CIV/APN/309/2000

IN THE HIGH COURT OF LESOTHO

In the matter between

MASERU CITY COUNCIL **APPLICANT**

and

DLAMINI HOLDINGS **RESPONDENT**

JUDGMENT

Delivered by the Honourable Mr. Justice M.M. Ramodibedi
On the 12th day of December 2000

It will no doubt be convenient if I start this judgment by stating at the outset that the instant application which is brought on a certificate of urgency and which principally involves an interdict is flawed in many ways than one as will become clear in the course of this judgment. Suffice it to say at the outset that there are no averments in the founding affidavit to set out the basic facts such as the *locus standi* and full particulars and identity of the Applicant as well as whether it has a clear right to sue. Indeed no attempt is made to describe the Applicant at all and to show that it is capable

of suing or being sued in its own name. The founding affidavit is indeed so shockingly sketchy and lacking in essential detail that it must reflect badly on the legal practitioner who drafted it and in that regard it is convenient , I think, to reproduce it in full. It simply reads:-

"I the undersigned,

PAUL 'MATLI QOBO

Do hereby make oath and say,

-1-

I am the Town Clerk and Chief Executive of Maseru city Council currently appointed as an Interim Town Clerk in terms of the urban government Act of 1983.

-2-

Facts deposed to herein are within my personal knowledge and are, unless the context otherwise indicates, to the best of my belief and recollection true and correct.

-3-

The respondent is a certain Company called DLAMINI HOLDINGS (PTY) LTD belonging to one Mr. Makhoza Dlamini of Lithabaneng Ha Keiso Maseru District.

-4-

I aver that around the end of July or thereabout the Respondent started digging trenches within the road reserve area at Lekhaloaneng next to the Thamae / Lekhaloaneng robots.

-5-

I aver also that the Respondent does not have a planning permit, a building permit or a lease for this particular area it is developing.

-6-

This is unacceptable and contrary to the laws of this land: One cannot just grab vacant (sic). Land and use it the way he pleases.

-7-

Despite the fact that the building authority reprimanded Dlamini Holdings by the letter of the 4th of August, 2000 and the roads Branch also did the same on the 10th August, 2000 the Respondent is still continuing to carry on with the works on (sic) this area. (See annexure marked MC1 and MC2).

-8-

I am making this affidavit in support of the prayers outlined in the notice of motion.

Signed

DEPONENT".

Predictably the Respondent has raised the following points in limine, *inter alia* (in view of the conclusion at which I have arrived hereunder it is strictly not necessary to traverse all the points):-

(1) lack of urgency shown in the affidavit;

(2) dispute of fact relating to the alleged digging of trenches at the time of the application;

(3) lack of clear right shown for an interdict.

At the hearing of the matter before me on the 7th November 2000 I directed that the points in limine be argued together with the merits of the application more especially as the point relating to a clear right in effect involves the merits of an application for an interdict in the normal course of events. It is an essential requisite which must be established before an interdict may be granted.

See the leading case of *Setlogelo v Setlogelo 1914 A.D. 221* at p 227.

Lack of urgency

As is apparent from the founding affidavit no attempt was made at all to show that the application was one that called for urgent relief. This, it must be said, is in total disregard of the peremptory provisions of Rule 8 (22) (b) of the High Court Rules which provides as follows:-

> "In any petition or affidavit filed in support of an urgent application, the applicant shall set forth in detail the circumstances which he avers render the application urgent and also the reasons why he claims that he could not be afforded substantial relief in an (sic) hearing in due course if the periods presented by this Rule were followed."

It follows from a proper reading of the above quoted Rule that the Applicant in an urgent application is obliged to disclose in his founding affidavit the circumstances upon which he relies as rendering the application urgent and also the reasons why he claims he cannot be afforded substantial redress at a hearing in due course. This was not done and I consider that in the particular circumstances of the case the omission must be fatal. The Rule was in my view clearly abused. On this ground alone this application stands to be dismissed.

The Applicant must count itself lucky that it fortuitously managed to obtain a *Rule Nisi* or an *ex parte* order at all in the first place on such sketchy and/or indeed totally inadequate papers as these. In the process the Applicant was unfairly allowed to jump the queue of litigants awaiting disposal of their cases. Thus I perceive prejudice in a number of ways.

Dispute of fact

I deal next with the point relating to a dispute of fact about whether the Respondent was digging trenches as the Applicant alleges at the time when the application was launched. It will be recalled that this allegation is contained in paragraphs 4 and 7 of the founding affidavit of Paul 'Matli Qobo as fully set out above. Now that allegation is hotly disputed in paragraphs 6 and 8 of the opposing affidavit of Makhoza Malunga Dlamini who avers that by the time the application was launched the digging of the trenches had "long ceased" or stopped in July 2000.

Instead of addressing issuably the Respondent's averment that the digging had long ceased at the time of the launching of the application the Applicant merely stated the following in paragraph 2 of the replying affidavit of Paul 'Matli Qobo:-

"If the digging of trenches or works on the site had long ceased why is this application being opposed?"

I have thus come to the conclusion that the Respondent's averment in this regard is not seriously disputed and I accordingly proceed on the basis of the correctness thereof. There is a wealth of authority in support of this approach.

See for example *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) SA 623 A.D. at 634-635.

National University of Lesotho Students Union v National University of Lesotho and Others 1993-1994 LLR-LB 87 at p. 108.

Supreme Furnishers (Pty) Ltd. & Another v Letlafuoa Hlasoa Molapo 1995-1996 LLR-LB 377 at p. 381.

Having arrived at the conclusion that by the time the application was launched the Respondent had long ceased or stopped the trenches as I hereby do the question therefore becomes: was the Applicant justified in bringing the application at the time when it did and more so on the basis of urgency? In my view the answer must be in the negative. On this ground alone the application falls to be dismissed.

Clear right

Now the requisites of an interdict as stated in *Setlogelo v Setlogelo*, supra, per Innes J.A., at p. 227 are a clear right, injury actually committed or reasonably apprehended , and the absence of similar protection by another ordinary remedy.

As I read the sketchy founding affidavit of Paul 'Matli Qobo I am driven to the inevitable conclusion that no attempt was made to establish the Applicant's clear right for an interdict. The result is that the Applicant, in my view, has not discharged the onus of establishing its entitlement for an interdict by virtue of its failure to show that it has a clear right.

Mr. Mohlomi for the Applicant has argued the case before me apparently on the assumption that the Court knows the jurisdictional limits of the Applicant. That is not a correct approach. Being a creature of statute the onus is obviously on the Applicant to prove the extent of its area of jurisdiction. That can never be the task of the Court and even though I was referred to Legal Notice No.76 of 1987 which defines the area of jurisdiction of the Applicant nowhere is mention made in the Legal Notice about the area where the trenches were dug namely Lekhaloaneng.

It must be noted that the Legal Notice No. 76 of 1987 referred to above was itself passed in exercise of the powers conferred on the Minister of Local Government by Section 4 (1) (c) of the Urban Government Act 1983 which reads as follows:-

> "4 (1) Subject to this section, the Minister may, by notice in the Gazette -
>
> (a) .....
> (b) .....
> (c) define the boundaries of any municipality and alter such boundaries."

It is clear, in my view therefore, that a municipality cannot claim jurisdiction over the whole country but is confined to boundaries defined by the Minister. Accordingly it is salutary, in my view, for a party claiming jurisdiction in a municipality to establish that it falls within the area defined as such by the Minister. This the Applicant failed to do. I consider that this is fatal in the circumstances of this case.

Although it is strictly not necessary to go further, it is nevertheless useful to point out that planning and building permits are governed by the Town and Country Planning Act 1980. In this regard, although the Applicant complains that the Respondent does

not have a planning permit, a building permit or lease for the area in question it must be noted that the Town and Country Planning Act 1980 only applies to an area designated by the Minister by notice in the Gazette. This is so in terms of Section 2 of the Act which provides as follows:-

> "2 This Act shall apply to any area designated by the Minister by notice in the Gazette." (Emphasis added).

Now as I read the founding affidavit of Paul 'Matli Qobo as fully set out above, I can find nothing even remotely suggesting that the area of Lekhaloaneng was designated by the Minister for the purposes of town and country planning within the meaning of the Town and Country Planning Act 1980.

Regarding the Applicant's *locus standi* to deal with town and country planning issues reliance was made in argument before me on legal notice No. 53 of 1994 which was issued by the acting Commissioner of Lands in his capacity as the Planning Authority in the following terms:-

"LEGAL NOTICE NO. 53 OF 1994

Delegation of Development Control Functions
to the Maseru City Council Notice 1994

Pursuant to section 11(4) of the Town and Country Planning Act 1980, I

QHOBELA SELEBALO

acting Commissioner of Lands hereby delegate to Maseru City Council my functions under section 11(1) of the Act within the gazetted Maseru Planning Area. These functions consist of power to grant plannig (sic) permission for the development of land within the designated Planning area or refuse consent.

The powers are granted subject to the condition that a computerized planning register be maintained.

Qhobela Selebalo
Acting Commissioner of Lands."

I have underlined the words "within the gazetted Maseru Planning Area" to indicate my view that the delegation that was conferred on the Applicant was confined to the "gazetted" Maseru Planning Area. It was not an unlimited delegation covering the whole country. Accordingly it was imperative for the Applicant to show in its papers that the disputed area fell within the gazetted Maseru Planning Area and hence under its jurisdiction.

Similarly Section 18(1) of the Building Control Act 1995 on which the Applicant further sought to rely is of no assistance to it in the absence of proof of jurisdiction as fully set out above. That section reads as follows:-

> "18 (1) No person shall, without the prior approval in writing of the building authority in question, commence any building."

Section 11 of the Act in turn defines the term "building authority" in the following words:-

> "11. (1) The Minister may, by notice in the Gazette, appoint as a building authority in relation to an area,
>
> (a) any local authority; or
> (b) where there is no local authority, any department of Government or any commission.
>
> (2) The notice of appointment referred to in subsection (1) shall also specify,
>
> (a) the areas of jurisdiction for each building authority;

(b) the powers of building authorities to make building bye-laws, which shall not be inconsistent with regulations made under section 39; and

(c) the powers which the Minister may decide not to delegate to prescribe building authorities."

Apart from the fact that the Applicant has failed to show in the founding affidavit of Paul 'Matli Qobo that it has been appointed by the Minister as a building authority at all it has also significantly failed to show that the disputed area falls within the area of jurisdiction for the building authority in question. All this goes to show, in my judgment, that the Applicant failed to establish a clear right for an interdict in the matter. Regrettably this failure to appreciate the legal principle involved in a matter of this nature namely an interdict is a reflection upon the Applicant's counsel himself who has made the following startling submission in paragraph 2.5 of his Heads of Argument:-

"The establishment of a so called "clear right" is irrelevant in these proceedings."

With respect to counsel I am constrained to say that nothing can be further from the truth. The establishment of a clear right is a prerequisite for entitlement to an interdict and anyone who ignores this principle does so at his own peril as the Applicant and its counsel are about to discover.

Weighing all of the aforegoing considerations I have come to the conclusion that the application cannot succeed and it is accordingly dismissed. The Rule is discharged with costs.

M.M. RAMODIBEDI
JUDGE
12th December, 2000

For the Applicant : Mr. Mohlomi

For the Respondent: Mr. Mphalane