

**IN THE COURT OF APPEAL FOR THE REPUBLIC OF BOTSWANA
HELD AT LOBATSE**

**CACLB-059-07
High Court Case No. CC 2553/2005)**

In the matter between

**FIRST NATIONAL BANK OF
BOTSWANA LIMITED**

APPELLANT

and

**EASTGATE ENTERPRISES (PTY) LTD
MACLEAN LETSHWITI
AUCILLIA LETSHWITI
KAGISO MAKGEKGENENE**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT**

**For the Appellant: AIS Redding SC, SC Vivian
For the Respondent: P. Collins**

JUDGMENT

**CORAM: MOORE, J.A.:
LORD COULSFIELD, J.A.:
TWUM, J.A.:**

LORD COULSFIELD, J.A.:

This is an appeal, with leave, against a decision of Gaongalelwe J dated 5 July 2007 by which he refused an application by the appellant for the appointment of a commission *de bene esse* to take the evidence of Darek Pryzwarski a witness whom the appellant wishes to call in the forthcoming trial of this action, but who is unwilling to come to Botswana.

In these consolidated proceedings, the appellant claims payment from the respondents of a sum in excess of P5 million, and the respondents claim two sums, amounting to approximately P12 million, from the appellants. In very broad terms, the claims arise from letters of credit issued by the appellant to facilitate the import of dried milk powders by the first respondent into Botswana. Under the arrangement embodied in the letters, the appellant was to make payment to overseas suppliers in Poland on presentation of certain documents, and was entitled to debit the first respondent's account with the sums so paid. The appellant's claim is for payment of sums so debited. The respondents' defence is that the conditions required by the letter of credit had not been satisfied, before the sum were paid out and that the appellant is not therefore entitled to debit these sums to their account. The appellant maintains that the terms of the letter were modified and the alterations authorised by a company called Challenger International Property Limited, of which Mr. Pryzwarski is managing director, acting as agent for the first respondent, and that the payments were properly made under the amended terms. This is denied by the respondents. It is immediately obvious that Mr. Pryzwarski's evidence is likely to be very important for a proper determination of the dispute, and so much is common cause between the parties.

Mr. Pryzwarski's reason for his unwillingness to come to Botswana is stated in the founding affidavit as follows:

"The primary reason [*sc. for this application*] is that Mr. Pryzwarski whilst he is prepared to testify in these proceedings, is not prepared to come to Botswana to testify. He has told Mr. Bookbinder of the

Applicant's attorneys that this is because Mr. Makgekgenene the Fourth Respondent has uttered threats to Mr. Pryzwarski which in Mr. Pryzwarski's view implied that if Mr. Pryzwarski attended the proceedings, his liberty could be at risk. While he believes that no cause exists for his arrest he fears that the Fourth Respondent will have sufficient influence to procure his unlawful arrest and he is not prepared to take the risk that he is arrested when attending in Botswana..."

This application is made under Order 44 Rule 3, which provides:

"A court may on application on notice in any matter where it appears convenient or necessary for purposes of justice make an order for taking the evidence of a witness before or during the trial by a commissioner of the court and permit any party to any such matter to use such deposition in evidence on such matters, if any, as to it seems meet..."

The learned judge approached his decision by reference to the principles stated by Mahomed J in *Fernandes v Fittinghof & Fihrer CC 1993 (2) SA 704*. He was, it would appear, not impressed by the witness' reasons for his reluctance to come to Botswana and said that while the reason for refusal was not on its own decisive, it was a factor to be weighed. In para. 13 of his judgement, he accepted that the evidence of Mr. Pryzwarski was likely to contribute significantly to the determination of the main issues in the case and continued:

"14. Two issues of great importance do arise from what is stated under paragraph 13 above. One is that when it appears to the court that the evidence of a witness would be material, the court should do everything possible to have such evidence placed on record, even if such may entail taking the evidence on commission. The idea would be to avoid miscarriage of justice.

15. The second consideration is that where the evidence is controversial and likely to be subjected to thorough cross-examination it is important that such a witness testifies before the trial judge to enable the judge to observe his demeanour for purposes of assessing his credibility. The known reality is that if the trial court is only provided with his recorded testimony it may not be able to assess his credibility by looking at the recording. It is often convenient to the trial court and conducive to the attainment of

justice if the trial court bases its determination on issues of credibility on what it has observed itself.”

The judge then observed that the court was engaged in a balancing exercise and added a reference to a passage in *Nathan Barnett and Brink* on the South African Rules of Court where it is stated that one of the main considerations is whether the evidence is formal or almost formal, and that if there is room for serious cross examination the commission will not be granted. He concluded by saying that on the strength of all the above considerations the application was refused.

The decision whether or not to allow a commission *de bene esse* is one involving the exercise of discretion on the part of the judge. Normally, therefore, an appeal court would be reluctant to interfere with the decision of the judge. Unfortunately, however, it turns out the text to which the judge was referred as an authority on the position in South Africa is long out of date and is not a correct statement of the law. Accordingly the respondents conceded that it is open to this court to review the decision and exercise the necessary discretion on its own account. I should add that the learned judge, in granting leave to appeal, recognised that there was, if not conflict, at least some degree of variation between the decided cases as regards the relative importance of the relevant considerations.

Order 44 rule 3 of the rules of the High Court is in substantially the same terms as the corresponding rule in South Africa and guidance as to its application can be found in decided cases there. Two in particular have been regarded as

giving general guidance. The first is *Robinson v Randfontein Estates Gold Mining Co. Ltd.* 1918 TPD 420 where the leading judgement was given by Wessels J. It is, I think, helpful to quote at some length from this judgement because of the clarity with which it sets out the broad context in which applications to take evidence on commission should be considered. The case was one in which a mining company sued a former chairman and director for alleged breach of fiduciary duty. Wessels J said:

"A charge of that kind involves *dolus* undoubtedly and it is upon this ground that the appellant asks us to say that a commission *de bene esse* ought not to issue from this court.

I take it as a general rule that, if a witness in a cause cannot, by subpoena, be brought before this Court, rather than do without or lose his evidence the Court will issue a commission *de bene esse* to examine him in his own domicile. The Court cannot compel an unwilling person to come from a foreign country to give evidence here and in these circumstances the next best thing that the Court can do is to take his testimony on paper."

Wessels J then observed that the person who produces evidence on paper is often at a disadvantage because the court may prefer to rely on evidence from witnesses whom it has seen and heard, and continued:

"There are however certain exceptions. In certain special cases the Court will refuse to allow such a commission to issue: First of all whenever there is a charge of fraud, the Court will carefully consider whether there is fear of a miscarriage of justice should a commission *de bene esse* be issued. In such a case, the Court will often insist on the plaintiff appearing in person because it is the plaintiff who invokes the aid of the Court and it is not too much to expect of him that he will submit himself to the jurisdiction of the Court and appear in person, especially if the Court thinks that he is an important or necessary witness. This also applies to a defendant, though not always with the same force...

Again if the Court has before it the testimony of a witness whose evidence is sought to be taken on commission, or has before it

letters under his hand that lead the Court to infer that, on the face of his own admissions, he is not an honest man, then the Court may require his presence in order to explain why he gave this testimony or why he wrote these letters....

Again, if, from the circumstances of the case, and from what has been revealed in the application for the commission, it appears that there is no adequate reason why the witness at the hearing cannot be produced in person, and if the issue is of so grave a nature that, unless the witness appears, there may be a miscarriage of justice, the Court will require his presence here and will not be satisfied with his testimony on paper...

There are, no doubt, other special cases where the Court will refuse to grant a commission, as where the witness cannot be properly examined or cross-examined, where he is in a locality that no lawyer can reach, or that it would be difficult to send anybody to take his evidence on commission. The Court in such circumstances might refuse to entertain the application. But, as a general rule, the exclusion of the testimony of witnesses whose attendance cannot be enforced by this Court is more likely to lead to miscarriage of justice than to have their testimony on paper."

The passage in which Wessels J referred to the reason for inability to produce the witness was particularly founded on by Mr. Collins, and I will return to it later. For the moment, it is important to note that Wessels J twice expressed it as a general rule that it is better to have the evidence of witnesses whose attendance cannot be enforced on paper than not to have it at all, and that he repeatedly refers to the need to avoid miscarriage of justice as the overriding consideration. In the same vein, Mason J said:

"Where a witness cannot be produced before the Court, it seems to me that it is the duty of the Court to allow the evidence to be taken upon commission unless it should appear that the other side is not likely to have a fair trial of its case if that evidence is taken on commission."

The second of these authorities is *Fernandes v Fittinghof & Fihrer CC*, the case cited by the Learned Judge. In his judgement, Mohammed J set out in some

detail the various questions which might arise and the considerations which might have to be taken into account in different circumstances. The matters mentioned included the materiality of the evidence, whether reasonable steps had been taken to attempt to obtain the evidence, whether the application appeared to be made *bona fide*, the convenience of the parties and the prejudice which would arise from a refusal of the application. I do not think it necessary to repeat all that he said, but two passages particularly founded on by Mr. Collins, are as follows:

“(b) How substantial are the prospects that the evidence sought to be adduced would indeed be forthcoming if the commission is authorised? An assessment of that issue could depend on whether the witness concerned would be compellable; whether the commission would be held within the Court’s area of jurisdiction; whether the proposed witness will have valid grounds on which he could refuse to testify before the commission even if he was compellable; and whether he has committed himself to giving such evidence in writing. (*Robinson v Randfontein Estates Gold Mining Co. Ltd.*)

.....

(g) What would the relative importance have been for the trial court itself to see and hear the particular witness whose evidence is sought to be adduced on commission? Again the spectrum can extend from the case where it is of such vital importance as to render virtually valueless the testimony of a witness before the commission whom the trial court has not itself heard or seen, to the opposite end where it can make virtually no difference at all for the trial court that it has not seen or heard the witness.....”

It is, I think, true that Mohammed J does not place as much emphasis on the importance of obtaining evidence rather than doing without it as does Wessels J, but he did say that if the evidence is truly material the court should not be slow to direct its reception merely because the evidence is controversial rather than just formal. It should be added that Mr. Redding referred to *Joki v Alexander* 1947 (3) SA542 where Blackwell J observed that if a party to an

action said that a witness was necessary to his case, and that statement was accepted, justice would demand that the witness be heard.

Mr. Redding's submission was quite simple. The witness is plainly a very important witness. His reason for refusing to come to Botswana may be bad, but he is not compellable and he refuses to come. He is, however, willing to give evidence before a commissioner in Durban. The applicant has arranged for a senior counsel at the South African bar to act as commissioner. It has also arranged for a video recording of the evidence, so that the judge will be able to see and hear the evidence given, and will not be entirely dependent on a paper record. In any event, the assessment of the quality of the evidence of a witness is not entirely dependent on the judge's direct impression. The evidence has to be weighed and considered in the context of all the other evidence, and the demeanour of the witness should not be over-emphasised, as was pointed out in *Medscheme Holdings (Pty) Ltd.v Bhamjee and Another* 2005 (5) SA 339, at 345. The commission could be carried out without disproportionate inconvenience or expense.

Mr. Collins took issue on almost every point. He accepted that the evidence of the witness would be relevant to one of the issues in dispute, but submitted that although relevance was a necessary condition, it was not sufficient in itself and all the circumstances should be considered. The witness had failed to sign an affidavit explaining his reason for refusing to come to Botswana, and in so far as there were statements of that reason in the founding affidavit and correspondence filed, they were inconsistent. Further the witness had not

committed himself in writing to give evidence. The inconvenience of holding a commission in Durban for counsel and parties would be great. There was other evidence, from an employee of the bank, Goitseone Sechele, which dealt with the alleged alterations to the letter of credit: it would be expected that a bank such as the appellant would have taken care to document all such matters. In the case of a witness whose credibility would be challenged, such as Mr. Pryzwarski, it was important that the judge making the decision in the case should actually participate in the hearing of the evidence and have the opportunity to ask questions, if so advised. The reasonableness of the witness' reason for not coming to the jurisdiction was a factor to be taken into account although not mentioned by Mohammed J in *Fernandes v Fittinghof & Fihrer CC*, as could be seen from the judgement of Wessels J in *Robinson v Randfontein Estates Gold Mining Co. Ltd.* and from the decision in *Meyerson v Health Beverages (Pty) Ltd* 1989 (4) SA 667, where it was stressed that convenience for the purposes of the rule was the convenience of parties and the court, not merely that of the witness. Mr. Collins stressed that the issue of a commission must not become, in effect, available on demand.

The decision whether or not to grant a commission is a decision to be taken on a balance of all relevant factors. Nevertheless two of Mr. Collins' submissions call for particular comment. The first concerns the disadvantage that the judge does not himself see and hear the witness give evidence. The fact is that evidence by video link or video recording is now widely used in many jurisdictions to take evidence, even when the credibility of the witness is critically important: for example the evidence of child witnesses in sexual abuse

prosecutions is now routinely taken by those means in the United Kingdom. Of course, seeing and listening to a good video recording is not quite the same as hearing the witness directly, but it is very close to it. It is true that the judge does not have the opportunity to ask questions himself, but the supposed disadvantage is, in my view, minor, if not trivial. Bearing in mind the very forceful observations in *Medscheme Holdings* supra about the true nature of the judge's task in assessing evidence, I think that, in a case such as this, little weight can be given to this factor.

The other issue is that of the witness' reasons for refusing to attend. In my view, the *Meyerson* case is not of much assistance, because the witness there was a party whose conduct was very much in issue. The decision not to issue a commission in that case is, in my view, in line with the judgement of Wessels J cited above. As regards the passage particularly founded on by Mr. Collins, it seems to me that Wessels J was not referring primarily to the witness' reasons for being unwilling to attend but to the complex of reasons which made it necessary for the party wishing to call him to apply to the court. In any event, it is fully recognised that the overriding consideration is the avoidance of miscarriage of justice, and the fact that the reasons advanced by a reluctant and non-compellable witness for refusing to attend to testify in Botswana may be frivolous, irrelevant, immaterial; or, as in this case, insulting to the legal system of Botswana seems to me irrelevant to that overriding requirement so clearly expressed by Wessels J.

I should perhaps also mention the question of the absence of an affidavit or written statement from the witness. In a case like this, I do not see why the court should not proceed on a simple statement from counsel that the witness refuses to attend. I do not see that an affidavit would be of any value, even if it is supposed that a witness who is *ex hypothesi* unenthusiastic about becoming involved would agree to grant one. It is true that Mohammed J mentions the availability of a written statement of willingness to give evidence as a factor. I have not found any reference to that in the report of the *Robinson* case, but in any event I would read the reference as a factor to be considered not a requirement.

This is an important case for the parties and may be one of some difficulty. In my view, there is an obvious risk that the absence of the evidence of this witness would give rise to a risk of a miscarriage of justice. On the other hand, Mr. Collins' submissions for the most part related to matters of relatively minor inconvenience: I do not think that he put forward any reason for thinking that to take the evidence on commission would give rise to a real risk of miscarriage of justice. Taking all the circumstances into account, in my opinion, the balance clearly favours granting the order for a commission. This court will therefore allow the appeal and grant an order as follows:

1. It is ordered that a commission *de bene esse* be issued to take evidence on commission in Durban, South Africa, of Darek Pryzwarski of Challenger International (Proprietary) Limited.
2. A I J Chadwick is appointed as Commissioner to take the said evidence.

3. The issue of a letter of request to the South African Government to take steps necessary to obtain the evidence of the said witness before the Commissioner is authorized.
4. 4.1 The costs of the commission are to be the costs in the cause.

4.2 In the event of payment having to be made to the Commissioner for the services and/or for the taking and transcribing of the evidence, these costs are to be disbursed *pro tem* by the First National Bank of Botswana, but will be costs in the cause.
5. The appellant is entitled to the costs of the appeal: otherwise the costs of the application will be costs in the cause.

DELIVERED IN OPEN COURT AT LOBATSE THIS 30TH DAY OF JANUARY 2008.

LORD COULSFIELD
JUDGE OF APPEAL

I agree

S. J. MOORE
JUDGE OF APPEAL

I agree

S. TWUM
JUDGE OF APPEAL