CCT/1/2001
CIV/APN/105/2001

IN THE HIGH COURT OF LESOTHO

In the matter between:

COMMISSIONER OF SALES TAX	1ST APPLICANT
PRINCIPAL SECRETARY MINISTRY OF FINANCE	2ND APPLICANT
ATTORNEY-GENERAL	3RD APPLICANT

and

MAGISTRATE'S BEREA (MR MURENZI)	1ST RESPONDENT
HAMID CASSIM ISSA t/a CA ISSA SUPERMARKET	2ND RESPONDENT

For Applicant : **Mr Motsieloa**
For Second Respondent : **Mr Mpaka**

REASONS FOR JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
on the 28th day of June 2001

I gave my decision in this matter on the 14th June 2001. My reasons now follow.

Applicant said he was owed sales tax by the Second Respondent to the tune of M130,000.00 which, despite demand, the Second Respondent refused to pay.

That was why he filed what the Applicants called a distress in terms of section 39 of Sales Act No. 14 of 1995.

The present matter had been an application for review of cases No. CC23/2001 and CC 35/2001 of the district of Berea whose nature will be discussed later. The matter had ended up being designated a commercial case. There was no need to say more about this. The said "distress" was levied and came into effect on the 30th January 2001 hence the Second Respondent rushed to Court as shown hereinafter though two court cases in the magistrate's Court of Berea being in the court of the First Respondent.

The record of proceedings before this Court had ended up being beautifully bound, indexed and paginated as a result of commendable work of Mr. Motsieloa for the Applicant. Indeed both Counsel had prepared heads of argument which assisted the Court to see through the maze of the history of the two matters. That the files of the two magistrate Court cases were not procured in terms of Rule 50 (1) of the Court was instantly pointed out by Mr Mpaka for the Second Respondent. As the Court realized, this was later not proved to be a completely correct observation. The magistrate's records had been brought down to the High Court registry but later disappeared. This did not however overly hamstring the Court's work.

Applicant pointed out defects in the procedures leading up to discharge of one of the cases. Reference was also made to the other matters which led to the need to call the records brought before this Court. It was correct that the applications had been brought *ex parte* before the magistrate and without notice. This resulted in the following order (in CC 23/2001) of the 31st day of January 2001 (see page 4 of the record) which the Applicant complained (in the present review application) that it flouted the elementary principle of natural justice. I realized that after I had halted argument by Counsel (midstream) that in fact that order nisi had as Mr. Motsieloa submitted been discharged on the 6th February 2001 as shown on page 67 of the record of proceedings before this Court. The order was as follows:

> "The application for discharge of the rule is granted and the Rule is discharged with costs."

This seemed to make sense (that there was discharge of the rule in CC 23/2001) when one looks at page 68 of the record where on or about the 12th February 2001 another (cc 35/2001) application was filed headed: In matter of *Ex parte* application for interdict and vandament (sic) van spolie." I would consider therefore that correctly speaking the application in CC 23/2001 could no longer be subject of this review as it had been deposed of.

I have to consider issues pertaining to application CC 35/01 which it

appeared to be common cause was pending when the review application was filed. This matter was indeed pending when one has regard to the *rule nisi* issued on the 31st January 2001 returnable on the 14th March 2001. (See page 82 of the record) I noted that while that rule in cc 35/2001 was to be returned the rule in CC 23/01 had been discharged on the 6th February 2001. If this was not a recipe for confusion I do not know what it would mean in the end. I did not understand why Mr. Mpaka explained the co-existence of the two applications and the discharge of the first by saying that the magistrate had felt that there was no longer any urgency. If so why was the rule not extended or left to lapse? Why would another application have to be filed during the pending of the other. The two applications were almost similar.

I must refer to the *rule nisi* in CC 35/2001 which had been attacked by the Applicant as having flouted the elementary principle of natural justice. At the same time one has to bear in mind and to see if there was substance in the criticism by the Applicant that Respondents' orders were intended to frustrate lawful process issued by Applicant in terms of the Sales Tax Act. Before doing that I must first invoke the definition of a *vandament van spolie* as a remedy. In this regard one has to rely on the longish definition by D Hutchison and Others in the 8th Edition of **Willes Principle of South African Law** at page 267 where the authors wrote:

" SPOLIATION ORDER

If a person has been deprived of possession by violence, fraud, stealth or some other illicit method, he may obtain from the court a mandament van spolie, or spoliation order, commanding the dispossessor to restore the possession to himself, the applicant. It is a fundamental principle that no man is allowed to take the law into his own hands. Consequently if a person without being authorized by a judicial decree, dispossesses another person the court, without inquiring into the merits of the dispute, will summarily grant an order for restoration of possession to the applicant, as soon as he has proved two facts; namely, that he was in possession, and that he was despoiled of possession by the respondent. The policy of the law is neatly summed up in the maxim, spoliatus ante ominia restituendus est.

The applicant must, or course, proved that he was in possession, and also that he was ousted illicitly from such possession. Dispossession, for example, does not amount to spoliation if it takes place in accordance with the law, for instance where cattle are impounded in terms of the Pound Law, or where stolen gold is taken and kept by the police department. But dispossession effected by a person exercising a statutory power in fraud of the law does amount to spoliation." (My emphasis)

In addition to above would be the succinct statement by LTC Harms in **Amlers Precedents of Pleadings 5th Edition.** The statement says:

> "Dispossession: The plaintiff must allege and prove that he was unlawfully deprived by the defendant of his possession. "Unlawful" in this context means a dispossession without plaintiff's consent or without due legal process." **Sello v Naude 1929 AD 21, Ntai v Vereeniging Town Council 1953(4) SA 579 (A)** (My emphasis)

Having stated above then is the need to state the contents of the *rule nisi* of the 31st January 2001. It was ordered that:

> "1. Rule nisi be issued calling upon the Respondents to show cause if, any on the 14th March 2001 why:
>
> (a) The ordering mode of service shall not be dispensed with due to urgency hereof.
>
> (b) ordering and directing the 1st and 2nd Respondent and/or other officers subordinate to him to desist from closing the Applicant's shop and/or desist forthwith from removing Applicant's stock in trade or from taking action in prejudicial to Applicant's interest over h is shop CA Issa Supermarket situate at Teyateyaneng for Applicant's business operation to continue unhindered.
>
> (c) Interdicting Respondents from interfering with Applicant's

business without due process of law and/or from resorting to self help and/or return and restore Applicant's stock if it shall have been removed at the sanction or service of this order.

(d) Show cause why Applicant is alleged to owe sale tax at all in the amounts stated in the Respondents' papers. Full account and not estimates of such liability should be provided by Respondents.

(e) Granting Applicant such further and/or alternative relief this Honourable Court my deem fit.

2. Prayer 1(a) (b) (c) operate with immediate effect as temporary interdicts.

I failed to understand the reason for order (d) against the background of the history of the matter and when Mr. Mpaka had submitted that:

> "This Honourable Court is not called upon to determine the tax liability of the Second Respondent nor to interpret Sales Tax Act .
>
> (My emphasis)

I did not see why we could avoid doing the latter if it was necessary and when it was to be borne in mind that:

> "Dispossession for example does not count to spoliation if it takes place in accordance with the law ....." See **Wille's Principles of**

South African Law (supra) and "unlawful in this context was dispossession without ..... due legal process." See **Amler's Precedents in Pleadings** (supra)

Furthermore, I did not see why the provisions of Sales Tax Act 1995 could not fall to be interpreted more especially section 35 thereof. See also page 38 of the record (paragraph 9 of Hamid Cassim Issa's affidavit) wherein the Respondent relied upon section 35 and as against section 39 of the Act which the Applicant relied upon. See also page 47 of the record (paragraph 19 of Puseletso Kali's affidavit). In resolving which section is the applicable section one is doing a process of interpretation.

It is perhaps helpful to enunciate the Applicant's submission having resolved that question of which application (cc 23/01 or cc 35/2001) remained pertinent. As will be seen later it will not be all of the submissions that will prove valid. It was said firstly, that the learned magistrate had flouted the elementary principles of natural justice in granting orders *ex parte* with final effects as he has done.

Secondly, that the learned magistrate erred in not finding that he had no jurisdiction to entertain the application in cc 23/2001 and cc 35/2001 as the quantum of the claim was far beyond his primary jurisdiction.

Thirdly, that "the learned magistrate misled himself and did not comprehend section 39 of the Sales Tax Act 1995."

Fourthly, the Court *a quo* failed to advert its mind to section 17(4)(a) of the constitution contrary legal authority to levy distress.

And fifthly, the learned magistrate misled himself in not rejecting the Applicant's/Second Respondent's averment in his founding papers that the action of applicants however were contrary to section12 of the constitution relating to fair criminal proceedings.

The Court found no need to evaluate the last submission except to say that the Court was not dealing with criminal proceedings. This was obvious. The matter before the Court *a quo* had nothing to do with criminal proceedings nor criminal offences chargeable under Part VII Division II of the Sales Tax Act 1995.

On the point about lack of jurisdiction I could not agree more with Respondents that the Court *a quo* was entitled to deal with the Applicant's application. This was even more so as the Court's understanding appears to have been rightly or wrongly that the Respondent should have proceeded in terms of section 35(3) of the Sales Tax Act 1995. It is beneficial to state what the section

says. It is that:

> "(3) If a person fails to pay sales tax when it is due and payable, the Commissioner may file, with the Clerk of Court of competent jurisdiction, a statement certified by the Commissioner setting forth the amount of the sales tax due, and that statement is treated for all purposes as a civil judgment lawfully given in that Court in favour of the Commissioner for a debt in the amount set forth. (My emphasis)

A Court of competent jurisdiction has not been defined in the Sales Tax Act. If it was intended by the legislature that it was to be the High Court only which would deal with claims of a high amount that is those beyond the jurisdiction of any Subordinate Court this should have been explicit. The use of the Clerk of Court and "the Subordinate Court having jurisdiction over the person" in section 35(4) gives an irresistible impression that any Subordinate Court will competently handle claims chargeable under the Sales Tax Act. In my view, in answer to that particular attack, there was nothing precluding First Respondent from dealing with the dispute.

My answer to the second query raised by the Applicant would be a simple one. If the First Respondent acted correctly in filing spoliation proceedings he

would have been entitled to an order having the effect of a final order as far as restoring possession to him was concerned in the nature of "*spoliatus ante omnia restituendo est.* A person despoiled must first of all be restored to his possession." See Claasen's **Dictionary of Legal Words and Phrases** (1977 edition vol.4 page 115). This is a different question as to whether the second Respondent was entitled to act by way of spoliation, the main question being whether the Applicant acted "unlawfully". See pages 4-5,6 (supra).

Having answered the first two and the last queries I now proceed to the fourth submission. This will allow for a better treatment of the third submission. The answer is simple. Claims for tax recovery by the State (fiscus) on defaulting citizens are treated differently from other claims some people would even say that the procedure is draconian. Besides historical reasons including bias or superior power of state, speed and effectiveness readily come to ones mind. The procedure for recovery must be geared towards this. This right of the State is obviously protected by the Constitution where it deals with freedom from arbitrary seizure of property under section 17 especially sub-section (1) and (2). The protection of the right or the power of the state is contained in section 17(4) of the constitution as follows:

(4) Nothing contained in or under the authority of any law shall be held

to be inconsistent with or in contravention of sub-section (1) or (2).

(a) ..... to the extent that the law in question makes provision that is necessary in a practical since in a democratic society for the taking of possession or acquisition of any property, interest or right -

(i) in satisfaction of any tax, duty rate or other import.

(ii) ..... etc. (my emphasis)

I found the above a complete answer. I was therefore unimpressed with the suggestion that there was anything inherently unconstitutional in the procedure for levying a distress by the Applicant. Even if the suggestion was valid namely that it is unilateral and without notice it losses its value when regard is had to the clear meaning of section 39(1).

The above now leads the Court to the third submission by the Applicant. The meaning of section 39(1) is clear. It is that:

" 39 (1) The Commissioner may recover unpaid sales tax by distress proceedings against movable property of the person liable to pay sales tax (the person liable) by issuing or order in writing specify the person against whose property the proceedings are authorized, the location of his property and the sales tax

liability to which the proceedings relate and may require a police officer to be part while the distress is being executed."

The clarity of this provision needs no overemphasis.

Then comes the last but one subsection of section 39 of the Sales Tax Act. It reads:

"(6) Nothing in this section preclude the Commissioner from proceeding under section 35 with respect to any balance owed if the proceeds of the distress are not sufficient to meet the costs thereof and the sales tax due."

This indicates clearly that the Commissioner can resort to section 35 as an alternative and on a certain condition which is spelt out in the above section. While the objection that the Commissioner ought to have proceeded under section 35 was arguable its value was lessened by the fact that the Commissioner seems to have a choice in all circumstances especially under the section 39(6). Nothing was shown as precluding or blemishing his choice.

I did not, with respect, agree with Mr. Mpaka that this Court had no power

to review pending proceedings in a Subordinate Court. I reminded him of the usual and numerous applications for review of criminal proceedings. I observed that he was finding it difficult to give any authority for the proposition. Authority for the authority to the contrary was easily available. That is why the authors of **Civil Practice of the Supreme Courts of South Africa 4th edition** Van Winsen et al. have this to say at page 957:

> "It is not necessary that the proceedings being brought on review should have terminated. Review proceedings may be initiated at any stage if the intervention of the Supreme Court is necessary in the interests of justice .....".

I was also mindful of the words of the same authors in the above work where at page 931 it is said:

> "The supreme court is reluctant to interfere with uncompleted proceedings in an inferior court. It will do so in exceptional circumstances where serious injustice would otherwise occur or where justice cannot be attained by other means. (My emphasis)

It is without doubt now that it was not wholly correct that "the reason for bringing proceedings on review is to set aside a judgment already given."

The Court accepted the proposition that where the reason was that the Court came to a wrong conclusion on the facts or the law the appropriate remedy was to

proceed by way of appeal and that where on the other hand the real grievance was against the method of trial it was proper to proceed by way of review. I felt however that this was a sweeping surety statement. This I say without disregarding the destruction between the grounds for review and the grounds for appeal. I took note of the "method of trial" requirement and what authorities say about the grounds for review (See **Becks Theory and Principles of Pleading in Civil Actions/Isaacs** 5th edition page 326 and **The Civil Practice of the Supreme Court of South Africa** (supra) at page 929). I noted further that none of the grounds shown by the Applicant in the present case could be any of the following propounded by the above authorities, that is :

" (a) absence of jurisdiction on the part of the Court.

(b) Interest in the cause, malice, or corruption on the part of the presiding officer.

(c) Gross irregularity in the proceedings; and

(d) The admission of inadmissible or incompetent evidence, or the rejection of admissible competent evidence."

As matter of fact the power of a Superior Court, as I am aware is much less circumscribed or restricted when one has regard to that:

"The Court is apparently prepared to exercise a right to interfere with

> the proceedings of a lower Court in a broader range of circumstances than those ordinarily required for review proceedings." See **The Civil Practice of the Supreme Court of South Africa** (supra) at page 931.

Those broader range of circumstances will include for instance where principles of natural justice were not complied with, unfairness, absence of full reasons for a decision, unreasonableness, errors of law and fact. That the learned magistrate could ignore distress proceedings filed as a result of a lawful order by the Applicant (in the absence of appeal procedures available to the said Respondent) was one such circumstance open to attach at least as being grossly unreasonable for leading to "serious injustice" or error of law or certain serious illegalities.

Mr. Mpaka also complained that Miss P Kali had no authority to depose on behalf of the First Applicant because this was an irregular delegation of his powers. Miss P Kali who was the Applicant's deponent was on the 30th January 2001 given authority to carry out distress proceedings against Second Respondent for failure to pay his tax liability and recover the amount of about M130,107.28 of tax owing to the Government of Lesotho. The authority was given to Miss Kali and her colleagues with whom she proceeded to the Second Respondent's business to carry out distress on the 31st January 2001. This was in terms of section 39 of Sales Tax Act. The notification of offences for the purpose of section 39 document (PW 1)

specially designated Miss Kali (Senior Sales Tax Officer). I failed to understand why the deponent was said to have had no authority to depose to the facts pertaining the this case and it being said this authority to depose was contrary to section 71 of the Sales Tax Act. Section 71 reads:

> "The Commissioner may delegate any officer of the Department of Sales Tax any power or duty conferred or imposed on the Commissioner by this Act other than the power of delegation" my emphasis)

My understanding was that the powers that may not be delegated are those of delegation but other powers the Commissioner himself may delegate. I did not see how this fell foul of the principle "*delegatus non potest delegare*" "the power delegated does not therefore include the power delegated". See **Botha JA in Attorney General OFS v Cyril Anderson Investments (Pty) Ltd** 1965 (4) SA 682 (A) 639 as quoted on page 435/6 of **Administrative Law** by L. Baxter.

In my judgment the magistrate's decision in cc 35/2001 ought to be reviewed, corrected and nullified. The application succeeded with costs.

T Monapathi
Judge