CIV/APN/266/90

IN THE HIGH COURT OF LESOTHO

In the Application of :

MAHOMED ASLAM ABUBAKER..... Applicant

and

DISTRICT SECRETARY FOR LERIBE..... 1st Respondent
MINISTER OF INTERIOR ..... 2nd Respondent
OFFICER COMMANDING LERIBE POLICE.... 3rd Respondent
ATTORNEY GENERAL..... 4th Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai

on the 3rd day of December, 1991.

On 30th October, 1990 the applicant herein obtained, before my brother Cullinan, C.J. an ex-parte order couched in the following terms:

> "1. Rule nisi, returnable on the 12th day of November, 1990, be and is hereby issued calling upon the Respondents to show cause, if any, why:
>
> (a) the periods of notice prescribed by the Court Rules shall not be dispensed with on the ground of the urgency of this application.
>
> (b) the 1st Respondent's purported notice to Applicant dated 3rd July,

1990 shall not be declared null and void and set aside.

(c) the Applicant shall not be authorised to continue to complete his building operations on Plot No. 25122-178 situate at Lisemeng, Leribe Urban Area in the Leribe district.

ALTERNATIVELY

The applicant shall not be authorised to continue his building operations on the said plot pending finalisation of these proceedings.

(d) the 1st and the 3rd Respondents and/or their subordinates or agents shall not be restrained and directed forthwith from interfering with, interrupting or in any way whatsoever disrupting the construction operations that are being carried out on the Applicant's Plot No. 25122-178 situate at Lisemeng, Leribe Urban Area in the Leribe district without due process of the law.

(e) the 3rd Respondent and/or his subordinates or agents shall not be interdicted forthwith from arresting or causing the arrest of or in any manner whatsoever harassing the building contractor and his employees working in the applicant's building operations on his aforesaid plot in connection with such operations.

(f) the Respondent shall not be directed to pay the costs of this application only in the event of opposing the same.

(g) the Applicant shall not be granted such further and/or alternative relief as this Honourable Court may deem just.

2. That prayers 1(d) and (e) herein operate with immediate effect as an interim order."

On 5th November, 1990 the Respondents intimated their intention to oppose confirmation of the rule. Affidavits were duly filed by the parties. After several extensions of the

rule the matter was, on 21st November, 1991, placed before me for arguments

In as far as it is relevant, it is common cause that the applicant is the owner of site No. 25122-178 situated at Lisemeng in the Leribe Urban Area. On 15th September, 1989 he was issued with building permit No. 10/89 authorising him to develop the site. The permit reads, in part:

1. This permit is issued subject to full compliance with the requirements of:

   (a) The attached approved plans and any comments inscribed thereon; plans marked 10/89.

   (b) The attached specification of building materials. (specification incorporation in plans/attached).

2. Your attention is drawn to regulation 22 and 23 or Part IV of the Government Reserve Regulations reproduced over leaf. Any failure to build in accordance with all requirements will be penalised.

3. The validity of this permit will expire within ninety days of its date if building works are not commenced by that date and continued without unreasonable interruption until completed according to plan.

4. This permit is not valid unless the holder is already in possession of an approved document of final allotment of the site.

5. Neither the Government nor the Town/District Administrator incur any liability consequent upon the issue of this permit.

> The structural soundness and suitability of the building erected under the authority of this permit does not convey any authority to build in contravention of any law or by-law or in
>
> contravention of any building or development restriction, or any other restriction in the area in which the site is situated..."

In his affidavits the applicant averred that following the issue of the building permit he engaged a building contractor, Jacob Monokoane, who commenced building operation on or about 22nd September, 1989. However, the work did not progress fast enough because there were some delays in the delivery of good and uncommon face bricks which he had to order from the Republic of South Africa.

In their answering affidavit which was deponed to by the 1st Respondent, the Respondents merely stated that the applicant's averments above were not within their knowledge. The Respondents cannot, in my judgment, be allowed to state that the applicant's averments are not within their knowledge and then rest. If they denied the applicant's averments and wanted him to furnish proof thereof the Respondents must, in their answering affidavit, clearly aver so. In the absence of any such averment the Respondents' answering affidavit is ambiguous in as much as it can imply either that the applicant's averments are not disputed and there is, therefore, no need to furnish proof, or are disputed and there is, therefore, the need for proof, thereof.

Be that as it may, Jacob Monokoane, did depone to an affidavit in which he supported the applicant in his averments. Even if, in their answering affidavit the Respondents denied the applicant's averments and wanted proof thereof, it seems to me reasonable to accept as the truth the latter's averments supported by Jacob Monokoane and reject as false the former's unsupported denial thereof.

It is common cause that some time in February, 1990, the 1st Respondent accompanied by a public health inspector, called at site No. 25122-178 and found the construction works in progress. It was alleged by the 1st Respondent's party that the foundations of applicant's building were extending too close to the edges of the site's boundaries thereby leaving no sufficient room for a sceptic tank and canopy. The applicant
denied the allegation. There was, therefore, a dispute between the applicant and the 1st Respondent as to whether or not the foundations extended to the edge of the site leaving no room for sceptic tank and canopy. In order to resolve the dispute, it was suggested that an architect or a surveyor be found to give a final say on the matter. That was admittedly never done and the applicant continued with his building operations.

In the contention of the applicant the onus was on the

1st Respondent to find the architect or surveyor who would settle their dispute. This contention is, however, denied by the Respondents according to whom it was the duty of the applicant to do so.

It must be borne in mind that it was the 1st Respondent's party who alleged that the foundations of the applicant's building were extending to the edge of the site leaving no room for a sceptic tank or canopy. The applicant denied the allegations. As I see it, the legal principle is that he who alleges bears the onus of proof. That being so, it was, in my finding, incumbent upon the 1st Respondent, and not the applicant, to prove the allegations he had made viz. that the foundations were, in fact, extending to the edge of the site leaving no sufficient room for the sceptic tank and canopy. To hold the contrary would imply that the applicant had to prove the negative which is unheard of in our legal system.

It is further common cause that following the dispute between the 1st Respondent and the applicant about the correctness or otherwise of the foundations on site 25122-178 the former addressed, to the latter, a letter dated 6th March, 1990 in which he directed that the development works on the site should stop. Firstly because the building permit No. 10/89 issued on 15th September, 1989 had expired and Secondly because in February 1990 it was pointed out to the applicant

that he had dug the foundations to the edge of the site allowing no room for the sceptic tank and canopy. The letter added that the building permit was suspended in February, 1990, a fact which is, however, disputed by the applicant. The contents of the 1st Respondent's letter of 6th March, 1990 were admittedly ignored by the applicant who continued with his development works on the site.

As regards the first ground on which the 1st Respondent directed the applicant to stop the development works on site 25122-178 viz. that the building permit No. 10/89 had expired it is to be observed that condition 3 of the permit provides:

> "3. The validity of this permit will expire within ninety days of its date if building works are not commenced by that date, and continued without unreasonable interruption until completed according to plain."

A proper reading of the above cited condition 3 of permit No. 10/89 issued to the applicant on 15th September, 1989 clearly stipulates that the permit will expire only on two grounds viz. if the applicant did not start building within 90 days from 15 September, 1989 or if he started building within 90 days from the 15th September, 1989, the applicant unreasonably interrupted the building operations.

In the present case the applicant started building on 22nd September, 1989 well before the 90 days of his permit had

expired. Surely the permit could not expire on the ground that he did not commence building operations within the 90 days of the issuance of his permit.

Once the applicant had commenced development works within 90 days of the issuance of his permit the validity of the permit could not expire simply because the development works had not been completed at the end of the 90 days. The validity of the permit had to continue beyond the 90 days unless, of course, it could be demonstrated that the applicant had, during or after the period of 90 days, unreasonably interrupted the development works.

The applicant has alleged, in his affidavits, that there was interruption, in the building operations, caused by some delays in the delivery of the face bricks he had to order from the Republic of South Africa for the erection of his building. As it has been pointed out earlier in this judgment, the allegation was not disputed y the Respondents who merely contended themselves with saying the averment was not within their knowledge. Assuming the correctness of the applicant's averment that the interruption in the building works was the result of the delays in the delivery of the special type of face bricks he had to order from the Republic of South africa, it seems to me such interruption was not within his control. It cannot, therefore, be said to be unreasonable, even by any

stretch of imagination. In the circumstances the applicant's building permit cannot have expired even after the 90 days of its issuance had passed.

As regards the second ground on which the 1st Respondent directed the applicant to stop the building operations on site 25122-178 viz. that the foundations were dug to the edges of the site leaving no room for the sceptic tank and canopy I have already stated that the applicant denied the correctness of this allegation. It was the duty of the 1st Respondent as the person who had made the allegation to prove it on a preponderance of probabilities. He had, in my finding, failed to do so.

As it has already been pointed out earlier, the applicant denied the allegation made by the 1st Respondent viz. that in February, 1990 the latter suspended his building permit No. 10/89. The court has, therefore, the word of the 1st Respondent against that of the applicant on this issue. It is, however, clear that if, at all, the 1st Respondent did tell the applicant that his building permit was being suspended he did so on the basis of his controversial allegation that the applicant had dug the foundations to the edge of the site leaving no room for a sceptic tank and canopy. Assuming the correctness of my finding that he bore the <u>onus</u> of proof of that allegation and had failed to

discharge satisfactorily the onus that vested in him, it stands to reason that in suspending the applicant's building permit, as he did, the 1st Respondent acted without justification. if the grounds on which the applicant was directed to stop the building operations on his site No. 25122-178 could not be justified, it necessarily follows that the directive contained in the 1st Respondent's letter of 6th March, 1990 was null and void and of no legal force. The applicant had, therefore, no legal obligation to comply with such directive.

It is common cause that on 3rd July, 1990 the 1st Respondent addressed another letter to the applicant. the letter reads, in part:

> "You have been made aware of your contravention of Government Reserves Regulations Section 1 and 2 of Part VI.
>
> On the strength of Government Reserves Regulations I give you notice to bring down the construction on the said site at your expense within 14 days from the date of this letter.
>
> Sincerely yours
>
> Sgd
>
> District Secretary."

Proper, reading of the above cited letter leaves no doubt in my mind that under para 2 thereof the 1st Respondent purportedly derived the power to notify applicant to demolish his building on the strength of the allegation contained in para 1 viz. that the latter had been made aware of his contravention of Government Reserves Regulations section 1 and

2 of Part VI. It is, however, significant to observe that Part VI of the Government Reserves Regulations 1941 (Vol. I of the Laws of Basutoland - 1960 ED p. 343 at P.355) deals with Government Reserve Headman. It has nothing to do with either development or demolition of sites and consists of regulations 45 to 48. It has no "section 1 and 2" at all. As it stands the first paragraph of the above cited letter makes no sense. The applicant simply could not have been made aware of contravening non-existent sections of Part VI of Government Reserves Regulations (1941). Para 1 of the letter did not, therefore, empower the 1st Respondent to notify the applicant as he did under para 2.

In his affidavits the applicant averred that when he received the above cited letter he was convinced that the 1st Respondent was up to chasing him for no good reasons. He, therefore, continued with his development works on the site. I am unable to blame him for the impression he had about this letter.

However, on 22nd October, 1990 the Leribe police came to site No. 25122-178, arrested some of the men working on the site and locked them in a cell on the allegation that they were carrying out building operations without a permit. The men were, however, released on 23rd October, 1990. According to the applicant the men together with the contractor, Jacob

Monokoane, were subsequently afraid to continue work on the site. Hence this application for an order as aforesaid.

From the foregoing, it is obvious that the view that I take is that applicant has made a case for the relief he is asking for. I would, in the circumstances, confirm the rule that was granted on 30th October, 1990.

B.K. MOLAI
JUDGE
3rd December, 1991.

For Applicant : Mr. Mafisa
For Applicant : Mr. Putsoane.