

CRI/T/22/93

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

v.

'MATLI BOLOU

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 12th day of November, 1996.

The accused person is before me charged with two counts of murder and assault with intent to do grievous bodily harm, it being alleged on :

Count I: "Upon or about the 15th Day of February, 1991 and at or near ha Mosiuoa in the district of Leribe, the said accused did unlawfully and intentionally kill Motala Joel Mosiuoa."

Count II "Upon or about the 15th day of February, 1992 (sic) and at or near ha Mosiuoa in the district of Leribe the said accused did unlawfully and intentionally assault Molisenyane Mokhali, by hitting him with a stick on his left thumb with intent

on that
charge, and
the
prosecutor
accepts that
plea the
court may

- (a) if it is the High Court, and the person has pleaded guilty to any offence other than murder, bring in a verdict without hearing evidence;"

In the present case, the charge faced by the accused, on count II, is that of assault with intent to do grievous bodily harm. The crown has accepted the plea of guilty to common assault which is a competent verdict of assault with intent to do grievous bodily harm. On the authority of the above cited S.240 (1) (a) of the Criminal Procedure and Evidence Act, 1981, the court is empowered to return a verdict without hearing any evidence. On count II I would, in the circumstances find the accused guilty of common assault on his own plea.

Turning now to count I, it may be mentioned that at the commencement of this trial, Mr. Mafantiri, counsel for the accused person, told the court that the defence admitted the depositions of D/Tper. Ramaphiri, D/Tper. Kharafu and Edwin Mosiuoa who had testified as P.W.2, P.W.9 and P.W.10, respectively, at the proceedings of the Preparatory Examination. Mr. Qhomane, counsel for the crown accepted the admissions

made by the defence. The depositions of P.W.2, 9 and 10 at the Preparatory Examination proceedings were admitted in evidence and it was, therefore, unnecessary to call the deponents as witnesses in this trial.

It is, perhaps, also significant to mention, at this juncture, that during the course of the trial, Mr. Ohomane, for the crown, informed the court that Malefetsane Mokhali who had given evidence as P.W.8 at the proceedings of the Preparatory Examination had since passed away and was, therefore, not available to testify in this trial. He called 'Mamatseliso Mosiuoa, who testified as P.W.4 in this trial. According to P.W.4, Malefetsane Mokhali was her paternal uncle-in-law i.e. the younger brother of her own father-in-law. She, therefore, knew Malefetsane Mosiuoa very well.

In 1993, her paternal uncle-in-law, Malefetsane Mosiuoa, passed away at Leribe Government hospital. Thereafter the deceased, Malefatsane Mosiuoa, was buried in the village of ha Mosiuoa and she (P.W.4) personally attended his funeral. She, therefore, assured the court that Malefetsane Mosiuoa was dead and not available to testify in this trial.

Mr. Ohomane, counsel for the crown, submitted

that the deposition of the late Malefetsane Mosiuoa should, in the circumstances, be admitted in evidence pursuant to the provisions of section 227 of the Criminal Procedure and Evidence Act, 1981. Mr. Mafantiri, for the accused person, told the court that the defence would not dispute that Malefetsane Mosiuoa had since passed away and was, for that reason, not available to testify in this trial. He however, pointed out that the accused person had not been afforded the opportunity to cross-examine Malefetsane Mosiuoa, whose depositions could not, therefore, be admitted in evidence.

It is worth noting that, according to the record of the Preparatory Examination proceedings, after Malefetsane Mosiuoa had testified in chief as P.W.8, the accused person, who was in attendance, was afforded the opportunity to cross-examine him when he replied that he was reserving, as he was entitled to do so, his cross-examination until the day of the trial. That being so, the defence cannot, in my view, be heard to say the accused person was not afforded the opportunity to cross-examine Malefetsane Mosiuoa.

In the circumstances, I am satisfied that Malefetsane Mosiuoa has since passed away and is, therefore, not available to testify in this trial. The accused person was, however, afforded the

opportunity to cross-examine him at the end of his evidence in-chief during the proceedings of the Preparatory Examination.

The ruling that I made was, therefore, that the deposition of Malefetsane Mosiuoa who was P.W.8 at the proceedings of the Preparatory Examination be admitted in evidence and read into the record of proceedings in this trial.

In the course of the hearing of this case, Mr. Ohomane who represents the crown informed the court that the crown was dispensing with the evidence of 'Maphakiso Khuswayo, 'Malikano Mokhali and 'Makoloi Mokhali who were P.W.5, P.W.6 and P.W.7, respectively, at the proceedings of the Preparatory Examination. The witnesses were, therefore, available for use by the defence, if it so wished.

It is significant to mention that at the close of the case for the crown, Mr. Mafantiri, counsel for the defence, informed the court that the accused person was also closing his case without adducing any evidence in his defence. The court had, therefore, only the evidence adduced by the crown to rely upon for the decision in this matter.

In as far as it is relevant, the crown evidence

was briefly that adduced by D/Tper. Kharafu (P.W.9 at the proceedings of the Preparatory Examination). His testimony was to the effect that he was a member of the Royal Lesotho Mounted Police attached to the C.I.D. and stationed at Hlotse Police station. On 15th February, 1991 he received a certain information following which he proceeded to the mortuary at the Leribe Government hospital in the district of Leribe. At the mortuary, he was shown the dead body of the deceased. He undressed and examined it for injuries. He observed two open wounds on the back of the dead body of the deceased.

It is common cause that on 20th February, 1991, a post-mortem examination was performed on the dead body of the deceased. The medical officer who performed the post mortem examination was an expatriate who had since returned to his country of origin. He was, therefore, not available to testify as a witness. His post-mortem examination report was, by consent of both counsels, handed from the bar as Exh. "A" and part of the crown evidence.

According to Exh "A", on 20th February, 1991, the medical doctor examined, at Leribe Government hospital mortuary, a dead body of a male Mosotho adult. The body was identified by Edwin Mosiuoa as that of the deceased, Joel Motala Mosiuoa.

cattle in the veld. He, however, herded his cattle a distance of about 100 meters (ind.) away from those of the accused. As they were herding their cattle in the veld P.W.3 noticed a certain Moselinyane Mokhali also driving his cattle to the veld for grazing. He drove them passed where P.W.3 and the accused were herding their cattle. After Moselinyane Mokhali had passed and was about 40 meters (ind.) away from them P.W.3 noticed the deceased appearing from above the village of ha Mosiuoa. As he appeared from above the village the deceased called out Moselinyane Mokhali and told him to wait for him. The deceased then walked passed next to where P.W.3 and the accused were herding their cattle. As he passed next to them P.W.3 noticed that the deceased was holding a sickle in his hand. When the deceased came to where Moselinyane was waiting for him the two men talked to each other but P.W.3 could not follow what they were talking about. He was nearer to where the deceased and Moselinyane Mokhali were as they talked than the accused. Although he was nearer to them than the accused P.W.3 heard the latter calling at the two men saying: "Hei lona banna! Hobaneng le ntse le bua ka 'na moo?" Loosely translated: "Hei you men why are you talking about me there? " Moselinyane Mokhali then said to deceased: "Aubuti na ua utloa hore

ngoaneo o reng ho rona?" Loosely translated: "My elder brother do you hear what that child is saying to us?"

Before the deceased could reply, P.W.3 heard the accused insulting the two men saying: "Mesima meno ting! 'na ba ke eso ka ke re monna e mong a nkhatooe": Loosing translated: "Your mothers' anus you are! I have never pleaded with another man to step down from on top of me". As he uttered those words the accused who was holding a timber stick picked up stones and advanced towards the deceased and Moselinyane Mokhali. As he advanced towards them the accused threw stones at the deceased and Moselinyane Mokhali who were dodging and also throwing stones at the accused as they advanced towards him. Eventually, the accused came face to face with Moselinyane Mokhali, who was holding an iron rod and a thin stick (twig) of a queens tree. The accused delivered a blow with his timber stick at Moselinyane Mokhali, who warded off the blow with the thin stick of a queens tree, he was holding. After he had warded off the blow delivered by the accused, Moselinyane Mokhali also delivered a blow with his iron rod at the accused. The blow landed on the accused's forehead. As the accused and Moselinyane Mokhali were exchanging blows, the deceased joined the fight on the side of Moselinyane Mokhali. He was using his sickle to deliver blows at

the accused, who was, however, dodging them.

After he had been struck a blow with an iron rod on the forehead by Moselinyane Mokhali, the accused ran away in the direction towards his parental home. Moselinyane Mokhali also left the veld and went towards his house in the village. The deceased remained standing where the fight had been taking place.

Shortly thereafter, P.W.3 noticed the accused running from the direction of his parental home. He was in the company of a certain Robert Qhojeng. They were running in the direction towards where the deceased was standing in the veld. The accused was then holding a jungle knife while Robert Qhojeng was holding a stick.

When the accused and Robert Qhojeng arrived at the spot, where the deceased was standing in the veld, P.W.3 noticed Robert Qhojeng striking the deceased a blow on the head with a stick. The deceased fell to the ground. When the deceased attempted to rise, the accused caught hold of and stabbed him with a knife on the back. After stabbing the deceased with the knife, the accused ran away. Robert Qhojeng remained there. However, P.W.3 did not observe what Robert Qhojeng remained doing there because when he saw the

deceased being stabbed with a jungle knife he got so frightened that he immediately drove his cattle home and kraaled them. He then absconded to his original home in the district of Mafeteng. He did so because he feared it would be thought that he assisted the accused to do what he did to the deceased as the accused was his friend. However, after his fright had subsided, P.W.3 returned, on his own, to the village of ha Mosiuoa in the district of Leribe.

Moselinyane Mokhali testified as P.W.2 and told the court that he knew the accused and the deceased both of whom lived in the same village as he did. The accused was a son of his elder brother and, therefore, his relative. The deceased was a son of his (P.W.2's) father's elder brother. He too was, therefore, his relative.

In the early morning of the day in question, 15th February, 1991, P.W.2 drove his cattle to the veld for grazing. He confirmed that on the way to the veld he passed the accused and P.W.3, who were already herding their cattle in the veld. After he had passed the accused and P.W.3 in the veld, the deceased whistled at, and asked, him to wait for him. P.W.2 complied. The deceased then walked passed where the accused and P.W.3 were herding their cattle. He eventually came to where P.W.2 was waiting for him. Before they could

even say anything to each other, P.W.2 heard the accused loudly insulting them by their mothers's private parts. P.W.2 then asked the deceased whether he had heard that that child was insulting them. Before the deceased could reply to the question P.W.2 had put to him, the accused approached them. As he did so, the accused picked up stones, which he threw at them. P.W.2 and the deceased dodged the stones and parted. As they parted, the accused went straight to P.W.2. He delivered a blow at P.W.2 with a timber stick he was holding in his hand. According to him, P.W.2 warded off the blow with the iron rod he was holding in his left hand. As he warded off the blow, the accused's stick slipped down the iron rod and hit the thumb of his left hand. The accused delivered another blow with his stick at P.W.2 who again warded it off. P.W.2 then delivered a blow at the accused with the twig he was holding. It was a thin stick of a queens tree. The blow landed on the forehead of the accused. After P.W. 2 had struck him a blow on the forehead, the accused ran away in the direction towards his parental home. As he ran away, the accused said he would be becoming back. As he was having a stick fight with the accused, P.W.2 did not notice what the deceased was doing.

According to P.W.2, after the accused had left, the deceased, who was holding only a sickle, asked him

to go and get him a stick from his (P.W.2's) home for he realised that there was going to be a fight. The reason why deceased asked him to go and get him a stick from his house was because P.W.2's house was nearer in the village. According to him P.W.2 did go to his house to get a stick for the deceased. He left the deceased still standing where the fight had been taking place in the veld.

After he had obtained the stick at his house, P.W.2 returned to where he had left the deceased in the veld. When he appeared within his view P.W.2 noticed that the accused and another young man by the name of Robert Qhojeng were with the deceased in the veld. The accused and the deceased were physically fighting. In the course of their fight the deceased and the accused fell each other down. P.W.2 did not clearly notice what Robert Qhojeng was doing. When he was about 35 paces (ind.) from them the accused left the deceased and ran away together with Robert Qhojeng. P.W.2 went to the deceased who was rolling on the ground. He noticed that the deceased had sustained bleeding injuries on the back. When he tried to talk to him the deceased could not speak. At that time many villagers came to the scene. Those who knew First Aid assisted to stop the bleeding of the deceased. He asked the villagers to bring a blanket with which the deceased could be carried to a spot

where a vehicle might reach him. They did bring the blanket with which the deceased was carried to a spot next to his (P.W.2's) house from where he was conveyed, in a vehicle belonging to a certain Mokoago, to Leribe Government hospital. P.W.2 was one of the people who accompanied the deceased to the hospital. He assured the court that the deceased did not sustain additional injuries whilst he was being transported from Ha Mosiuoa to the hospital. However, on arrival at the hospital, the deceased was certified dead.

P.W.2 further told the court that at the spot where he had seen the deceased and the accused physically fighting he found a knife holster, a stone sharpener (the type normally bought from shops) and the deceased's sickle. He took possession of, and subsequently handed, them to the police at Leribe police station. He also handed his iron rod and the twig to the police. He did not know what the police had done with the knife holster, the stone sharpener, his twig and the iron rod, all of which are not before court. He was positive that he did not find a hat at the scene of crime.

P.W.2 told the court that he was one of the people who had identified the dead body of the deceased before the medical doctor who performed the autopsy.

The evidence of P.W.3 and P.W.2 that in the course of the fight between the accused and the deceased the former stabbed the latter with a knife was corroborated by Malefetsane Mokhali, who told the court that Robert Qhojeng also delivered a blow with his stick on the deceased, who had already fallen to the ground.

P.W.1, W/O Chabalala, testified that he was a member of the Royal Lesotho Mounted police attached to the C.I.D. and stationed at Maputsoe Police station. In February, 1991, he was stationed at Leribe police station. He remembered interrogating the accused who was already under arrest at the police station. He had duly cautioned the accused before interrogating him in connection with the death of the deceased in this trial.

Following the accused's explanation, he and the accused proceeded to the accused's parental home in the village of ha Mosiuoa. They were in the company of other police officers. At his parental home, the accused produced a jungle knife and a timber stick, commonly known as "Lebetlela", as the weapons he had used in his fight with the deceased.

According to him P.W.1 took possession of the jungle knife and the timber stick. They have since

been in the custody of the police. Later on Tper Ramaphiri, who was P.W.1 at the proceedings of the Preparatory Examination, handed to him a sickle and a hat. P.W.1 took possession of the sickle and the hat. They have since been in the possession of the police. The knife, the timber stick, the sickle and the hat were handed in as exh 1, 2, 3 and 4, respectively, by P.W.1.

It is to be observed, however, that Tper. Ramaphiri himself gave evidence as P.W.2 at the proceedings of the Preparatory Examination. His testimony was to the effect that he was a member of the Royal Lesotho Mounted Police. On 15th February, 1991 he was still stationed at Leribe police station. He was, on the day in question, on duty at his station when the chief's messengers came to the police station and handed to him exh. 1, 3, 4 and a knife holster. He denied, therefore, the evidence of P.W.1 that exh. 1 was produced by the accused at his parental home in the village of ha Mosiuoa. He conceded, however, that exh. 1, 2, 3, 4 and the knife holster had since been in the custody of the police at Leribe police station.

It is worth noting that although P.W.2 told the court that he had handed them to the police at Leribe police station, the stone sharpener, the knife holster, his iron rod and twig have not been handed in

as exhibits in this trial. This in my view, goes a long way to show that the manner in which the Leribe police officers keep articles to be used as exhibits in court cases leave much to be desired.

Regard being had to the evidence of P.W.2, D/Tper Kharafu and the post-mortem examination report which was admitted in evidence as exh. "A" there is no doubt in my mind that prior to his death, the deceased sustained injuries which resulted in his death. The salient question that arises for the determination of the court is whether or not the injuries were inflicted upon the deceased by the accused person who, therefore, brought about his death. In this regard, the evidence of P.W. 3 was to the effect that the accused was one of the persons who assaulted the deceased by stabbing him with a jungle knife. The evidence of P.W.3 that the accused was one of the persons who, on 15th February, 1991, assaulted or fought with and injured the deceased was corroborated by that of P.W.2 and Malefetsane Mokhali. The evidence of P.W.3, Malefetsane Mokhali and P.W.2 was unchallenged by the accused, who had decided not to adduce any evidence in his defence. That being so, I find no good reason why the unchallenged evidence of P.W. 3, Malefetsane Mokhali and P.W.2 in this regard should be doubted. I am inclined, therefore, to accept as the truth that the accused is one of the

persons who assaulted the deceased and inflicted upon him the injuries that brought about his death. The reply to the question, I have earlier posted viz. whether or not the injuries were inflicted upon the deceased by the accused person who, therefore, brought about his death must, in my finding, be in the affirmative.

The important question that further arises for the determination of the court is whether or not in assaulting the deceased, as he did, the accused person had the requisite subject intention to kill. In his testimony, P.W.3 told the court that when he returned from his parental home, the accused was in the company of another young man by the name of Robert Qhojeng. The former was carrying a jungle knife whilst the latter was armed with a stick. They went straight to the deceased who was still standing in the veld. On arrival to him Robert Qhojeng delivered a blow with his stick at the deceased, who fell to the ground. When the deceased attempted to rise the accused stabbed him several times on the back with his knife. The deceased again fell to the ground.

The evidence of P.W.2 is slightly different on this point. According to him, when he left his house with the stick he had gone to fetch for the deceased, P.W.2 heard a lot of noise in the village. He hurried

to where he had left the deceased in the veld. When he came within the view of the deceased in the veld, P.W.2 noticed the accused and Robert Qhojeng with the deceased. Although he could not observe what Robert Qhojeng was doing, P.W.2 clearly noticed that the accused and the deceased were holding each other and physically fighting. He hurried towards them but when he was about 35 paces (ind.) away from them the accused and Robert Qhojeng left the deceased and went away. He (P.W.2) went to the deceased who was rolling on the ground. He observed that the deceased had sustained bleeding injuries on the back and was rolling on the ground with pain. He tried to speak to the deceased who, however, could not respond.

Considering the evidence of P.W.3, P.W.2 and, indeed, Malefetsane Mokhali as a whole, I am of the view that the deceased sustained the fatal injuries in the course of a fight with the accused and Robert Qhojeng. Assuming the correctness of my view that the accused fatally injured the deceased in the course of a fight, I am unable to find that in assaulting the deceased as he did, the accused could have had the requisite subjective intention to kill. In the circumstances, the proper verdict would be that of guilty of culpable homicide. The accused is accordingly convicted on count I.


To sum up, the accused is found "guilty of culpable Homicide" on count I. "guilty of common assault "on count II".

My assessors agree with these findings.

SENTENCE:

Count I : 6 years imprisonment.

Count II : 6 months imprisonment or M60.00 in default of payment of the fine. The sentences to run concurrently.



B.K. MOLAI
JUDGE.

12th November, 1996.

For Crown : Mr. Qhomane,
For Defence : Mr. Mafantiri.

IN THE HIGH COURT OF LESOTHO

In the matter between

A.Z. ANWARY

APPLICANT

and

THE SECRETARY -
LOCAL LICENSING BOARD - BEREA
LOCAL LICENSING BOARD - BEREA
MINISTER OF TRADE & INDUSTRY
THE ATTORNEY-GENERAL

1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT

JUDGMENT

Delivered by the Honourable Mr. Justice M.M. Ramodibedi, Acting Judge,
On 17th day of December 1996.

This application is a culmination of a running battle between Applicant and the first two respondents which can best be gleaned from two letters written by the latter to the former on 28th October 1996 and 29th November 1996 respectively. It is necessary to reproduce the said letters in full in as much as they highlight the respondents' stance in the matter as they perceived it to be in terms of the Trading Enterprises Order, 1993.

The said letter of the 28th October 1996 is to the following effect:-

“Local Licensing Board

P.O. Box 488

Teyateyaneng. 200

28/10/96

A.Z: Anwary
P/Bag Ox05
Teyateyaneng

Re: Inspection Of A.Z Anwary's Supermarket.

The Local Licensing Board held its meeting to-day at the District Secretary's Office, you were invited but you did not turn-up.

The objective of the meeting was to discuss with you issues mentioned in the Health Inspectors letter copied to the Local Licensing Board, the District Secretary and the Commercial Officer.

The issues are:

1. Repairing Of Leaking Roof
2. Repairing Of The Ceiling
3. Painting and Repairing of cracked walls
4. Removal Of Rotten Rafters And Replacing With New Ones
5. Repairing Chipped Floors.
6. To Built a Proper Septic Tank.

All these items mentioned above, you are advised to repair them within 30 days from the 28th October 1996 to the 28th November 1996.

This advice is made in conjunction with the Trading Enterprises Order 1993 Section 20 (2) (A) and Trading Enterprises Regulations 1988 Section 20 (1) and (2).

Lastly, this issue has nothing to do with your case with your Landlord.

Your cooperation will be highly appreciated.

Yours Faithfully,

M.Ncholu - Local Licensing Board - Secretary.

CC: Legal Officer - Ministry of Trade & Industry.”

On 31st October 1996 Messrs G.G. Nthethe & Co. responded to the above mentioned letter on behalf of the Applicant and wrote to the first two respondents as follows:

“The Local Licensing Board Secretary,
Local Licensing Board,
P.O. Box 488,
TEYATEYANENG-200

Dear Sir,

re: INSPECTION OF A.Z. ANWARY'S SUPERMARKET:

Your letter dated 28th October, 1996, addressed to A.Z. ANWARY has been handed to us for action.

We note with great care and interest that there are certain "issues" mentioned in your said letter which you have directed that they should be repaired within 30 days, from the 28th October to 28th November 1996.

We have advised our client, Mr. Anwary that he cannot accede to your directive as that would amount to contempt of Court. We have indicated earlier in our letter that Mr. Anwary has been stopped expressly by Order of Court from handling the said "issues" in your letter.

By copy of this letter, the Legal Officer, Ministry of Trade and Industry is informed for his/her action.

We trust that you will find all in order.

Yours faithfully,

.....

G.G. NTHETHE & CO.

cc. Legal Officer,
Ministry of Trade & Industry
Maseru.

Received copy hereof this day of October, 1996.

Licensing Board Secretary”

Indeed the said court order of Berea Magistrate’s court in CC 101/96 dated 12th July 1996 which Messrs. G.G. Nthethe refer to specifically states in prayer 2 thereof:-

“Respondents or any of their sub tenants are interdicted and restrained from continuing with any construction works, renovations and/or alterations to certain commercial buildings erected on plot No. 19223-636, Teyateyaneng, pending the outcome of the Application.”

It is significant that the Applicant featured as the 1st Respondent in that case. I am satisfied therefore that the Applicant was expressly interdicted by a lawful order of court from complying with the repair demands of the Local Licensing Board - Berea namely the 2nd Respondent herein.

Yet despite this first and second respondents wrote to the Applicant on 29th November 1996 in the following terms:-

“Local Licensing Board

P.O. Box 488

Teyateyaneng. 200

Mr. A.Z. Anwary

P/B OX 05

TEYATEYANENG.

Dear Mr. A.Z. Anwary,

SUSPENSION OF A. A. ANWARY'S SUPERMARKET LICENSE

I am hereby directed by the Local Licensing Board Berea to suspend your Licence with effect from the 29th November 1996 to 28th January 1997.

The reasons for suspension are as following:-

I) You failed to respond to the letter which was written to you by the Local Licensing board Berea on 28th October 1996 whereby you were advised to make the following renovations to the building which is a danger to public Health, Section 20 subsection (2) (a) of the Trading Order 1993.

1. repairing of leaking roof
2. Repairing of the ceiling
3. Painting and repairing of cracked walls
4. Removal of rotten ruffers (sic) and replacing with new ones
5. repairing chipped floors
6. To build a proper septic tank
7. To construct a decent parcel counter.

Mr. Anwary the Health Inspector advised you to repair all these issues from the 6th March 1995 but you failed to respond.

You were therefore given a notice by the Local Licensing Board Trading Enterprise Regulations 1988 Section 20 (2) but you failed (sic) therefore subsection (3) is applied to you.

Your cooperation will be highly appreciated (sic).

Yours obediently,

S.H. Ncholu - SECRETARY
LOCAL LICENSING BOARD - BEREA.

CC:- Commissioner of Trade - Ministry of Trade & Industry
Officer Commanding Police - Berea.”

Indeed it is common cause that on the same date namely the 29th November, 1996 members of 2nd respondent accompanied by a police officer arrived at Applicant's shop and closed it.

It was against the above mentioned background that on the same day the 29th November, 1996, thanks to the swift action of Messrs. G.G. Nthethe & Co. the Applicant then filed an urgent application with this Honourable Court seeking for an order in the following terms:-

“1. That Rule Nisi issued, returnable on the date and time to be determined by the Honourable Court, calling upon the Respondents to show cause, (if any), why:-

- a) The forms of service shall not be dispensed with;
- b) The Respondents and/or their subordinates shall not be ordered to open Applicant's shop;

- c) The Respondents and/or their subordinates shall not be ordered to reinstate applicants Trading License;
 - d) The Respondents shall not be ordered to stop interfering with the Applicant pending the outcome of CIV/APN/278/96;
 - e) Applicant shall not be granted such further and/or alternative relief.
2. THAT prayer (1)(a) and (b) and (c) operate as an interim interdict with immediate effect.”

On 30th November 1996 I duly granted the Rule Nisi as prayed returnable on 10th December, 1996 and on the latter date the matter was argued before me.

I have already found that the Applicant was expressly stopped by a lawful court order from carrying out the repair works as advised by the Local Licensing Board - Berea. I agree with Mr. Nthethe for the Applicant that an attempt by the Applicant to do the said repair works would definitely amount to contempt of court. I therefore find that the 1st and 2nd respondents acted most unreasonably and unlawfully in suspending the Applicant's license on that ground alone. The matter however does not end there.

In paragraph 7 of his answering affidavit the Secretary of the Local Licensing Board (Berea) Senoti Ncholu states in part:-

“The court order had nothing to do with the administrative functions of the Local Licensing Board.”

I understood this statement to be a clear suggestion that because the deponent believed the Local Licensing Board (Berea) had power to safeguard the conditions for trading licences then any court order which would appear to stand in the way of the Local Board would simply be ignored. Well nothing can be further from the truth. I find that the respondents are ill advised in this view and that there can be no question of the licensing board competing against the order of court as the first two respondents have attempted to do in this case.

The argument before me then turned on whether the first two respondents herein had power in law to suspend the Applicant's licence.

I observe straight away that in terms of Section 5(1) (g) of the Trading Enterprises Order, 1993 the power to suspend or cancel licences is clearly vested in the Board. That section reads in part:-

“4 (1) The functions of the Board shall be,

(g) to suspend or cancel licenses granted under this order in accordance with the provisions of this Order.”

Section 2 of the Trading Enterprises Order, 1993 defines the word “Board as the Trading Enterprises Board under Section 3.

Now Section 3 of the Trading Enterprises Order, 1993 is to the following effect:-

“3. (1) There is established a Board to be known as the Trading Enterprises Board.

(2) The Board shall consist of :

(a) the Principal Secretary of the Ministry responsible for Trade and Industry or his representative, who shall be the chairman;

(b) the Principal Secretary of the Ministry responsible for Interior and Chieftainship Affairs or his representative;

(c) the Principal Secretary of the Ministry responsible for Health or his representative;

(d) the Principal Secretary of the Ministry responsible for Employment and Social Welfare or his representative;

(e) the Principal Secretary of the Ministry responsible for Agriculture, Cooperatives and Marketing or his representatives;

(f) a representative of the Royal Lesotho Defence Force nominated by the Commander of the Royal Lesotho Defence Force;

(g) the Commissioner of Police or his representative;

(h) the Commissioner of Trade who shall be the Secretary of the Board; and

(I) a representative of the Lesotho Chamber of Commerce and Industry, who shall be appointed by the Minister.”

I have come to the conclusion therefore that the Local Licensing Board is not the same thing as the Board itself in terms of the Trading Enterprises Order, 1993.

Section 12 of the order provides that a Local Licensing Board shall perform such functions as may be delegated to it by the Board or may be prescribed in regulations.

Indeed I observe that Section 20 (2) (a) of the Trading Enterprises Order, 1993 reiterates the view that the power to suspend or cancel any trading licence vests in the Board itself. That section reads as follows:-

“20 (2) Subject to the other provisions of this section, The Board may,

(a) on the advice of the Commissioner, if the continuance of any trade or occupation constitutes a danger to public health or public morality;

suspend or cancel any licence in relation to the trade or occupation.”

I observe quite amazingly that in their afforesaid letters of 25th October 1996 and 29th November 1996 respectively the 1st and 2nd

Respondents sought to rely on the said Section 20 (2) of the Trading Enterprises Order, 1993.

Now there is absolutely no evidence in the papers before me that the Board delegated its powers to suspend applicant's licence to 2nd Respondent nor do the current Trading Enterprises Regulations, 1988 provide for such delegation.

On the contrary Section 20(2) (3) of the Regulations continues to vest the power to suspend or cancel a licence in the Board itself. That section provides as follows:-

“(2) The Board may give a notice in writing to the licensee specifying the matters under this regulation which it considers require to be remedied and requiring him to remedy them to its satisfaction before a specific date.

(3) If a licence fails to comply with the requirements of a notice given to him under subregulation (2) the Board may suspend or cancel the licence.”

In the circumstances I am satisfied that the power to suspend licenses is the function of the Board and not the local Licensing Board. In fairness to Mr. Masoabi for the respondents he conceded as much and properly so in my view.

In the result therefore I am satisfied that the 1st and 2nd Respondents acted in a manner not contemplated by the legislature and thus acted ultra

vires their powers in suspending Applicant's licence. In my view these respondents clearly misconstrued their powers and in the circumstances therefore the purported suspension of applicant's licence is therefore null and void and of no legal force and effect.

Estate Geekie v Union Government and Ano. 1948 (2) S.A. 494 AT 502.

I have given serious thought to prayer 1(b) of the Notice of Application seeking an order that Respondents open Applicant's shop. The problem as I see it however is that in CIV/APN/278/96 which was also under consideration in this matter this court has already made an order reinstating the interim order of the Berea Magistrate's court in CC 101/96 in which the Applicant herein was interdicted from trading in, or using the commercial building erected on the said plot No. 19223-636 Teyateyaneng. In my view it would therefore be improper to make two conflicting orders at the same time and for that reason prayer 1(b) of the Notice of Motion is hereby refused.

Prayer 1(d) of the Notice of Motion to the effect that the Respondents be ordered to stop interfering with the Applicant "pending the outcome of CIV/APN/278/96" also falls away in as much as it has been overtaken by events in view of the fact that the said CIV/APN/278/96 has already been finalised as aforesaid and is therefore no longer pending before this court.

In the result therefore the application is granted in terms of prayer 1(c) of the Notice of Motion with costs.

For the avoidance of doubt the order of Court shall be as follows:-

- (a) The Respondents and/or their subordinates are hereby ordered to reinstate Applicant's trading licence.

- (b) The Respondents shall pay costs of this application.



M.M. Ramodibedi

ACTING JUDGE

17th December, 1996

For Applicant : Mr. Nthethe
For Respondents: Mr. Masoabi