

IN THE HIGH COURT OF LESOTHO

In the matter between

A.Z. ANWARY

APPLICANT

and

THE SECRETARY -
LOCAL LICENSING BOARD - BERA
LOCAL LICENSING BOARD - BERA
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 adviced 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 adviced 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