CIV/APN/287/89

IN THE HIGH COURT OF LESOTHO

In the Application of :

MABEOANA FOOTBALL CLUB — Applicant

V

ROMA BOYS FOOTBALL CLUB — 1st Respondent
LESOTHO SPORTS COUNCIL — 2nd Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 8th day of December, 1989.

On 11th November, 1989 the applicant sought and obtained a Rule Nisi calling upon the respondents to show cause why:

(a) they shall not be interdicted from arranging, holding or proceeding with the match scheduled for 12th November, 1989 at Mafeteng between the 1st respondent and either R.L.M.P. Qacha's Nek F.C. or Liphiri F.C. as part of the annual 2nd Division Football Competitions;

(b) the applicant shall not be the winner of the Zone 7 Competitions;

(c) the respondents shall not be directed to pay the costs of this application jointly and severally;

(d) the applicant shall not be granted such further or alternative relief as the Court may deem fit.

An order was issued directing that the rule embraced in paragraph (a) above operate as an interim interdict with immediate effect.

After a single extension of this rule the matter was ready for hearing and accordingly heard on 4th December, 1989.

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The 2nd respondent did neither respond to the applicant's papers plus the interim order served on it timeously, nor appear in court in person or through any agency.

As occasion serves the rule should be confirmed. But can it be confirmed in the face of the fact that the 1st respondent has been joined? Indeed properly joined on the basis that on account of the interest it has in the matter it should be afforded an opportunity to be heard? Is it a sound approach to adopt an attitude which seems to suggest that the fate of the 1st respondent is contingent upon the variable fortunes of the 2nd respondent? If so, i.e. if the 1st respondent's fate is a fait accompli why need it have even bothered to oppose this application when the 2nd respondent has virtually thrown in the sponge?

Barring the legal maxim that in things preceding judgment the plaintiff is favoured I take the view that every party to a suit pursues his claim on equal terms with any other. The outcome of the case would thus depend on the quality of the case advanced by each respective party.

However, I defer the answers to the questions posed above to the determination by what the facts reveal. I accordingly propose to deal with the facts presently.

The applicant avers in paragraph 4 of its founding affidavit that

> ".. on the 4th June, 1989 applicant played a fixture match against another club namely Manonyane Football Club at Matsieng which fixtures fall under Zone 7 of the 8 Zones delimited by the 2nd respondent throughout the country. The said match was discontinued by the referee in terms of Article 5(4) of the Lesotho Sports Council (Competition) Rules 1988 in terms of which a team which is found by the referee to be responsible for any disorder leading to the discontinuance of a match automatically forfeits the match and two goals or more if the score showed a greater number of goals for the team declared winner. The referee duly submitted his report indicating the breach, by

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Manonyane, of the said Article. As required applicant submitted its report to 2nd respondent and claiming the benefits allowed by the said Article 5(4)."

The applicant further averred that Manonyane Football Club lodged an objection with the Senior Football Executive Committee, a sub-committee of the 2nd respondent which is the tribunal of first instance in matters relating to the game of soccer falling under the over-all management of the 2nd respondent. Manonyane F.C. relied on Article 2 in registering its complaint against the discontinuance of the game in question.

It appears that the applicant and Manonyane F.C. duly appeared before the said sub-committee in order to have the dispute concerning their match settled. This was on 28th September, 1989.

It turned out that the hearing led to inconclusive results in that to-date no decision has been made by the sub-committee notwithstanding that an undertaking was made by it to the parties that in due course they would be informed of the results of the hearing by letter.

In paragraph 6 the applicant sought to justify its assertion why it should be declared a winner in terms of prayer (b) which it later abandoned. This averment is based on the points that the applicant maintains it has to its credit presently and those it hopes to gain if the decision by the sub-committee were to be given in the applicant's favour.

The applicant did not in its replying affidavit nor in the main argument by its counsel pursue averments in that paragraph i.e. paragraph 6.

However the 1st respondent devoted much of its attention to the applicant's averments in that paragraph. The 1st respondent relying on Mr Manyeli's answering affidavit revealed that either the basis on which the applicant sought to be declared the winner was wrong or

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was a deliberate attempt to mislead the court that granted the rule nisi.

Apart from its attempt to reveal the true position of the points accruing and possibly going to accrue to the parties represented in these proceedings the 1st respondent revealed that there are more and more protests pending the decision of the sub-committee the outcome of which in my view would appreciably affect the respective positions of the parties either way. From this what can be gathered is that the applicant's averment that the winner was announced prematurely by 2nd respondent is common cause.

I wish therefore to recoil from the quick sands of speculation in favour of the firmer ground of fact.

It is averred by the applicant that on 9th November, 1989 at about 7.45 p.m. Radio Lesotho announced that the applicant was the winner in the Zone 7 competitions.

But the following day an announcement over radio Lesotho was to the effect that the previous day's announcement was a mistake. The effect of this was that the 1st respondent was the winner in the Zone 7 competitions.

Thereupon the applicant sent one Pesho Mochesane, the applicant's coach to approach the 2nd respondent with a view to finding out what the true position was and also seeking advice from that sports body. Mochesane was directed by the 2nd respondent's office to the Senior Football Executive Committee's member, to wit one Mr Masupha. The whole of that day was spent in a fruitless attempt by Mochesane at locating Masupha. When Mochesane repaired to the 2nd respondent's office to report about his unsuccessful efforts he met with another brand of misfortune namely that the 2nd respondent's office was closed and its staff had left.

The hour was 4 p.m. and the date fixed for the semi finals i.e. 12th NOvember, 1989 was drawing nearer and

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nearer by the minute. The applicant states that the absence from the office of the 2nd respondents by its staff at 4 p.m. on 11th November 1989, thwarted the applicant's attempts at lodging its appeal as required by the rules.

Indeed a letter dated 9.11.89 by the subcommittee's secretary addressed to Liphiri Football Club shows that the semi final was scheduled for 12th November 1989 between the 1st respondent and the winner between Liphiri F.C. and R.L.M.P. Qacha's Nek F.C. which would have had their game at Quthing the previous day i.e. 11.11.89.

It was argued for the 1st respondent that the applicant has not exhuasted the domestic remedies in that even though the appeal from the sub-committee lies to the 2nd respondent the applicant did not avail itself of this remedy. But this Court attaches importance to the fact that the applicant set out in its founding affidavit reasons for its failure to do so. The court's attitude could possibly be otherwise if the reasons for failure were revealed at the replying stage. Regard should also be had to the fact that the announcement that the applicant was no longer the winner only came when there was only one day to go before the date fixed for the semi finals. On the back of that the applicant sought to appeal but its quest was unrequited. Thus the only option left to the applicant was to have recourse to this Court for there was nothing to justify the hope that if the applicant delayed further the officers of the 2nd respondent would surface after 4 p.m. of 11.11.89 when semi finals were to be held the next day. It would also be viewed with misgivings that the applicant having conceived that it had been wronged, nevertheless waited until after 24 hours had passed before laying its claim, if the applicant took a chance and waited till the morning of 12.11.89 before registering its objection.

It cannot therefore be said the applicant by approaching this Court had recourse to the extraordinary while the ordinary had not failed. The truth remains that the 2nd respondent had abdicated thus leaving the applicant no

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option but to come to this Court. The 1st respondent has not gainsaid this for it has also acknowledged that there are many protests still pending before the 2nd respondent; and in fact has referred to more such than the applicant has drawn attention to.

In para 7(b) of Mr Manyeli's affidavit, it appears that the 1st respondent acknowledges that Masupha in accordance with his responsibility declared the 1st respondent winner. Yet the 1st respondent questions the wisdom of the applicant's effort to locate Masupha and take him to task about the different announcements ascribed to him over the radio. Mr Manyeli maintains that this was not Masupha's individual responsibility but that of his committee. I agree, but find nothing wrong in Mochesane looking for clarity from Masupha.

Mr Monaphathi argued that the sub-committee being a body entrusted with the responsibility of announcing who the winner is should have its ruling undisturbed, but Mr Manyeli on behalf of the 1st respondent averred at para 4.3 that

> "I am reliably informed that a replay has been ordered as between the applicant and Manonyane Football Club"

on the basis of which position he avers that the correct position is that the applicant has 28 points in its possession.

Regard being had to the fact that since the applicant did not allude to this alleged replay but stated that it was in possession of 30 points, and thus could have not been aware of the information that the 1st respondent's deponent has sworn to, could it seriously be said in saying that it had 30 points the applicant had betrayed a desire to mislead the court as at the time of moving the application ex parte? I think not. It is not revealed by the 1st respondent since when the information it relies on obtained. Thus it cannot be said that when approaching the court the applicant knew as well as the 1st respondent what the true position was.

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The 1st respondent took strong objection to the applicant's abandonment of its prayer that it be declared the winner. The objection was all the more forceful because the abandonment appeared to have been adopted as a result of the revelations of what the 1st respondent referred to as the correct position of the points possessed by the respective parties. If an analogy can serve as profitable, it seems to me that the view adopted by the 1st respondent towards the applicant is as follows: fancy indeed an astonishing thing; a man raises the storm at sea, when it gathers about his ears, instead of weathering it he turns round and desparately seeks a harbour!

But as illustrated by the applicant's counsel another analogy was highlighted as justifying the abandonment referred to above.

It was submitted that if A hears that the Master of the High Court is about to make a ruling that A's father's deceased estate be administered in terms of the Administration of Deceased Estates Proclamation on the grounds that A's father abandoned tribal custom; such being the representations made to the Master by A's siblings in A's absence, A is entitled to approach the High Court on an urgent basis and ask for an interdict restraining the Master from making such ruling having regard to the fact that he had never given A an opportunity to make representations to him.

Basing himself on judgments such as Thomas Mokorosi vs Mokorosi & 4 Others 1967-70 LL.R. 1 and Lefa Hoohlo vs Hoohlo 1967-70 LL.R. 318 which held that the High Court need not refer such cases back to the Master for his decision before the High Court exercises its jurisdiction A would be entitled in addition to ask for a further order declaring him his father's heir on the grounds that his father had not abandoned tribal. law and custom. If A's siblings then oppose the granting of the additional prayer and A finds that it would impose an unnecessary burden on the court due to disputes

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emerging when he insists on this prayer, it was illustrated that A would be perfectly entitled to say to the Court that he would be satisfied with the granting of his main prayer as it would be enough to prevent the mischief apprehended and abandon the additional prayer thus leaving it to the Master himself to conduct a factual inquiry and make a finding which, if A is still not satisfied with, he then can bring the matter on review to the High Court.

Indeed on 16th February this year in CIV/T/345/84 Liliehoek Motors (Pty) Ltd. vs Y. Mahomed (unreported) this Court had this to say:-

> "When the disparity was pointed out as to the subject matter of its claim in paragraph 3 of the plaintiff's Particulars of Claim its counsel decided to abandon contents of paragraph 1 of the summons and pursue the plaintiff's claim in terms of paragraph 3 thereof. This was a wise move because the defendant had in any case pleaded to the particulars of the plaintiff's claim..."

To take up the thread of the argument advanced by the 1st respondent with regard to the indifference of the 2nd respondent towards these proceedings it was urged that the Court should decide on inferences in favour of the 1st respondent. The inferences suggested were that

(a) the 2nd respondent had no more interest in these proceedings because it had declared the 1st respondent a winner so why should the 2nd respondent be called to repeat just this declaration.

(b) the 2nd respondent is content with abiding the decision of this Court.

(c) what 1st respondent says is correct.

(d) assertions in (a) and (b) outweigh the assertion in (c).

But it seems to me that it could very well be said the 2nd respondent decided not to get involved because it felt that what the applicant says is correct.

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Morover it seems the 1st respondent labours under a serious misconception of the rule applying to the drawing of adverse inferences against wrongdoers; as shown in Rex vs Blom 1939 A 202-3 namely that:-

> "(i) The inference sought to be drawn must be consistent with all proved facts; and
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> (ii) the proved facts should be such as to exclude every reasonable inference from them save the one sought to be drawn."

I am aware that the standard in the above quotation may not be quite appropriate as, it relates to criminal matters where the standard of proof is higher than in civil. But in civil cases also the rule says that duplication of possibilities is not permissible. Furthermore there is a general rule in civil proceedings that failure to oppose imports nothing else but consent. Thus the conclusion to reach is that the averments which are not opposed even though affecting the other party adversely are admitted by it as true. What is not denied is admitted.

It was called into question that the applicant having abandoned the prayer to which the 1st respondent addressed itself, should nevertheless seek to have the rule confirmed in respect of the first prayer saying the semi finals be stopped till the decision is given, in a matter pending between the applicant and Manonyane F.C.

But it seems that nothing can prevent a party opting for the lesser in a claim where it had originally asked for the greater.

This Court feels that it would be inappropriate for it to usurp the functions of the 2nd respondent by treating the matter presently before it as if on appeal. That aspect of the matter is reserved to the 2nd respondent. The prayer that the rule be discharged is refused.

The applicant's prayer that the rule be confirmed is granted. But because the applicant abandoned the prayers

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upon which the 1st respondent's case was anchored the applicant is ordered to bear 65% of the 1st respondent's costs.

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8th December, 1989.

For Applicant : Mr. Sello

For 1st Respondent: Mr. Monaphathi