IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

Case No: C of A (CIV) 17/1998

In the matter between:

THE MINISTER OF TOURISM, SPORTS AND CULTURE	**First Appellant**
THE CHAIRMAN OF THE CASINO BOARD	**Second Appellant**
THE COMMISSIONER OF POLICE	**Third Appellant**
THE ATTORNEY-GENERAL	**Fourth Appellant**

and

LESOTHO HOTELS INTERNATIONAL (PTY) LTD t/a VICTORIA HOTEL, SENQU HOTEL AND MOLIMO NTHUSE HOTEL	**First Respondent**
LESOTHO HOTELS INTERNATIONAL (PTY) LIMITED	**Second Respondent**
SEKEKETE LIQUARAMA (PTY) LTD t/a SEKEKETE HOTEL	**Third Respondent**
GOLDEN HOTEL	**Fourth Respondent**
CROCODILE INN HOTEL (PTY) LTD	**Fifth Respondent**

JUDGMENT

Date of hearing: 29 July 1998

Date of judgment: 31 July 1998

GAUNTLETT, JA

On 25 February 1998, Lehohla, J handed down a judgment in terms of which he dismissed an application for various interdicts and a declaratory order instituted by the first respondent in the present matter against the appellants before us in the present case. That judgment has formed the subject of an appeal under case no. C of A (CIV) 18/1998, which we heard on the same day as the present appeal, and in which we have just handed down a judgment dismissing the appeal. The two matters are linked, in an essential respect explained below.

The present appeal arises from an application brought as a matter of urgency for an order declaring that the present respondents (applicants in the court below) were entitled in terms of section 38(2) of the Casino Order 4 of 1989 to "**forthwith conduct slot machine operations**". In addition, an order was sought that the second appellant be ordered forthwith to convene a casino board meeting to issue the necessary licence documents to the respondents in respect of slot machine operations in the hotels concerned, subject to any conditions regarding security, deposits or conditions regarding the manner of operation, alternatively to issue the licences on such conditions as might be appropriate in terms of section 10(2) and

(3) of order 4 of 1989. In the alternative, an order was sought that the second appellant forthwith consider the respondents' licence applications in respect of the hotels concerned.

Meanwhile, pending finalisation of the application, an order was sought declaring the remaining respondents entitled to conduct slot machine operations at the Senqu Hotel, the Golden Hotel, Molimo-Nthuse and the Crocodile Inn, while an interim order was also sought interdicting the appellants from interfering with the respondents' slot machines pending the finalisation of the application and any consequential steps the court might direct.

Other orders sought were that the respondents and their employees should not be charged or arrested pending the finalisation of the application and any consequential steps, on the basis that unlicensed slot machine operations were being conducted through any of the hotels, while the third appellant was to return to the respondents all slot machines seized from Lerib Hotel, Molimo Nthuse Hotel and Crocodile Inn.

The hearing of the application was evidently attended by some confusion. After an interlocutory order without relevance to this appeal had been made by Monopathi, J, the matter was heard (on short notice) by Maqutu, J. He had understood from the parties that the facts were common cause, but initial argument

soon established this to be incorrect. He advised the parties to endeavour

"to come together to determine among themselves where the truth lay. As I had not read the papers carefully, I was beginning to fail to follow what was going on. There were too many contradictions. What on the papers appeared to have been omissions might not be omissions. This application (at places) also seemed to cover the same ground as what was before Lehohla, J in CIV/APN 18/1998. I indicated to the parties that they are obliged to clarify the scope of that application and this one".

The matter was postponed for this purpose. It was not realised. Maqutu, J **"then proceeded with the application as if nothing had happened".**

The kernel of the application appears to have been the contention by the respondents that the relief was unaffected by the failure of the earlier application before Lehohla, J (although they sought an order from Maqutu, J staying the effect of Lehohla, J's judgment, which Maqutu, J dismissed *in limine*), and that they were entitled to continue operating slot machines at their hotel premises pending consideration of applications for licences.

In a lengthy judgment, Maqutu, J dealt with the grant of purported authorisations by then Minister Mokone in circumstances which formed the subject matter of debate in CIV/APN/18/1998. Maqutu, J noted that he could not **"say with certainty what was going on in that application"**, apparently **"because I do not have the proceedings in CIV/APN/18/98"**. He however noted, in relation to the

authorisations, that he was "**just as critical about them as Lehohla, J. I am particularly worried by the date of their issue**" (a reference to the fact that this had happened after the holding of general elections, and a matter of hours before the assumption of office by a new government). Despite this observation, Maqutu, J chose "**to follow Lehohla, J's beaten track and assume those authorisations are valid**".

Two fundamental questions appear to arise. Was the court below correct in making this assumption (as it happens, that is not at all the track Lehohla, J had followed; the court *a quo* appears (as noted above) not to have had the assistance of access to the record in CIV18/98) ? If not, was there a proper basis for the relief sought ? If the assumption was correctly made, was the court in any event correct in granting the relief it ultimately accorded the respondents ?

In my view, the court *a quo* was not entitled to make the assumption that the "**authorisations**" were valid. Their validity was hotly in issue on the papers. By the time the application was ultimately fully heard in the court below, full sets of affidavits had been filed, and the matter was no longer being heard on a purely interim basis, as the notice of motion had originally envisaged. In these circumstances the trite rule applicable to disputes of fact in motion proceedings had application: a matter with which we deal at greater length in our judgment in C of A (CIV) 18/1998. In these circumstances, the warning by the then president of

this court in Ramahata v Ramahata C of A (CIV) 8/1986 at p 4 has particular application:

"It must be emphasized that there are severe limitations on deciding disputed issues of fact on affidavit: see Plasco-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A). This is not the only case on this session's roll where a judge of the High Court has shown too great a readiness to decide disputed factual issues on affidavit. The limitations to which I have referred are based on long, and sometimes unhappy, experience. As it is often put, it is not for a court to decide which typewriter to believe".

It is unfortunate that it has since been necessary to reiterate this as a fundamental rule, and to warn of the consequences of a disregard for it (see Supreme Furnishers (Pty) Ltd v Molapo C of A (CIV) 13 1995 at 6; Sykes v Lethole C of A (CIV) 35 of 1996 at 4).

In the learned judge's own words, there were indeed **"too many contradictions"**. The correct course was not to postpone the matter, for the adversaries **"to determine among themselves where the truth lay"**, but for the court *a quo* to apply the rule intended to enable it to discharge its own duty in that regard.

What is now to be done ? It is,**"a salutary general rule [but not] an inflexible one"** that an application to refer a matter to evidence should be made at the outset and not after argument on the merits (Kalil v Decotex (Pty) Ltd 1988 (1) SA 943D-F, per Corbett, JA, and authorities there collected). As Didcott, J put it in Hymie

Tucker Finance Co (Pty) Ltd v Alloyex (Pty) Ltd **1981 (4) SA 175 (N) at 179D** (and a passage expressly approved in **Kalil's case at 981F):**

"One can conceive of cases on the other hand, exceptional perhaps,....when to ask the court to decide the issues without oral evidence if it can, and to permit such if it cannot, may be more convenient to it as well as the litigants. Much depends on the particular inquiry and its scope".

I have no doubt that the present is not such an exceptional case. The course adopted by the respondents in pressing on regardless, despite so serious and fundamental a dispute of fact, has caused no little inconvenience not only to the parties but to the courts. This was not an instance in which a consideration of convenience was served by pressing ahead in the way the respondents did. The respondents themselves (or some of them) had been the appellants in the appeal(s) to the Minister which they had asserted. When their discovery application in CIV 18/98 failed, but the Attorney-General's opinion suggested that appeals had in fact taken place, that was the time to seek a referral to oral evidence.

In these circumstances, **"this court, exercising the discretion which was vested in the court *a quo*" (Kalil's case at 982D)** should not remit the matter to the court below for the hearing of *vive voca* evidence. I would add in this regard that while it is open to the court to adopt such a course *mero motu*, it is not without significance that course is both strenuously resisted by the appellants, and not the subject of a substantive and timeous application by the respondents themselves.

As a result, the court *a quo* erred in approaching the matter on the basis of an "assumption" as to the existence of valid authorisations and there is accordingly no substratum for the relief it granted, apart from that encompassed by paragraph 2 of the notice of motion (paragraph (b) of the order made by Maqutu J).

That relief is in essence a mandamus, directing that the respondents' applications for licences be considered by the second appellant. The respondents' argument before us amounts to this. They had concluded agreements permitting the operation of slot machines at three hotels for unspecified periods. These agreements were concluded outside the ambit of the Casino Act, 1969 or any other statute. The agreements conferred rights which were saved by the provisions of section 38 (2) of the Casino Order, 1989.

I am unable to agree.

Section 38 (2) of the 1989 Order deals indeed with savings. But it does so consequentially upon sub-section (1), which repeals the 1969 Act. It is hard to imagine that the savings intended by sub-section (2) should apply to subsisting rights other than those conferred or at least permitted under the statutory regime created by the 1969 Act.

More fundamental, however, is the fact that the savings allowed by section 38 (2) is

limited to rights or liabilities arising "under any agreement relating to the operation of a casino in Lesotho" (my emphasis). "Casino" is defined in the 1989 Order as meaning "the specific area in premises in respect of which a casino licence is in force and includes gambling rooms in a hotel" (my emphasis). It is not in issue that the respondents had no such licences.

The respondents' counsel sought to meet this difficulty by reference to section 38 (3). But this does not assist his argument. It is a deeming provision predicated upon the claimant qualifying under sub-section (2) (i.e., a person with an existing casino licence). It refers specifically to such a person having a deemed licence (under the 1989 Order) "in respect of each casino operated by it immediately before the commencement of this Order". By ordinary rule of statutory interpretation that indicates a lawful casino operation which in turn predicates an existing casino licence.

In these circumstances it is unnecessary to decide whether in any event the agreements on which the respondents rely were an ineffective contractual act in conflict with the common law and the 1969 Act, as opposed to a public law act authorised by statute (as to which see **Dilokong Chrome Mines Ltd v Director-General 1992 (4) SA 1 (A))**, and whether (as the appellants argued) the agreements have been validly terminated. We make no finding in either respect.

I accordingly conclude that the agreements on which the respondents rely did not survive

the commencement of the 1989 Order.

The respondents' counsel rightly conceded that the claim to licences is predicated upon valid extant authorisations or agreements. That being so, the respondents have no claim to a mandamus in the terms sought once they failed to establish on the papers valid agreements or authorisations.

The appeal is allowed with costs, including the costs of the application to lead further evidence, and in both instances including the costs of two counsel. The orders made by the court *a quo* are set aside, and the respondents are directed to pay the costs of those proceedings, and in both instances the costs of two counsel. Both costs orders are made against the respondents jointly and severally, the one paying the others to be absolved.

J.J. GAUNTLETT
JUDGE OF APPEAL

I agree

J. BROWDE
JUDGE OF APPEAL

I agree

R.N. LEON
JUDGE OF APPEAL

Delivered at Maseru on this 31st day of July 1998