CIV/APN/278/96

IN THE HIGH COURT OF LESOTHO

In the matter between

MAHAMOOD AMIR MANSOOR PATEL	**APPLICANT**

and

RESIDENT MAGISTRATE BEREA MAGISTRATE'S COURT	**1ST RESPONDENT**
ABDULREHMAN JAUNUDIN ANWARY	**2ND RESPONDENT**
A Z ANWARY CASH AND CARRY	**3RD RESPONDENT**

JUDGMENT

Delivered by the Honourable Mr. Justice M.M. Ramodibedi, Acting Judge,
On the 13th day of December, 1996.

On 31st July, 1996 the Applicant filed an urgent application with this Honourable Court couched in the following terms:

"URGENT AND INTERIM RELIEF

Dispensing with the normal modes and time limits of service, especially the time limit of fourteen (14) days set out in Rule 51 (b).

2. Ordering and directing that the Rule Nisi granted by the 1st Respondent on the 13th June 1996 and under case number C C 101/96 be re-instated with immediate effect and pending the final outcome of this Application.

3. Issuing a Rule Nisi calling upon the Respondents to show cause on a date to be determined by this Honourable Court why this Order should not be made a Final Order of Court and why the 2nd and 3rd Respondents should not be ordered to pay the costs hereof.

4. Ordering and directing the 1st Respondent to dispatch to the Registrar of this Honourable Court the Record of the proceedings under case number C C 101/96 together with his reasons for any rulings or decisions in that matter as well as all the proceedings, including his reasons for decisions in C C 112/96, both of Teyateyaneng Magistrate's Court, within a period of seven (7) days from the date of service of this Application on him.

ORDINARY RELIEF (IN TERMS OF RULE 50)

a) Reviewing and setting aside the Interim Court Order granted by the 1st Respondent in favour of the 2nd and 3rd Respondents on the 28th June 1996.

b) Reviewing and setting aside the ruling by the 1st Respondent dated the 16th July 1996, in terms of which points in limine raised by the Applicant's legal representatives were dismissed with costs.

c). Directing that the proceedings instituted under case numbers C C 101/96 and C C 102/96 be transferred to the abovementioned Honourable Court for hearing.

d) Ordering and directing the 2nd and 3rd Respondents to pay the costs hereof in the event of opposition only.

e) Granting further and/or alternative relief as this Honourable Court may deem fit."

Presumably the original court file in this matter has gone missing because the one that was finally presented to me when the matter was argued on 28th November 1996 is styled "DUMMY". I find this rather strange because apart from the label "DUMMY" all the original documents are still intact. What this court shall perhaps never know is what was the exact minute of the court on 31st July 1996 when a Rule Nisi was granted. The significance of this is that the typed interim court order that was subsequently prepared by applicant's attorneys gives the impression that the aforesaid applicant's prayers for "Ordinary Relief (In terms of Rule 50)" were granted as well. This in my view could hardly be correct as such prayers would only be confirmed on the return date.

Be that as it may I now proceed to examine the issues involved in this application and in doing so it is necessary to refer to both case numbers CC 101/96 and CC 112/96 of Berea Magistrate's Court both of which are the subject matter of the review before me.

In CC 101/96 the Applicant Mahamood Amir Mansoor Patel made an ex parte application for an order in the following terms:

"1 Interdicting and restraining the Respondents from trading in, or using, the commercial buildings erected on Plot 19223-636 Teyateyaneng, pending the outcome of this Application.

2. Interdicting and restraining the Respondents from trading in the aforesaid premises contrary to an Agreement of Sublease dated the 4th April 1989, as well as the regulations of the District Health Inspector, Teyateyaneng District.

3. That a Rule Nisi be issued calling upon the Respondents to show cause on a date to be determined by this Honourable Court why a Final Order should not be made in terms of paragraphs 1 and 2 and why this Honourable Court should not grant the ordinary relief set out herein and costs.

ORDINARY RELIEF

1. The Respondents, or any one of their sub tenants, be ejected from the premises at Plot 19223-636 Teyateyaneng.

2. Directing the Applicant to institute proceedings against the Respondents for damages suffered as a result of breach of contract."

Mr. Mpobole for the Applicant before me submits that the learned Magistrate in the court a quo duly granted the interim order on 13th June 1996 in the said CC 101/96 of Berea Magistrate's Court and that the Rule Nisi therein was returnable on 5th July 1996.

As a point of departure Mr.Nthethe submits on the contrary that there was never any interim order granted by the court a quo. Since this is the main bone of contention between the parties in this matter I proceed then to determine whether the court a quo did make an interim order on 13th June 1996 as a matter of fact.

It is significant that the minute of proceedings in the court file in the said case number CC 101/96 is to the following effect:-

> "On the 13/06/96 Mr. Mpobole for the applicant - Having heard the Counsel for the applicant and also having read all papers filed in the record, the rule is granted as prayed for in the notice of application - returnable on the 5/07/96"

To put the matter beyond any reasonable doubt the learned Magistrate in the court a quo states in part as follows in his written judgment, Annexture "D" to Applicant's founding affidavit:-

> "On the 13/06/96, I granted a rule Nisi in CC 101/96, and gave an interim interdict which was returnable on the 5/7/96, and the essence of the interim interdict was amongst other prayers to restrain the respondents from trading in, or using the commercial building erected on plot 19223-636 TY, pending the outcome of this application. ..... I must state from the onset, that I was much influenced materially by para. 27 of the applicant's founding affidavit that the state of the building are deteriorating on daily basis and they may collapse at any time causing death or serious injury to the customers of the respondents; hence I granted the rule.
>
> I do not want to retariate (sic) or repeat my previous concerns about the loss of life, I have indicated in my ruling about the seriousness of the allegations concerning immediate loss of life. This is one of the material factors that influenced me to grant the application ex parte on the 13/06/96, and gave an interim interdict fro (sic) the protection of life."

Well it seems to me that the learned Magistrate has not minced his words about the fact that he did grant an immediate interdict "pending the outcome of this application." That much is very clear.

In the circumstances I have come to the conclusion that the court a quo did in fact grant an interim order of interdict against the respondents.

Yet quite amazingly on 28th June 1996 and before the aforesaid interim order of 13th June 1996 had been disposed of and indeed before the return date itself the second respondent herein who was also first respondent in the said CC 101/96 filed an ex parte application CC 112/96 in the court a quo seeking for an order against the Applicant herein in the following terms:-

> "1. That Rule Nisi isse, (sic) returnable on the date and time to be determined by this Honourable Court, calling upon the Respondent to show cause, (if any), why:-
>
> (a) The Interim Order in CC. 101/96, issued by this Honourable Court shall not be stayed and or suspended, pending finalisation of the application in CC. 101/96;
>
> (b) The Applicant shall not be allowed to open his said business premises for purposes of trading, pending finalisation of the application in CC. 101/96;
>
> (c) The Applicant shall not be given such further and/or alternative relief.
>
> (d) The Respondent shall not be ordered to pay costs hereof.

2. That prayer 1 (a) and (b) operate as an interim order with immediate effect."

It is indeed common cause that the rule nisi was granted as prayed. In fact I observe that the minute of the 28th June 1996 in the court file in the said CC 112/96 is to the following effect:-

"Having heard Mr.Nthethe for the Applicant and also having read all papers filed in the record, the rule is granted as prayed for in the notice of application returnable on the 5/07/96."

I am satisfied therefore that the said interim order of the court a quo in CC 112/96 clearly had the effect of canceling or suspending the previous order in CC 101/96 to Applicant's obvious prejudice.

In trying to justify himself the learned Magistrate states in his judgment:-

"I must state that I was influenced greatly by para. 8 of applicant's affidavit that collections were closed in the shop, all perishable goods are going to be destroyed and that in order to minimise loss the premises be allowed to trade."

Now the question that arises for determination is whether the court a quo was entitled to grant the second rule which without notice to the present applicant effectively set aside the previous order which was granted in favour of the latter on 13th June 1996 as aforesaid.

A similar problem arose in Lesotho Football Association v Lesotho Sports Council C of A LLR 1991-92 page 26 and I would respectfully like to adopt the remarks of Browde JA at page 27 to the following effect:-

> "It seems to me that there are only two ways in which a rule nisi once granted can be dealt with namely:
>
> (i) It can be abandoned by the party in whose favour it was granted; or
>
> (ii) It can, on the return day (actual or anticipated), be confirmed or discharged by the court."

Moreover following Lesotho Football Association v Lesotho Sports Council (supra) I also find that the court a quo was functus officio in the matter and that even if the learned Magistrate considered that he should not have granted the previous order in CC 101/96 the only opportunity left to deal with the rule was on the return date itself. It is significant that the second rule granted without notice to the present applicant was not even on anticipation of the previous rule granted in favour of the applicant on 13th June 1996.

In the circumstances I have come to the conclusion therefore that the recalling of the rule of 13th June 1996 by the learned Magistrate was grossly irregular and prejudicial to the Applicant. I find that the court a quo was not entitled and had no power to act in the manner that it did and that the second rule it granted on 28th June 1996 in CC 112/96 is irregular.

Mr. Nthethe submits that the ex parte orders of the court a quo being interlocutory in nature, the application for review by this Honourable Court is improper. Well I do not agree. In my judgment it is not necessary for proceedings to have terminated and a final

decision reached before a party may bring a review to this court. It seems to me that there may well be cases whereby the interlocutory order is so prejudicial and of such an urgent nature that relief in due course by way of ordinary review may be inappropriate. Each case must be decided on its own merits.

See **The Civil Practice of the Superior Courts in South Africa:**
Herbstein and Van Winsen 3rd Ed at Page 765.

See also **Mohlakoana Mabea and Ano. v Magistrate M.T.Motinvane (Butha-Buthe) and Attorney General.**
CIV/APN/367/91 (unreported) and the cases cited therein.

In the result therefore the rule is confirmed and the following is the order of court:-

(a) The interim interdict granted by the 1st Respondent on the 13th June 1996 in case number CC 101/96 is hereby reinstated returnable on 17th January, 1997.

(b) The interim Court Order granted by the 1st Respondent in favour of 2nd and 3rd Respondents on the 28th June 1996 in CC 112/96 is hereby reviewed, corrected and set aside as being grossly irregular.

(c) That proceedings in case numbers CC 101/96 and CC 112/96 are hereby remitted back to Berea Magistrate's court for hearing de novo before a different Magistrate.

(d) That costs shall be costs in the cause in CC 101/96 of Berea Magistrate's court.

M.M. Ramodibedi

ACTING JUDGE

For Applicant : Mr. Mpobole

For Respondents: Mr.Nthethe