sole purpose of upgrading colonial legislation. He was given vast powers under that act more particularly section 3 of the act to, inter alia:

(2) "omit from statutes

(l) a law which has been repealed expressly or by necessary implication or which has expired, or has become spent or has had its effect".

Further at section 3 (2) (j)

"make such amendments, modifications, adaptations, qualifications and exceptions to a law as may be necessary or expedient for bringing it into conformity with the provisions of the constitution and with the status of Swaziland as an independent sovereign state "

Further on in section 3 (2) (k) the Act provided:

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"Make such adaptation of, or amendments in, any law as may appear necessary or proper as consequence of constitutional changes in Botswana and Lesotho or in any other government or country "

The gravamen of Mr Flynn's argument is that the Attorney General in exercise of his powers conferred upon him by this Act upgraded colonial legislation to be in tune with the others of independent Swaziland. He amongst other revised the proclamation which is the subject of the dispute in this case. Thus the present day Commissioner assumed the duties of the Registrar in the British Proclamation. In fact, if I understood him properly there two offices fused into one with the rebirth of a Commissioner and the Registrar's office became obsolete and for practical purposes the Commissioner step into the shoes (as it were) of the colonial Registrar. In this scenario according to Mr Flynn the question of lack of locus standi does not arise.

On the issue that the founding affidavit was defective as the Commissioner of Oaths who attested to that affidavit is also an employee of the Swaziland Government. Mr Flynn does not find any merit in this contention. He argued that the cases cited by Mr Mazibuko viz The Barclays Bank case (supra) is not in point and should be scrutinised carefully in view of other cases by this division on this issue. He referred the court to the cases of Magagula vs The Town Council of Manzini 1979 - 81 S. L. R 291, Attorney General No and Bhekwako in re: Bhekwako Dlamini and Swaziland Government Civil Case 3111/96. The thrust of Mr Flynn's submission is that the Commissioner of Oaths Jabulane Maseko who attested to the founding affidavit of the commissioner did not have an interest in this matter as he is employed in the

department of Public Prosecutions as a Senior Crown Counsel. He could not by any strength of the imagination be said to have an interest in the outcome of the present suit.

On points of law Mr Mazibuko maintained his stance that the application before court is defective in that the prayers in the notice of motion relied on section 45 (a) and 46 of the co-operatives societies Proclamation No. 28 of 1964 where section 45 (3) (a) states that a Registrar may:

"At any time of the audit summon any officer, agent servant or member of the society who he has reason to believe can give material information in regard to any transaction of the society or the management of its affairs ".

Section 46 states, thus:

"(1) The Registrar or any person authorised by General or special order in writing by the Registrar shall at all times have access to and, if sees it fit may take possession of and remove any books, accounts, papers and securities of a registered society ".

Mr Mazibuko's gripe is that the commissioner in view of the afore mention section does not have locus standi to bring this suit and the application is to be dismissed with costs.

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These are issues before me. Before proceeding with my judgement I wish to make a few remarks which have a bearing on this case. As the matter was been hotly argued on the 22nd May, 1998 Mr Flynn upon seeing the invidious position he was placed into, made an application to court to amend the notice of motion to conform with his views on the matter. I did not make a ruling on this at the time as I was of the view that this was a desperate effort by Mr Flynn to effect amendments on papers which are patently defective as it has been shown by Mr Mazibuko's submissions. It is trite law that the granting or refusal of an application for amendment of a pleading is a matter for the discretion of the court, to be exercised judicially in the light of all the facts and circumstances before it (see GMF Knotrakers (EDMS) BPK and another vs Pretoria City Council 1978 (2) S.A. 219 (t) at page 22b-d. The tendency of our courts has been to allow amendments where this can be done without prejudice to the other party (see Wavecrest Sea Enterprise (Pty) Ltd vs Elliot 1995 (4) S.A. 596 (SE) at page 5981 I - j). It is my view, that the amendment sought would grossly prejudice the respondent as the very essence of its point in limine is to show that the sections cited in the notice of motion of the applicant does not give him loci standi to sue in these proceedings. It would have been a travesty of justice if I had allowed the amendment sought by Mr Flynn then. Another point I wish to mention is that Mr Flynn promised the court the Act which showed that the Attorney General effected the change as envisaged in The Statutes of Swaziland Act No. 14 of 1970 fusing the office of the Commissioner to that of the Registrar. Mr Flynn provided the court with a copy of the Co-operative Society Act No. 28 of 1964 to show the fusion of offices. On closer examination the Act does not attempt to do so. The interpretation section of the said enactment define a commissioner thus;

"Commissioner" means the Commissioner for Co-operative Development appointed in terms of section 3 or any person exercising such powers of the commissioner as may have been conferred on him under such section: (added K.O.I.C 2/1975)".

Further in part II of the Act section 3 (1) provides for the appointment of a registrar and assistant registrar and reads as follows:

"3 (1) The Minister shall, by notice published in the gazette, designate a public officer to be a Registrar of Co-operative societies for Swaziland.

(2) The Minister may appoint persons from amongst public officers to assist the Registrar and confer on such persons any of the powers of the Registrar in terms of this Act".

The "Minister" according to the interpretation section means the Minister of Agriculture.

The power to audit co-operatives books of accounts in terms of the said Act are exercised by the Registrar in terms of section 45 of the said Act.

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Clearly the Commissioner has no power of audit in terms of the Act. The power lies with the Registrar duly appointed by the Minister of Agriculture in terms of section 3 (1) of the Act.

Now I revert to determine the issues before me. I proceed to determine the question of loci stand. Clearly from the papers before me the applicant who is the Commissioner of Cooperatives Societies in Swaziland cited provisions of the Co-operative Societies Proclamation No. 28 of 1964 which conferred powers of audit to the Registrar and for present purposes make him the proper party to prosecute these proceedings. It is also clear to me that the person who drafted these papers was relying on this Proclamation. This view is buttressed by Mr Flynn's feeble attempt to effect the amendment to the notice of motion. With due respect, I disagree with Mr Flynn that the Commissioner has stepped into the shoes of the Registrar in the British Proclamation. Why would the legislature provide a machinery for the appointment of the Registrar if that was the case. In the premise I rule that the Commissioner has no loci standi to bring this suit. It may well be that the Registrar does not exist de facto but it is inescapable that he does exist de jure. The applicant stands or falls on his papers.

On the second issue that of the attestation of the founding affidavit I am inclined to rule in favour of the applicant and hold that the founding affidavit attested by Jabulane Maseko a Senior Crown Counsel in the office of the Director of Public Prosecution is admissible. This case is in all fours with the case of Bhekwaoko Dlamini vs Attorney General (supra) decided by Dunn J. He held in that case after reviewing a number of local decisions as well as F. N. Dlamini vs J.N. Dlamini 1982 - 86 Vol (II) S. L. R. 416 by Hannah CJ.

"From my reading of the three decisions referred to the position in Swaziland may be summed up as follows: an affidavit attested to by a Commissioner of Oaths who has an interest in the matter deposed to, is admissible in evidence provided he is not the deponent's own attorney, agent or partner or a clerk of such attorney"

He went further to state, thus:

" 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, Ms 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 deposed to by 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".

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In the result, therefore I hold that the applicant has no loci standi in judicio to prosecute these proceedings.

I thus dismiss the application with costs.

S.B. MAPHALALA

ACTING JUDGE