CIV/A/14/83

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

BANTU SPORTS UNION - Appellants

V

BANTU FOOTBALL CLUB - Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice M. P. Mofokeng
on the 8th day of November, 1983

This is an appeal against the whole of the judgment of the Magistrate of Mafeteng. The learned Magistrate confirmed an interim Rule Nisi operating against the appellant. The initial order sought was couched in the following: why;

"1 (a) The respondent shall not be restrained from interfering with the Applicant in any way from using football ground, site No. 84 Mafeteng Reserve, Mafeteng, pending the outcome of CIV/T/134/83.

(b) The respondent shall not be ordered to pay the costs of this application.

(c) That the aforesaid Rule Nisi operate as immediate temporary interdict restraining the Respondent in terms of paragraphs 1(a) above.

/The Rule ...

The Rule Nisi granted by the learned magistrate E. M. Lentsoe was phrased as follows:

" IT IS ORDERED .

1. THAT a Rule Nisi be issued returnable on the 8th day of April, 1983 at 9.30 a.m.; calling upon the Respondent to show cause why -

   (a) The Respondent shall not be restrained from interfering with the Applicant in any way from using football ground site No.84 Mafeteng Reserve, pending the finalization of CIV/T/134/83.

   (b) The Respondent shall not be ordered to pay the costs of this application.

2. That the aforesaid Rule Nisi operate as immediate temporary interdict restraining the Respondent in terms of paragraph 1(a) above.

The founding affidavit was made by one Mokete Mahula who describes himself as Secretary General of the Respondent. (A resolution to this effect is filed and signed by the manager). However, it is now common cause that this founding affidavit is attested to by Mr. Khauoe, an attorney who represented the Respondent in the Court below. In the case of Lesotho National Development Bank Ltd. vs Lesotho Sheepskin Products (Pty) Ltd., 1978(2) L.L.R. 336 (in the press) Isaacs, A.J. is reported as follows:

" This affidavit is undoubtedly a vital piece of evidence but the affidavit is sworn to before the applicant's attorney as Commissioner of Oaths. The applicant's attorney, in my opinion, has an interest in the case. By law in Lesotho (Regulation 7 of Government Notice 80 of 1964)

/it is ...

> it is provided that a Commissioner of Oaths must not attest an affidavit relating to a matter in which he has an interest. This is also the law in South Africa and the South African Courts have held that an affidavit attested by a Commissioner of Oaths relating to a matter in which he has an interest is a nullity. (CP Nochmowitz v Bellville Liquor Licensing Board and Another, 1956(2) S.A. 228 (C)). In my view this is also the law in Lesotho.

In Tseliso Masunyane, 1961-1962 H.C.T.L.R. 30 at 33E Elyan, J. is recorded as follows : " .... Of course a Solicitor who is also a Commissioner of Oaths is not permitted to take an affidavit from his own client in connection with the proceedings in which such a client is a party." I entirely endorse these two passes as expressing the law in Lesotho. The learned magistrate, with respect, could not condone this fatal irregularity. Since the founding affidavit is a nullity there was, therefore in my view no basis upon which even a Rule Nisi operating as a temporary interdict could be granted let alone be subsequently confirmed. For that reason alone the appeal ought to be upheld. In fairness to Counsel for the Respondents I must state that he has conceded this point.

There is yet another feature in this matter. It is common cause that the Respondents paid an amount of 40% of the gross gate takings whenever they made use of the football grounds. They became dissatisfied as they put it with certain arrangements, and they stopped payment. It is not quite clear to me why they had to pay that percentage unless there was an agreement existing

/between ....

betweem the parties. There must have been some sort of agreement exısting otherwise ıt does not make sense why there was payment and then stoppage and then an attempt at negotiations. However, one thing is quite clear to me, the Appellants are in possession of a tittle deed to that pıece of land now called site 84. The possession of that document plus Form C is prima facie proof that the said plot was allocated to them. Perhaps that is why the 40% akin to a lease was payable to them as an acknowledgement to that fact. If that is so, what wrong have the Appellants committed? The Respondents have not adhered to the terms of the use of the sıte and were thus at fault.

An ınterdıct is a judıcial process whereby a person is ordered to refraim from doıng a particular act, or ıs ordered to perform a particular act. It ıs a remedy of a summary and extraordinary nature, allowed in cases where a person requires protectıon against an unlawful interference or threatened interference, with his rights, (Toyota Marketing Company v Mahasc & Another, 1978(2) L.L.R. 416 (in the press). The essence of this remedy is to prevent self-help. It seems to me that by stopping to perform their part of the agreement, the Respondent resorted to self-help and now they are coming to seek help from the Courts to protect them against their own wrong doings. That is not how this extraordınary remedy ıs to be used. For that reason also the appeal ought to be upheld.

I have also considered the other grounds of appeal lodged by the Appellant. I have not dealt with them not

/because

because they are invalid but because I thought those I have mentioned are sufficient to dispose of this matter without unnecessarily overloading this judgment. I repeat they are equally valid.

In the result the appeal ought to be upheld with costs and it is so ordered.

J U D G E
8th November, 1983

For the Appellant : Mr. Sello
" " Respondent : Mr. Khauoe