

CIV/APN/191/99
CIV/APN/270/99
IN THE HIGH COURT OF LESOTHO

In the matter between:-

AFRICAN OXYGEN LIMITED	APPLICANT
AND	
S T M MARKETING AND AGENCIES LIMITED	1ST RESPONDENT
MR SELAI MOKETE	2ND RESPONDENT

JUDGMENT

Delivered by the Honourable Mrs Justice K. J. Guni on the 7th day of April, 2000.

By consent, these two applications, were heard together. The facts in both applications are exactly the same, because the same application was resubmitted for the reasons given by the applicant. The legal issues raised, apply to and must be determined in the light of those facts.

The applicant, as shown in paragraph 2 of the Founding Affidavit, is a South African Company. It is incorporated in the RSA, in accordance with the company law of that country. The applicant's registered office address is

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given as 20 Maarsdorp Street, Old Industrial Area, Bloemfontein, OFS, RSA.

The applicant carries on the business of supply, sale and distribution of Liquefied Petroleum Gas (hereinafter referred to as LPG) and related services. It is claimed, that the applicant has obtained, from the Ministry of Trade and Industry here in Lesotho, authority to trade as a wholesaler. To support this claim a copy of an expired Trader's Licence Certificate annexure "GP6" is attached to the replying affidavit.

The respondent, as shown at paragraph 9 of answering affidavit, is STM Marketing and Agencies (Pty) Limited. It is a company registered in terms of the Law of Lesotho. It carries on, by means of a specialised licence, the business of a distributor and wholesaler of ELF liquefied petroleum gas. ELFGas is distributed in Southern Africa by ELFGas Southern Africa (PTY) Limited of 13th Floor, Medlife Centre, Coen Steydtler Avenue, Cape Town in RSA. The respondent has a distributorship and dealership agreement with this ELFGas Southern Africa (Pty) Ltd.

These two parties are competitors in the market place for the sale of LPG. Applicant claims to hold the major share of the market in Lesotho for the sale and distribution of LPG. There are no grounds laid nor reason given for this claim. Although the applicant has no branch office or agency here in Lesotho, applicant claims to have a distribution network stretching across the entire country. There is no mention of what the applicant's network of distribution is made of e,g is it shops, depots, wholesales, etc????? The applicant has

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come to court to knip in the bud, the competition against it in the market here in Maseru. I say knip in the bud the competition because STM Marketing and Agencies (PTY) Limited started operations only in March 1999. Almost immediately, after the commencement of business by respondent the applicant came to court and obtained ex-parte orders restraining respondent from receiving (in exchange of its own full gas cylinders) any of the gas cylinders of the description given in the ex-parte order.

According to the applicant, there are numerous distributors of LPG in this country, but there are five main ones, including these two parties before court. The applicant has given full description of how the market in Lesotho is supplied with LPG contained in gas cylinders.

When a customer purchases LPG from any supplier or distributor for the first time, the customer pays a deposit plus sales tax in respect of the gas cylinder. That same cylinder nevertheless, always remains the property of that particular supplier - from whom the customer obtains it. The customer may then from time to time have that gas cylinder exchanged for another one which is filled with gas from any supplier. The customer is not compelled to return or to patronise the first supplier from whom the customer obtained that gas cylinder for future and further purchases of gas (I suppose that is, to certain extent, the respect of the customers' right of the freedom of choice. This applicant does not share this sentiment as appears in the prayers made in these applications and ex-parte orders obtained). The applicant, went on to explain the practice presumably from its experience.

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It is said that, suppliers seldom refill their own empty gas cylinder presented for the purchase of gas by the customer. It is unlawful to fill or refill the gas cylinders of other suppliers. Section 13(2) Legal Notice No.90 of 1997. For the efficient running of that kind of business (i.e distribution and sale of gas) the suppliers agreed amongst themselves and established that trade custom practice of exchange of cylinders. The empty cylinder may be exchanged for the full one. As a result all suppliers are free to exchange cylinders of any and all trade marks of any and all other suppliers. Each supplier regains possession of its gas cylinder through an established trade custom practice of exchange of cylinders. According to the applicant this agreed trade custom practice, has been going on for some time. Whenever any supplier is in possession of gas cylinders belonging to another supplier, it will return those cylinders to that supplier and receive in exchange its own cylinders which are in the possession of that other supplier. In any cylinders exchange exercise, if the numbers of cylinders do not match, the recipient of the greater number will pay that standard deposit on the extra numbers of cylinders received.

Respondent agrees with the applicant completely on this description of the trade practice. The respondent has gone further by showing this court, that both parties are in fact, active participants in that trade custom practice. Respondent has even given specific dates when the trade custom practice of exchange of cylinders took place between the applicant and respondent.

Applicant alleges that there are unscrupulous distributors who take advantage of its own cylinder support, by using applicant's cylinders to supply LPG

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supplied by this applicant's competitors. It is claimed, without indicating by numbers or proving the same in any way, that this applicant, has the most cylinders in the field. It is further alleged, that the respondent makes use of the applicants cylinders to fill and sell their gas. There has been so far no evidence to support this allegation. Should a sufficient number of competitors (imagined) of this applicant make use of the applicant's cylinders to sell their LPG, damage to the applicant (imagined) would be immeasurable.

The applicant approached this court on an urgent basis and by ex-parte application alleging that the respondent unlawfully fills or refills applicants own gas cylinders and unlawfully competes with this applicant. It was further alleged, that the proof of the alleged unlawful filling by respondent of the applicant's gas cylinders came into applicant's possession during second half of April 1999. Applicant took steps to protect its rights on 8/5/99 by obtaining those ex-parte orders restraining the respondent from receiving in the normal way the gas cylinders described in those ex-parte orders.

The applicant does not say, how and where he obtained the proof of the alleged unlawful activities of the respondent, during half of April 1999. Annexures 3 and 4 attached to the founding affidavit are sworn statements made by two gentlemen described as directors and investigators employed by Private Detective Services. The impression made is that the applicant must have observed with its own "private eyes" the alleged unlawful filling of its cylinders by respondent. Those private eyes claim to have been at the business premises of the respondent on the 30th and the 31st March 1999.

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They had specific instruction to determine whether the respondent is dealing in Afrox LPG cylinders.

What did they do?

- 1) They bought gas at the respondent's business - handed-in the Afrox empty gas cylinders and received in exchange thereof full cylinders and in a normal way, they paid only for the contents.
- 2) The full cylinders, received by those private detectives, should have been those of the respondent. In accordance with the trade practice only ELF gas cylinders - are distributed by the respondent. The applicant's private eyes claim that, it was Afrox full gas cylinders which was placed by a black gas attendant of the respondent company, into their motor vehicle.

The two statements further indicate that a video recording was made prior, during and after the transaction. This video recording, was to be produced before the court, perhaps at the hearing of the confirmation of the ex-parte orders obtained by the applicant. There was no such production of any video tapes

Respondent denies that the two detectives were given by an attendant at the respondent's business premises a full Afrox gas cylinder.

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Respondent again denies that the video recording was done at its premises and therefore such video recording was irrelevant. Perhaps that is why applicant decided after all not to produce the said video tapes.

A number of points in limine have been raised by respondent.

LOCUS STANDI

A first point in limine raised on behalf of the respondent is with regard to the applicant's claim of right to use and therefore protect for its exclusive use only, the following brand names, Mobile, Engen, Caltex, Homegas, Sonap/Sonarep, Trek and Socony. Mr Parker for applicant, in his reply does not help applicant's case at all. He merely claims that applicant bought those business but, does not bother to attach any proof of the ownership as claimed by him. Curiously enough, he demands that respondent must produce prove of the denial that applicant does not own those business and therefore has no authority to claim protection for the applicant's exclusive use of those brand names. The allegation that this applicant own those brand names for its exclusive use, must be proved by the applicant. He who alleges must prove. *Vulcan Rubber Works (Pty) Ltd vs SAR and H 1958 (3) SA 285 (A)*.

The copy of an expired Trader's Licence Certificate attached to the replying affidavit, does not make any mention of those brand names as being for the exclusive use of this applicant. There is no mention at all of what the wholesaler so licenced trades in. There is no connection between the

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wholesale trader's licence issued, by the Ministry of Trade and Industry of Lesotho Government, to this applicant and its claim of ownership of Mobile, Engen, Caltex, Homegas etc, etc. The applicant has failed to prove that it owns those brand names.

DEFECTIVE PROCESS

Another point in limine raised concerns the irregularity of the Notice of Application in CIV/APN/270/99 filed on behalf of the applicant company. This application is not signed as required by the rules of this court. High Court Rules, Legal Notice No.9 of 1980 - [Rule 18(6)]. This rules reads as follows:-

"18(6) The summons shall be signed by the Registrar and the plaintiff's attorney or plaintiff personally and must disclose the attorney's address or plaintiff's address which must be within, five kilometres from the office of the Registrar at which he will accept service of all documents." [My underlining].

There are, however, names and addresses of attorneys of South Africa and of Lesotho. My observation is that the attorneys of this applicant, are De Buys Human, because it is clearly stated so on the papers.

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Harley and Morris appear to be only a local address which must be within five kilometres from the office of the Registrar at which the party will accept service of all documents. The applicant's attorney is clearly stated as De Buys Human. In terms of Rule 18 (6) he should be

the one who signed the application. He seemed to have had a problem of not having been admitted to practice as an attorney and to practice as such in the courts of Lesotho and of having no office here in Lesotho. It is stated nowhere in these papers that Harley and Morris are the attorneys of this applicant. Harley and Morris did not sign and they were not entitled to do so by the rules.

Rule 18 (6) must be read with rule 13 (1) High Court Rules (Legal Notice No.9 of 1980). The interpretation of "Action" is clearly shown as including application: that being so the application must be signed by the party or its attorney. As shown at page 353 B, signing of Notice of Motion, in Herbstein and Van Winsen. The CIVIL PRACTICE OF THE SUPREME COURT OF SOUTH AFRICA, FOURTH EDITION, the notice must be signed by an attorney issuing it whether the application is ex-parte or otherwise. The failure to sign this application by the attorneys issuing it created an irregularity. It is not a proper process to be before this court. On this point respondent must succeed. This, however, does not end this matter, because applicant resubmitted the same application which is heard together with the application in question.

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NON-DISCLOSURE

Respondent has shown in the answering affidavit deposed to by Mr Selai Mokete, that on 19th March 1999, 25th March 1999 and on the 20th April 1999, the trade customary exchange of cylinders did take place between these two parties. These averments, by Mr Selai Mokete are admitted by Mr Giles William Parker who deposed to both founding and replying affidavit on behalf of the applicant. It is very material that the very same deponent omitted to mention that these two parties participate fully in that trade customary exchange of cylinders. He further omitted to mention in the founding affidavit for the consideration of the court prior to the making of an ex-parte order that as recently as 20th April 1999 - only about (8) eight days prior to the launching of the first application, the applicant collected from the respondent's business premises three hundred and twenty eight (328) cylinders in accordance with that trade practice established amongst the suppliers such as these two parties. (As shown in annexure STM4 attached to the Answering Affidavit).

In motion proceedings, particularly when bringing an ex-parte application, in which relief is claimed against another party, the applicant must make full disclosure of all material and relevant facts, that might affect the granting or otherwise of an order ex-parte. Herbstein and Van Winsen The civil Practice of the Supreme Court of South Africa, Fourth Edition page 367.

Applicant alluded to the trade custom practice of exchange of cylinders generally. There was a need to give the court the true and proper attitude of

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the respondent as regards the trade custom practice of exchange of cylinders, more particularly because applicant had given this court a distinct (though erroneous and false) impression that the applicant is not able to regain possession of its own empty gas cylinders which are in the possession of this respondent, who, as alleged, fills them up with ELFGAS products for sale and distribution.

The applicant did not disclose that they (applicant and respondent) participate fully in the trade customary cylinder exchange. Had this fact been mentioned, there would have been no court order made compelling respondent to surrender to applicant any cylinders at all as the owners of those cylinders are free to regain them by participating in that trade customary exchange of cylinders whenever they so wish and wherever they are found. Failure to disclose in ex-parte application is very important and goes to the root of the matter as shown in *Herbstein and Van Winsen supra Judge Le Roux in Schlesinger vs Schlesinger 1979 (4) SA 342* at page 349, emphasised that importance of full disclosure of true facts. He went even further; after examining the relevant authorities on this point, he indicated that there is a clear duty on the applicant to disclose material facts which might affect the granting of the ex-parte order more particularly with regard to the respondent's attitude to the request made by applicant before court.

It has been established that suppression of true facts, is as bad as lying. Therefore courts, in the judicious exercise of their discretion, are entitled to discharge ex-parte orders obtained by applicant who withheld true facts or

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lied in order to obtain such order. *Schlesinger case cited above. Bank Orp Ltd vs Ridla 1993 (4) SA 276.*

The applicant did not only withhold true facts which would have indicated to this court clearly, the attitude of the respondent, but lied, that the respondent fills applicant's cylinders with ELFGas which is distributed by the respondent. Strangely enough applicant claimed that it distributes ELFGas and obtained the court order which even though respondent is ELFGas distributor it was restrained from receiving ELFGas cylinders which are, in fact respondent's own cylinders.

It was not only the withholding of true facts, there were also some false allegations. The applicant committed, in that way a double wrong [adding insult to an injury]. The court is therefore entitled, to discharge that rule nisi. Even if the applicant was to succeed on the merits of the application on this point alone this application must fail.

URGENCY

Another point in limine, which has been raised by the respondent is that of urgency. There was that trade custom practice of exchange of cylinders by the suppliers in order that each supplier regains possession of its cylinders. When ever the applicant wished to regain possession of its cylinders from the respondent, the applicant can and on three occasions actually did go to the business premises of the respondent and collected its own cylinders. This

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practice of exchange of cylinders has been carried out amicably by these two parties. While admitting that the exchanges of cylinders of 19th March, 25th March and 20th April 1999 did take place, applicant does not show the court in anyway, that on those three occasions of exchange, there were difficulties which necessitated the rushing to court urgently and by ex-parte application obtain an order to regain those cylinders.

The reasons given by the applicant for proceeding on an urgent application are that the respondent is filling applicant's gas cylinders with its own product and therefore making those cylinders unavailable for that trade custom exchange of cylinders. This allegation of filling applicant's cylinders with its ELFgas, is denied by respondent. Applicant failed to prove the same. Even though applicant claimed that it saw with its own "private eyes" (the affidavits of the two private detectives are referred), that the respondent has in its possession filled applicant's cylinders; No proof of that allegation was produced before court. A promise to make available to the court that video tapes - allegedly recorded by those detectives at the respondent's business premises or elsewhere, was never fulfilled. The respondent denied that there was any video recording by those detectives at his business premises. If there were video tapes, showing the refilling or filling of applicant's cylinders it was not done by or at the respondent's premises. The applicant decided not to produce the said video tape after all. There may have been no video tape after all. The reasons for the applicant's failure to prove those allegations that the respondent was committing unlawful acts are best known to this applicant only. They were not put before this court. The lack of scruples seems to

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characterise the applicant. Its main objective was to obtain that undeserved Rule Nisi. It is most unfortunate that the said Rule Nisi was obtained by deception.

The applicant, having seen with its private eyes, that there were its cylinders at the respondent's premises, and that those cylinders were filled and sealed, went to those premises on the 20th April 1999 prior to the launching of these applications and collected all its cylinders in a normal trade exchange practice. As shown on annexure STM4, they were all empty. The averments in the affidavits of the two detectives, to the effect that on the 30th 31st March, 1999 they saw filled and sealed applicant's cylinders at the respondent's premises, must be incorrect. Respondent has denied that such unlawful acts of filling other suppliers' cylinders are, committed by it. Even though the affidavits by the two detectives were sworn to on the 3rd April 1999, the applicant could not state the exact date on which the information, regarding the alleged unlawful acts committed by the respondent, reached it. Could it be safely presumed that by the time he reacted to that information, he had already on 20th April collected those cylinders of applicant which were seen by those two detectives? Their flabbier must have been so gusted when realising that the cylinders which they thought were filled were in fact empty.

Did applicant stop there and reconsider its steps whether or not there is a need to proceed urgently and obtain ex-parte order? This is very material because the fears expressed, and on the basis of which the ex-parte order was to be sought had disappeared. To proceed in the manner, this applicant did, in the

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light of these revelations, indicates bad faith.

This was to harass and embarrass respondent because applicant could still lawfully, obtain its own gas cylinders and did continuously manage to repossess its own cylinders. Obtaining by deception undeserved ex-parte order was merely to disrupt the business operations of the respondent. In the court order obtained the gas cylinders the respondent is ordered not to

receive in the usual exchange from customers, are those gas cylinders which belong to other suppliers whom the applicant though claiming to own them failed to prove its ownership. Applicant claimed to own ELFGas. ELFGas cylinders are part and parcel of the respondent company. In other words, respondent was being restrained from dealing with its own cylinders as this applicant had included them in the ex-parte order restraining applicant from receiving them from customers.

The urgency in the matter must be borne by the facts in that matter. The facts, of these applications show that any time the applicant could regain, if it so wished, its gas cylinders. There was no need even to come to court, let alone on urgent ex-parte applications. The point-in-limine on urgency was well taken and must succeed. On this point alone, when the lack of urgency was apparent to the applicant, who seemed to have been motivated by overwhelming malice the Rule Nisi must be discharged. It is abundantly clear, that there was in fact, no merit in these applications.

MALA FIDE

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Another issue raised, and which I intend to deal with at length because it has a great bearing on all other issues raised and the facts of both applications is that of Mala fide.. The applicant came to court to obtain by hook or crook, an order restraining the respondent finally and permanently from competing in the market for sale, supply and distribution of LPG. The Trade customary practice of cylinder exchange amongst the supplier was elaborately explained by applicant which shows that it knew its rights in that regard perfectly. In order to obtain my sympathy, (and I did feel sympathetic towards the applicant), lies were told. Deliberate and carefully calculated omission were made. It is a lie that the respondent fills or refills the applicant's cylinders with respondent's own LPG. It was a deliberate and carefully calculated omission to fail to mention that these two parties, participate fully, as often as anyone of them feels the need to do so, in that trade customary exchange of their cylinder. It was malicious to obtain by deception honerous and prejudicial interim order without notice to the respondent, more particularly, when recent exchanges had taken place and more exchanges could take place anytime as applicant wanted. Its detectives failed to determine that the respondent deals with Afrox cylinders. Following their (false) report, Afrox empty cylinders were in fact collected by applicant from the respondent. The applicant has nevertheless come to court to restrain the respondent from competing with it. The respondent is falsely accused of committing offences when in fact applicant is the person committing those offences alleged, falsely, against the respondent. The applicant has no branch offices and/or agencies so labelled here in Lesotho. Applicant makes use of distribution network. There is no mention as I have indicated earlier on of what this

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distribution network consists of e.g. shop, depots, wholesales etc. The respondent has alleged and produced a photograph to substantiate the allegation, that the unlawful acts of filling or refilling of cylinders belonging to another wholesaler, without that other wholesaler's consent, are committed by this applicant. On the 25th May 1999 it should be noted that by this date, the applicant had in its possession the ex-parte court order obtained on 8th May 1999. An observation was made by and photographs taken by the deponent of the answering affidavit, of the refilling or filling of the ELFGas cylinder owned by the respondent at the applicant's

depot at Teyateyaneng here in Lesotho. The applicant does not deny that the unlawful conduct photographed by the respondent at that Teyateyaneng Depot did take place. The denial relates to the name used, not the unlawful act. It is argued that the applicant uses a distribution network. That refilling of ELFgas cylinder by the applicant's LPG which is not denied, is for the benefit of the applicant. It is being done in the furtherance of the applicant's own business that of distributing and selling of its LPG. It is not claimed that applicant's distributor was refilling ELFgas cylinder with ELFgas LPG. Applicant actually uses these distribution network. If unlawful acts are committed by applicant's distributors, the liability for such acts must go to the supplier - applicant herein. The allegation that those distributors are refilling respondent's gas cylinders against applicant's policy, does not help this applicant's case. It is the applicant's duty to enforce its policy. The failure to enforce its own policy is still its responsibility and must be visited with liability for failing in its obligations to respect the law. Its distribution network is distributing on its behalf and for the furtherance of its business.

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When it comes to yet another brach of the law, that is, the unlawful removal from Lesotho of one wholesaler's cylinders by another competing wholesaler, the applicant who came to court and falsely accused the respondent of these unlawful acts, is the culprit. The unlawful removal from this Kingdom, of the respondent's cylinders, by this applicant, makes such cylinders unavailable for the respondent to repossess in the normal exchange of cylinders exercise. There is a well established principle, that a party who comes to court must come with clean hands. The applicant came to court with very dirty hands. No court order should have been put in such dirty hands. The law and the court in these application were being manipulated to afford protection to applicant who has no respect for the same. It was after obtaining the court orders granted on 8/5/99, and on 12th July 1999, that the applicant was now caught red handed breaking the law by the respondent. It was on the 25th May 1999 when the filling of ELFgas cylinder was photographed at one of the applicant's distributor networks. On the 30th June the truck load of ELFgas cylinders was observed and photographed at the Maseru border post crossing into south Africa against the specific statutory provision prohibiting such removal. Section 6(1) Legal Notice No. 93 of 1997 [Liquified Petroleum Gas (Trade and Handling) Regulations]. Whether or not the police were alerted is immaterial. The respondent's failure to report to police does not afford any good defence for applicant's unlawful acts. The respondent may have reported. The failure by the police to make arrest could be due to various reasons including corruption. Venturing into speculation why the applicant gets away with this criminal acts will not serve any useful purpose. There are serial murderers and rapists. When they are eventually caught they are brought to book. The truck

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which is loaded with the respondent's cylinders, in Annexure 'B' is that of the applicant. In the replying affidavit, Mr. Parker does not explain the reason for the removal of the respondent's cylinders. The truck is at the Maseru bridge between Lesotho and South Africa. That border post at Maseru, between South Africa and the Kingdom of Lesotho is a notorious place. The fact is the common knowledge which this court is entitled to take the judicial notice of. The applicant's attitude regarding the respect for the law, and its manipulation of courts, are clear indicators that it is very contemptuous of both. While in the process of committing offences the law and courts were used to tie the hands of law abiding citizens who are falsely being

accused of committing those crimes. The revelations, made on the return date of the Rule Nisi issued, indicated without a doubt, the bad faith with which this applicant acted. This applicant, should clean its hands by returning those cylinders which it unlawfully removed from this kingdom into Republic of South Africa. I strongly recommend to the licencing authority to ensure that the applicant is controlled to operate its business in terms of the laws of this Kingdom. The arrogance with which this applicant trample all over the laws of this country, demands his total exclusion from the continued operations of that business here in Lesotho.

This judgment and the photographs taken by the respondent and produced before this court must be placed before the Department of the Ministry of Trade and Industry which licenced this applicant company to operate its wholesaler business here in Lesotho. Cancellation of the applicant's licence must be seriously considered. The laws of this Kingdom must be respected by all who

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conduct their businesses on this land. Deliberate breaking of our laws by this applicant warrants cancellation and or denial of issue of licences to it to conduct that business here in Lesotho.

In the light of the conduct of the applicant in these two applications, its business tactics are not only unethical. They are unlawful. That kind of business should not be allowed in this Kingdom.

These unlawful activities together with the copy of this judgment must be handed to the relevant authorities to consider and take necessary steps.

COURT ORDER

- 1) Coming to court when there was no need and obtaining ex-parte order against respondent whose business activities were unduly and unfairly disrupted.
- 2) Seeking a final interdict by way of urgent ex-parte applicant when he was well aware that there will be material dispute, especially after those trade custom exchanges of cylinders, was the total abuse of the process -used when there is no need to do so, as the trade custom exchange exercise was being practised.

All these warrant costs at attorney and client scale.

Lesotho Teachers & Researchers Union vs Nul C of A No. 13/98 shows

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that even where such costs have not been asked for the court is entitled to show its displeasure by awarding such costs.

Both applications are dismissed with costs at attorney and client scale.

K. J. GUNI
JUDGE

7th April 2000

For Applicant:

For Respondent: