CIV/APN/7/97
CC 1002/96

IN THE HIGH COURT OF LESOTHO

In the matter between

ATTORNEY GENERAL	**APPLICANT**
and	
DLAMINI'S HOLDINGS (PTY) LTD.	**1ST RESPONDENT**
HER WORSHIP MAGISTRATE M. MATELA	**2ND RESPONDENT**

JUDGMENT

Delivered by the Honourable Mr. Justice M.M. Ramodibedi
On 13th day of February 1997.

This application raises the question whether a magistrate's court has jurisdiction to issue a mandamus.

On the 8th January 1997 the Applicant filed with this Honourable Court an urgent application seeking an order in the following terms:-

"1. A Rule Nisi be issued calling upon Respondents to show cause why:-

a) Rules as to form and service cannot be dispensed with on account of the urgency of this matter.

b) The Learned Magistrate Miss M. Matela shall not cause, within 7 days of the receipt of this Notice, the forwarding to the Registrar of the High Court of the record of proceedings in CC.1002/96 of the Maseru Magistrates Court - Dlamini's Holdings (Pty) Ltd. V Minister of Finance and Attorney General.

c) The decision dated the 7th January and the entire proceedings in CC.1002/96 should not be reviewed and set aside.

d) The Order granted by the Magistrate dated the 7th January 1997 should not be stayed until this application has been heard and disposed off by the Honourable Court.

e) Respondents should not be ordered to pay costs of this Application in the event of opposition.

f) Application (sic) shall not be given further and/or alternative relief.

2. That prayers 1 (a) and (d) operate as Interim Orders with immediate effect."

The matter came before me on the same day namely the 8th January, 1997 and after having heard Mr. Letsie Counsel for the Applicant as well as having perused the papers filed of record I duly granted the Rule Nisi as prayed returnable on 4th February, 1997.

On 9th January 1997 the First Respondent anticipated the return date to the 15th day of January 1997 on which date the matter was postponed to the 16th January 1997 for hearing.

I duly heard arguments in the matter on 16th January, 1997 and 24th January 1997 respectively. I should mention that I heard the matter out of term as a case of urgency.

At the commencement of the hearing before me Mr. Pheko for the First Respondent argued the following points in limine which were duly tabulated in paragraph 3 of the Answering Affidavit of Pitso Makhoza Malunga:

"(a) that this application be dismissed with costs on the account of lack of bona fides on the part of the Minister of Finance and Economic Planning as will appear more fully herein under:

(b) that ordinarily this Honourable Court will exercise its review powers at the end of the proceedings in a subordinate Court unless there are special reasons which warrant this Honourable Court to exercise its power at an interluctory stage, and that on the facts of this case there are no such grounds;

(c) that the procedure adopted in this application is inappropriate in terms of rule 50 of the High Court Rules 1980 where the procedure is specifically prescribed and peremptory;

(d) that even though the application is purportedly made under rule 50 of the High Court Rules 1980 it is far from it as it does not, inter alia, call upon the learned Magistrate and First Respondent to show cause, if any, why her interim order shall not be reviewed, corrected and set aside;

(e) that rules 1(a), (b) and (d) are not contemplated by rule 50 of the High Court Rules 1980;

(f) that the procedure adopted in this application is a novelty and not contemplated by the rules of this Honourable Court; and

(g) that the procedure adopted in this application in the light of rule 1(b) renders First Respondent's right to anticipate under rule 18(8) nugatory."

After having heard both counsel in the matter I duly dismissed all the aforesaid points in limine with costs and intimated that reasons would be filed together with the main judgment in this application and I now proceed to do so.

The main reason why the court declined to accede to the aforesaid points in limine was that in essence the whole case as I saw it turned on whether the learned Magistrate in the court a quo had any jurisdiction at all to order a Minister of the

Government of Lesotho to issue a permit to First Respondent to import liquor products into Lesotho.

Accordingly I was not prepared to allow a situation whereby the question of jurisdiction could be circumvented by technicalities such as the ones raised in the aforesaid points in limine. In the circumstances I considered that the interests of justice would best be served by exercising my discretion in the matter against the upholding of the points in limine particularly with regard to points (a) © (d) (e) (f) and (g).

Regarding point (b) above namely that ordinarily this Honourable Court will exercise review powers at the end of the proceedings in a subordinate court unless there are special reasons which warrant this Honourable Court to exercise its power at an interlocutory stage I recalled my decision in Mahamood Amir Mansoor Patel v Resident Magistrate Berea and 2 others CIV/APN/278/96 in which I duly stated the principle in a similar situation in the following words:-

> "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."

Well I see no justification for departing from this principle in the matter before me. See also Mohlakoana Mabea and Another v Magistrate M.T.Motinyane (Butha-Buthe) and Attorney General CIV/APN/367/91 (unreported) and the cases

cited therein.

In the circumstances all the points in limine were dismissed with costs as aforesaid.

I proceed then to deal with the main application in this matter.

On 10th December 1996 the First Respondent acting through its attorneys Pheko & Co. applied in writing (Annexure DH1) to the Minister of Finance for a permit to import liquor products pursuant to Section 3 of the Liquor Commission (Repeal) Order, 1986 which reads thus:-

> "3 (1) the Minister may issue permits for the importation of liquor products into Lesotho and may fix fees or charges for this purpose."
>
> (2) A permit to import liquor products into Lesotho shall be in writing and shall be issued upon such terms and conditions as the Minister thinks fit."

The above mentioned application by First Respondent was met with the following response from the Senior Legal Officer (Ministry of Finance) contained in his letter of the 20th December 1996 addressed to the attorneys for First Respondent:-

> "Ministry of Finance
> P.O. Box 395
> Maseru

Date: 20/12/96

L. Pheko & Co,
First Floor, No. F 12,
Speedy Shopping Complex,
Moshoeshoe Road,
P.O. Box 7703
Maseru.

Sir,

Re: **Application For A Permit To Import Liquor Products Pursuant To Section 3 Of the Liquor Commission (Repeal) Order, 1986 By Dlamini's Holdings (Pty) Ltd.**

This serves to inform your office that the Honourable Minster of finance is in receipt of your letter dated 10th December instant on the above named matter and has instructed me to reply as follows.
Section 3 (2) of the said Liquor Commission (repeal) order does indeed authorise the minister to issue an import permit to anybody. Attention is however drawn to your office that the word "anybody" as stated in the clause should be given a restrictive application in conformity with other existing legislation governing trade in alchoholic (sic) beverages. To this extent, you to refer to Section 21 of the Liquor Licencing Act No.16 of 1976 that, any person who sells, deals in or deposes of liquor without a licence is guilty of an offence..."

To the best of the knowledge of the ministry, following inormed (sic) and reliable consultations that were triggered by your above communication, your client is not at present in possession of a valid liquor trading licence. The terms of the licence clearly provide that the validity of the licence shall commence at the beginning of January 1997 and to terminate on the 31st of December 1997.

On the strength of the foregoing paragraph and also in the light of Section 21 (already referred to above) it can only be concluded that your client is not at present eligible to apply for an importation permit that he seeks in your letter.

Coming now to the substance of your request, it may be said that, much as the Act does not lay any guidelines to be considered in the granting of the permit sought by your client, it is important to consider the following, that:

(a) it is not uncommon for suppliers or indeed any suppliers, to run out of supplies of any particular brand (s) where the lack of supplies can be explained by a simultaneous and tremendous influx of demands for huge quantities from different dealers.

(b) when considering the contents of your letgter (sic) one is inclined to believe that a substantial (and perhaps even more than substantial) portion of your clients offer to the brewery was met, having averred as you did that where he tendered for M300,000, only M8,040 was returned due to lack of stock.

On the basis of the above, I would say that the clause in question does not contemplate incidences such as the one referred in your communication. It may be added that, the incidents mentioned by your client are not a common cause. They seem to be isolated occasions whose cumulative effect may have an impact. But, I would hesitate to say that such cumulative effect resulting from very isolated occasions should warrant the granting of a licence sought by your client.

Yours faithfully,

D.M. METLAE
Senior Legal Officer (Ministry of Finance)"

What then followed was that on the 31st day of December, 1996 the First Respondent launched an application entitled "In the matter of Ex-Parte Application For a Mandamus" in the Maseru Magistrate's Court suing the Minister of Finance and the present Applicant namely the Attorney General for an order in the following terms:-

"1. That a rule nisi do hereby issue calling upon First Respondent herein to show cause, if any, on a date to be determined by this Honourable Court why:-

(a) First Respondent shall not be directed forthwith to issue a permit to Applicant to import liquor products into Lesotho subject to such conditions as First Respondent may determine pursuant to section 3 of the Liquor Commission (Repeal) Order 1986;

(b) First Respondent shall not be directed to give reasons why Applicant herein shall not be accorded equal treatment and equality before the law in terms of section 19 of the Constitution of Lesotho under section 3 of Liquor Commission (Repeal) Order 1986;

(c) Respondents shall not be directed to pay the costs of this application;

2. That rule 1(a) shall operate with immediate effect as a temporary measure."

The said application was moved ex parte before the learned magistrate Her Worship M. Matela on the 2nd January 1997. The learned magistrate then issued the rule nisi as prayed. What I find very strange and certainly confusing if not novel is that the Court Order prepared and typed by the attorneys for First Respondent

appears to have two different return dates. It reads in part as follows:-

"ORDER OF COURT

On 2nd Jan 1997

Before His (sic) Worship Ms M. Matela

Having Heard : Mr. L. Pheko, Applicant's Attorney
Having Read : Papers filed of record.

IT IS ORDERED:

1. A rule nisi do hereby issue calling upon the Respondents to show cause, if any, on the 10th day of January, 1997 at 9.30 a.m. in the forenoon or so soon thereafter as the matter may conveniently be heard why:-

   (a) First Respondent shall not be directed forthwith to issue a permit to Applicant to import liquor products into Lesotho subject to such conditions as First Respondent may determine pursuant to section 3 of the Liquor Commission (Repeal) Order 1986, failing such, First Respondent shall not be directed to appear before this Honourable Court on the 7th day of January, 1997 at 9.30 a.m. there and then to show cause why he cannot in the interim grant and/or issue such a permit;"

The minute of the learned Magistrate in the court's file in the matter is however to the following effect:-

> "On 02-01-97 Mr. Pheko for Applicant bf ct. Having read the papers filed of record and having heard counsel for applicant, Rule Nisi is hereby issued returnable on the 10-01-97."

The learned Magistrate has appended her signature to this minute.

It is obvious to me therefore that nowhere in her aforesaid minute has the learned Magistrate issued the other return date of the 7th January 1997. I accordingly find that the aforesaid typed court order was most improper and/or irregular to the extent that it included the other return date of the 7th January 1997 which was never issued by the learned magistrate in the first place.

It is for this reason that legal practitioners must always ensure that the orders they seek have actually been granted by the court before including them in the typed court order. By the same token it is the responsibility of those whose duty it is to sign court orders to ensure that such court orders accurately reflect what the court itself actually ordered. Failure to exercise due diligence in this regard will often result in a miscarriage of justice as this case amply demonstrates.

To return to the sequence of events in this matter, what then happened was that on 7th January 1997 Mr. Pheko for First Respondent appeared alone before the learned magistrate in the court a quo and obtained an interim court order in terms of prayer 1(a) returnable on the 10th January 1997. How Mr. Pheko obtained audience in view of the fact that the return date was only on the 10th January 1997

this court shall never know because the said Learned Magistrate has elected not to give any reasons for her strange decision in the matter.

It was against the above mentioned background that the Applicant moved the application before me for review as aforesaid in terms of Rule 50 of the High Court Rules.

Mr. Letsie submits that a magistrate's court has no jurisdiction to issue a mandamus. Well I do not agree with this sweeping statement. In my view it all depends on the nature of the mandamus sought. It is for that reason that each case must be decided on its own merits.

In this regard it is necessary to examine the jurisdiction of the magistrate's court as defined by the Subordinate Courts Order 1988.

Section 18(1) thereof specifically provides as follows:-

> "18(1) Subject to the limits prescribed by this Order, the court may grant against persons and things orders for arrest tanguam suspectus de fuga, attachments, interdicts and mandamentem van spolie."

Section 29(d) of the Subordinate Courts Order 1988 significantly provides that:

> "29 ....the court shall have no jurisdiction in the matters,

(d) in which is sought the specific performance of an act without an alternative of payment of damages, except the rendering of an account in respect of which the claim does not exceed an amount within the jurisdiction of the court, or the delivery or transfer of property not exceeding in value the jurisdiction of the court."

Mr. Pheko submits that the First Respondent's application before the Learned Magistrate in the court a quo was a mandatory interdict and that therefore the latter had jurisdiction in terms of section 18(1) of the Subordinate Courts Order 1988.

The expression "mandatory interdict" was fully described by Corbett C.J. in Jafta v Minister of Law Order 1991 (1) S.A. 282 (A) at 295 as follows:-

> "The word interdict is a technical legal one and would seem to cover not only orders forbidding the doing of an act, styled 'prohibitory interdict,' but also orders enjoining the doing of an act, known as 'mandatory interdicts' ..... moreover, the distinction between prohibitory and mandatory orders is somewhat technical and one which it is not always easy to draw."

I respectfully agree.

Applying the legal principles to the present case I must therefore consider whether on the papers before the learned magistrate in the court a quo the First Respondent made out a case for a mandatory interdict and whether therefore the

said court had jurisdiction in the matter. I should hasten to state here that as a matter of principle a magistrate's court does have jurisdiction in a proper case to issue a mandatory interdict in terms of section 18(1) of the Subordinate Courts' Order 1988.

In Lipschitz v Wattrus NO 1980(1) S.A. 662 Myburgh J delivering judgment of the Full Bench of Transvaal Provincial Division had this to say at p 673 thereof:-

> "A mandatory order such as that sought in prayer (2) (i.e. directing the respondent to give due and proper consideration for nominations and recommendations for appointment of applicant to office) is a form of interdict and can only be granted if all the requirements for an interdict have been established. One of these is a clear right, which means that the alleged facts, if accepted, must establish "a legal right" vesting in the applicant." No legal right has been shown to exist that obliges the respondent "to give due and proper considerations" as contemplated by the relief claimed."

I find that these remarks are apposite to the case before me.

Lipschitz' case (supra) was followed by Buthune J in Kaputnaza v Executive Committee of the Administration for the Heroes and others (South West Africa Supreme Court) 1984 (4) S.A. 288 at 317 in the following words:-

> "In my view the relief claimed under prayer (a) (I) of the amended Notice of Motion is clearly for a mandatory interdict. For such an order all the requirements of an interdict have to be established and the

> court will have to decide, inter alia, whether the applicants have established a 'clear right'."

I respectfully agree with the principles enunciated above as they accord with the leading case on interdicts namely Setlogelo v Setlogelo 1914 AD 221 in which Innes JA said at page 227:-

> "The requisites for the right to claim an interdict are well known; a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy."

In his founding affidavit before the learned magistrate in the court a quo Pitso Makhoza Malunga does not even make a token attempt to show that the First Respondent has any legal right at all to import liquor into Lesotho. On the contrary it is clear that the First respondent was merely attempting to obtain a permit authorising it to import liquor.

In the circumstances I have no hesitation in finding that the First Respondent has failed to establish the requirements of an interdict in as much as it failed to show a clear right in the matter, injury actually committed or reasonably apprehended and the absence of similar protection by any other ordinary remedy.

Accordingly I find that the First Respondent failed to show that the learned magistrate in the court a quo had jurisdiction in the matter.

In the absence of the requirements for an interdict having been established in the court a quo I am satisfied therefore that what the First Respondent was seeking

in effect was an order for specific performance even though its claim was disguised in the form of a mandatory interdict. As there was no claim in the alternative for damages I am satisfied that Section 29(d) of the Subordinate Courts Order 1988 prohibited the magistrate's court from granting the order.

See Badenhorst v Theophanons 1988 (1) S.A. 793 at 795 in which Tebbutt J delivering judgment of the Full Bench of the Cape Provincial Division expressed similar remarks in a matter involving substantially similar legislation as our sections 18(1) and 29(d) of the Subordinate Courts Order 1988.

Accordingly I am satisfied that the matter was one which should be entertained by the High Court. This was the view that was adopted by Tebbutt J in Badenhorst's case (supra) and I am in total agreement with this approach.

Mr. Pheko has sung praises for the Learned Magistrate's bravery in entertaining a matter of this nature. This court is not impressed. Misplaced bravery such as is the case here cannot be tolerated. It is certainly the feeling of this court that it is a recipe for chaos if magistrates do not observe their own jurisdictional limits.

In this regard I am mainly attracted by the remarks of Tebbutt J in Badenhorst's case (supra) at page 799 wherein he states:-

> "A magistrate's power to decide civil matters has always been legislatively limited. Those limitations have either been as to the amount of the claim involved or as to the relief which a magistrate can

grant. Whether this was because of the generally more limited qualifications of judicial officers in magistrates' courts as opposed to those in the Supreme Court, as would appear to be suggested by Jones & Buckle (p 155) or whether some other motivation prompted such limitations is not clear. What is clear is that they were first introduced in the Cape Magistrate's Courts Act 20 of 1856 .....Tindall AJP in Bohm v Steyn's Garage Ltd 1930 TPD I considered the reason for the provision that a magistrate should not have jurisdiction to order the performance of an act unless there was an alternative claim for damages. He said at (5):

> 'Courts of law exercise a discretion in determining whether a decree of specific performance should be made and will not issue such a decree where it is impossible for the defendant to comply with it ..... But on the other hand the Legislature may well have taken the view that, considering the serious consequences that may result to a defendant who fails to perform an act ordered by the court and the danger of magistrates falling into error in the making of orders ad factum praestandum, the jurisdiction to make orders, the non fulfilment of which might involve committal for contempt, should be reserved to the Supreme Court except in the cases specified in the section."

I respectfully adopt these views as they are apposite to the case before me. The fact that on 7th January 1997 Mr. Pheko was granted audience and an interim court order despite the fact that the matter was not properly before the learned

magistrate on that date in terms of her own minute as aforesaid serves as a glaring example of lack of competence by the court a quo.

I am further in respectful agreement with the Learned Judge that to the extent that the court makes a finding with regard to the requirement of the applicant's clear right, the order would in effect be declaratory. This in my view is a further reason for holding that the magistrate's court has no jurisdiction in the matter. I hold that being a creature of statute the magistrate's court has no jurisdiction to make a declaration of rights without consequential relief.

I also think there is merit in Mr. Letsie's submission that in essence the First Respondent's application in the court a quo amounted to review and that consequently the court had no jurisdiction for such review. As earlier stated First Respondent started off by making an application to the Minister of Finance for a permit to import liquor into Lesotho. When that application failed it then launched the application in the court a quo complaining in paragraph 5.2 of the founding affidavit of Pitso Makhoza Malunga that "the Minister did not apply his mind to Applicant's application" and in paragraph 5.8 thereof that "on these facts the refusal to grant the permit was actuated by malice and bad faith." In my view these are clearly grounds for review for which a magistrate's court has no jurisdiction.

In all the circumstances of this case therefore I have come to the conclusion that the Magistrate's Court had no jurisdiction in this matter.

Accordingly the Rule is confirmed as prayed with costs.

M.M. Ramodibedi

JUDGE

13th February, 1997.

For Applicant: Mr. Letsie

For First Respondent: Mr. Pheko