IN THE HIGH COURT OF LESOTHO
(Commercial Court Division)

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HELD AT MASERU **CCA/0015/2022**

In the matter between:

NORTHERN INVESTMENT HOLDINGS (PTY) LTD **APPLICANT**

And

THE TOWN CLERK MAPUTSOE URBAN COUNCIL **1st RESPONDENT**

THE MINISTRY OF LOCAL GOVERNMENT **2ND RESPONDENT**

THE ATTORNEY GENERAL **3RD RESPONDENT**

Neutral Citation: Northern Investment Holdings (Pty) Ltd v The Town Clerk Maputsoe Urban Council and 2 others CCA/0015/2022 [2022] LSHC 32 COM (22nd February, 2022)

JUDGMENT

CORAM: MATHABA J

HEARD ON: 18th February 2022

DELIVERED ON: 22nd February 2022

SUMMARY:

Jurisdiction – Commercial Court established to hear disputes arising out of commercial or business transactions – Refusal to issue a building permit cannot be classified as restraint of trade or a dispute arising out of a commercial or business transaction – Commercial Court lacking jurisdiction to issue writ of mandamus against Government to issue a building permit.

ANNOTATIONS:

CITED CASES

LESOTHO

Bataung Chabeli Construction (Pty) Ltd v Road Fund and Others C of A (CIV)/34/2020

Mokhali Shale vs Mamphele Shale and others C of A (CIV) No 34/2019

Phaila vs Director of Public Prosecutions and others Constitutional case No 24/2018 [2020] LSHC Cons (March 2021)

South Africa

Graaf Reinet Municipality vs Van Ryneveld's Pass Irrigation Board 1950 (2) SA 420 (A)

Independent Institute of Education (Pty) Limited vs Kwazulu Natal Law Society & others [2019] ZACC 47; 2020 (2) SA 325 (CC).

Jackson Gcaba vs Minister of Safety and Security Case CCT64/2008 [2008] ZACC 26

Statute

The High Court (Commercial Court) Rules, 2011

INTRODUCTION:

[1] The applicant has applied on an urgent basis for an order in the following terms:

> "**1**. Urgency
>
> a) That a rule *nisi* be issued, returnable on the date and time to be determined by this honourable court calling upon the respondents to show cause, if any, why the following cannot be granted.
>
> b) that the rules of this honourable court pertaining to periods of notice and service shall not be dispensed with and the matter be heard on an urgent basis.

2. Directing the 1st respondent to issue a building permit in favour of the applicant for plot number 23134-729.

3. That the applicant be granted any further and or alternative relief.

4. That the respondents be ordered to pay costs of suit."

[2] Mr. *Lesupi* for the applicant, appeared before me on the 17th February 2022 to move the application. He indicated that he already received notice of intention to oppose the matter from respondents who were represented by Mr. *Ntoko* who works for the 2nd respondent. Mr. *Lesupi* informed me that they agreed with Mr. *Ntoko* that the applicant should be granted prayers 1 (a) and (b) in the interim.

[3] I observed that the notice of motion was inelegantly drafted as it did not specify which relief was going to be sought in the interim. Notwithstanding the agreement between Counsel alluded to above, I still wanted to be addressed on whether this Court has jurisdiction to hear the matter and on urgency of the application. Having read the papers, I adopted the attitude that the matter did not warrant immediate attention. As a result, I postponed the case to the 18th February 2022 with a direction for Counsel to address me on the two issues when we next meet.

[4] Before the Court adjourned, I engaged Counsel on the options he has should he share the same doubt regarding the jurisdiction of this Court to hear

the case. Firstly, it was to withdraw the case and refer it to the High Court in its general jurisdiction. Secondly, it was to request that the matter be designated as commercial action in terms of rule 11 (1) of the High Court (Commercial) Court Rules 2011, "*the rules*", once pleadings were closed. I nonetheless emphasised to Counsel that I was open to persuasion should he want to persuade me that this Court has jurisdiction to hear the matter.

[5] On the 18th February 2022 Mr. *Lesupi* still appeared alone and there was still no appearance for the respondents though notice of intention to oppose had been filed on the 17th February 2022. Mr. *Lesupi* assured me that he had notified Mr. *Ntoko* that the matter was postponed to the 18th February 2022. The lackadaisical attitude with which the respondents approached the matter will be reflected in the order that I will make regarding costs. Of the options that I had presented to him the previous day, Mr. *Lesupi* opted to persuade me that this Court has jurisdiction to hear this matter.

BACKGROUND:

[6] Desirous of opening a fuel station and a fuel depot, the applicant entered into agreement with a South African company, MVUA property partners, for financial support. It was during the year 2016 when the agreement was reached. Then the applicant acquired plot number 23134-729 situate at Maputsoe. Maputsoe falls within territorial jurisdiction of the 1st respondent.

The applicant also entered into another agreement with Tholo Energy for supply of fuel once business was operational.

[7] In preparation to develop the plot for the intended purposes, the applicant approached the 1st respondent for guidance. The 1st respondent advised the applicant to obtain environmental plan as well as to apply for grant of planning permission at the offices of Chief Physical Planner at Maseru taking into account the scope of the project.

[8] The applicant was issued with the planning permit whose validity was for twelve months at Maseru. The applicant was then asked to pay M4500.00 still at Maseru, which it did, with the understanding that the 1st respondent will issue it with a building permit at Maputsoe upon production of the receipt. The 1st respondent refused to issue the applicant with a building permit arguing that payment of M4500.00 ought to have been made at Maputsoe and not at Maseru.

[9] The refusal to issue the building permit was despite a request from the Chief Physical Planner through her letter dated the 11th April 2018 to the 1st respondent. In the meantime, the planning permit expired and according to the applicant, the 1st respondent is now using the expiry of the planning permission as an excuse why a building permit cannot be issued.

[10] What then precipitated the instant application is the email which the applicant received on the 11th February 2022 from investors that if the issue

around the building permit was not resolved, they were going to invest their money elsewhere.

LACK OF JURISDICTION

[11] Jurisdiction is defined as "*the power or competence of a Court to hear and determine an issue between parties, and limitations may be put upon such power in relation to territory, subject matter, amount in dispute, parties etc*." *See*: **Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board** 1950 (2) SA 420 (A) at 424

[12] When a jurisdictional challenge is raised, the court must dispose of it first before entering upon any further questions that are in the case. *See:* **Mokhali Shale v Mamphele Shale and Others** C of A (CIV) No 34/2019 at page 4. The position does not change even when lack of jurisdiction is raised by the court *mero motu.*

[13] It is therefore incumbent upon the applicant to demonstrate that the court before which he or she appears has the requisite power to adjudicate over the case. This is achieved by placing the necessary factual foundation before court in the founding affidavit. The court's jurisdiction must be established *ex facie* the founding affidavit. *See*: **Phaila v Director of Public Prosecutions and Others** (Constitutional Case No.24/2018) [2020] LSHC Cons 32 (March

2021).

[14] It is convenient at this stage to refer to instructive words of Van Der Westhuizen J where he said the following in **Jackson Gcaba v Minister of Safety and Security** Case 2010 (1) SA 238 (CC) at 263.

> "[75] Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in *Chirwa*, and not the substantive merits of the case. If Mr Gcaba's case were heard by the High Court, he would have failed for not being able to make out a case for the relief he sought, namely review of an administrative decision. In the event of the Court's jurisdiction being challenged at the outset (*in limine*), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognisable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim under the LRA, one that is to be determined exclusively by the Labour Court, the High

Court would lack jurisdiction. An applicant like Mr Gcaba, who is unable to plead facts that sustain a cause of administrative action that is cognisable by the High Court, should thus approach the Labour Court."

[15] Therefore, the relief which the applicant seeks in the notice of motion in *casu* must be viewed in the light of how the applicant pleaded jurisdiction as well as the cause of action. I now turn to the relevant parts of the founding affidavit.

"5. <u>Jurisdiction</u>

5.1 This honourable court has the jurisdiction to entertain this matter in as much as the parties herein all reside within the jurisdiction of this court, and the prayers and orders sought fall exclusively within the jurisdiction of this court.

5.2 The matter involves the grant of a building permit to a business entity, the applicant that is going to enable it to erect a fuel station and operate a business as such. The conduct of the 1st respondent in refusing to grant the permit has caused and continues to cause grave financial prejudice to the applicant as a business entity.

7. Cause of action

7.1 I submit that having submitted all the relevant information and having met all the legal requirements to obtain a building permit and proceed with the business, the applicant has a right to be issued with a building permit for the plot in issue.

7.2 The decision that the applicant be issued a building permit has been granted by the Chief Physical Planner, payment has been made in order to be issued with a building permit. There is absolutely no good cause why the 1st respondent refuses to issue the applicant with a building permit.

7.3 The 1st respondent is a government official that is obliged by law to perform statutory functions which include issuing building permits, has no right or authority to refuse to exercise the said power without good cause shown.

7.4 Despite demands and even clear instructions to issue the building permit, the 1st respondent refuses to do so.

7.5 This is a clear case that cries out for judicial intervention to protect citizens from abuse of power by public officials who abuse their powers arbitrarily.

7.6 I submit that there is absolutely no other alternative available to the applicant other than to approach the court in this fashion and to seek the orders sought.

7.7 If the application is not granted the applicant is at the risk of losing the investment and will suffer in a manner that cannot be repaired. The profit that will be lost and further profits is (sic) enormous."

APPLICANT'S ARGUMENTS ON JURISDICTION

16. Mr. *Lesupi* acknowledged that the Court's concerns were valid and was candid enough to disclose that he too had the same concerns at the time he got instructions to institute the case. He nonetheless and in a very spirited effort sought to persuade me that this Court has jurisdiction to hear this matter.

17. The kernel of Mr. *Lesupi* 's argument was that looking at rule 10 (1) (g) which covers *restraint of trade and licensing,* this Court has jurisdiction to hear his client 's case. He then referred the Court to the last sentence of paragraph 4.1 of the founding affidavit which speaks to the purpose for which the applicant was incorporated which is to operate and engage *"in the business of fuel retails, storage and distribution in accordance with the laws of Lesotho."* As a consequence, so he argued, the refusal to issue a building permit is

tantamount to restraint of trade, thus directly speaking to the jurisdiction of this Court.

18. Mr. *Lesupi* conceded, correctly so in my view, that the respondents do not have any business relationship with the applicant and that the cause of action does not arise from any commercial or business relationship or transaction between the parties. He however argued that since the Government was the only authority that issues licenses, the word *licensing* in the rule was indicative of the fact that this Court has jurisdiction to issue a *writ of mandamus* against the Government to issue a license.

[19] To his credit, Mr. *Lesupi* confessed that the latter argument dawned on him as he was already addressing the Court. He concluded his argument on the subject my referring the Court to rule 5 which speaks to the principles underlying the judicial system for commercial actions amongst which is to "*deal with cases with a reasonable speed"* and asked me to consider the purpose for which this Court was established.

ANALYSIS

[20] The case revolves around interpretation of rule 10 (1) (g) of the rules, which I am aware it has not been specifically pleaded. It is therefore imperative at this stage to consider the approach to statutory interpretation as I

believe it to be the proper approach even in interpretation of subsidiary legislation like court rules. Theron J captures it aptly as follows in **Independent Institute of Education (Pty) Limited v Kwazulu Natal Law Society & Others** [2019] ZACC 47; 2020(2) SA 325 (CC):

> "[38] It is a well-established canon of statutory construction that "every part of a statute should be construed so as to be consistent, so far as possible, with every other part of that statute, and with every other unrepealed statute enacted by the Legislature". Statutes dealing with the same subject matter, or which are in *pari materia,* should be construed together and harmoniously. This imperative has the effect of harmonising conflicts and differences between statutes. The canon derives its force from the presumption that the Legislature is consistent with itself. In other words, that the Legislature knows and has in mind the existing law when it passes new legislation, and frames new legislation with reference to the existing law. Statutes relating to the same subject matter should be read together because they should be seen as part of a single harmonious legal system.
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> …
>
> [41] This canon is consistent with a contextual approach to statutory interpretation. It is now trite that courts must properly contextualise statutory provisions when ascribing meaning to

the words used therein. While maintaining that words should generally be given their ordinary grammatical meaning, this Court has long recognised that a contextual and purposive approach must be applied to statutory interpretation. Courts must have due regard to the context in which the words appear, even where "the words to be construed are clear and unambiguous".

[21] This exercise will be incomplete without having a closer look at rule 10 which deals with the business of this Court.

"**Business of the commercial court**

10. (1) The business of the commercial court shall comprise all actins arising out of or connect with any relationship of a commercial or business nature, whether contractual or not, and shall include, amongst other things –

(a) banking, negotiable instruments, international credit and similar financial services;

(b) insurance, re-insurance;

(c) agency and partnership;

(d) suretyship and security over movable and immovable property;

(e) building and engineering construction;

(f) intellectual property;

(g) restraint of trade and licensing;

(h) unfair competition;

(i) a business contract;

(j) the export or import of goods;

(k) the carriage of goods by land, sea, air or pipeline;

(l) the exploitation of minerals, hydro-electricity and water resources or other natural resources;

(m) a matter involving a business trust;

(n) a matter arising from application of Companies Act 2011;

(o) arbitration;

(p) insolvency;

(q) winding up or liquidations; or

(r) delicts committed in a commercial context.

[22] More tellingly, rule 3 provides that the rules of this Court "*shall apply to commercial actions*". In terms of rule 2 the words commercial action means "*an action or application of a commercial nature as defined under these rules or as may be designated as such by the Chief Justice in terms of rule 10.*" Taking into account the context as well as the purposes for which the rules were enunciated and looking at rule 10 in its entirety, I am left with no doubt that the Court was established to deal with disputes relevant to commerce or those arising out of business or commercial activity.

[23] I accordingly find that reliance on rule 10 (1) (g) by the applicant in *casu* is misplaced and is mostly actuated by mischaracterisation of the 1st

respondent ‘s refusal to issue the building permit as restraint of trade. I asked Mr. *Lesupi* during argument what he understood by the concept restraint of trade. His answer was that restraint of trade entails any prohibition to trade such as Government’s refusal to issue a building permit. This answer reveals a clear misunderstanding of the concept of restraint of trade, at least in the context of rule 10.

[24] The broad definition which Mr. *Lesupi* ascribes to the concept of restraint of trade is as a result of him overlooking the opening paragraph of rule 10 (1) which is clear that the business of the Court shall comprise *all actions arising out of or connected with any relationship of a commercial or business nature*. The proper meaning of the concept of restraint of trade for purposes of the rules can only be deciphered from the context of the opening paragraph of rule 10 (1) as well as the rules in their entirety. I am accordingly of the opinion that restraint of trade in the context of the rules does not warrant any special definition. Most pertinently, there is no reason to depart from the ordinary common law meaning of the concept which entails a contractual restriction that limits trade or in some instances an employee from joining a competitor. That is not even to suggest that every contract that restrict freedom of trade qualifies as a contract in restraint of trade. Restraint of trade does not arise in *casu* as the applicant has not even started trading and the purported prohibition does not arise from any contractual arrangement between the parties.

[25] Again, the assertion that only the Government is a licensing authority as a result of which refusal to issue a permit falls within the purview of rule 10 (1) (g) is untenable. Firstly, it is worthy of note that the case is about issuance of building permit – a building permit is not a license but a permit authorising a person, natural or legal, to commence with construction. Secondly, while it is accepted that Government issues trading licenses, the argument overlooks the fact that there are several forms of licensing and arrangements entered into between private parties which, for instance, include patent licensing, trademark licensing, software licensing, franchising agreements or licensing etc. These forms of licences would normally have restraint of trade clause aimed at protecting trade secrets amongst others. I think it is logical to conclude that it is disputes arising out of arrangements of a similar nature that are envisaged in rule 10 (1) (g) which are justiciable before this Court and not a refusal by Government to issue out a building permit. But even were I wrong in that conclusion, refusal to issue a permit does not amount to restraint of trade.

[26] In the light of the decision that I have reached on the jurisdiction, which is dispositive of the case, it follows that I need not deal with the issue of urgency. I derive comfort from the Court of Appeal decision in **Bataung Chabeli Construction (Pty) Ltd v Road Fund and Others** C of A

(CIV)/34/2020 at para 12 in taking this approach as this Court cannot proceed any further with a case where it does not have jurisdiction.

ORDER

[27] The following order is made:

27.1 The application is dismissed for want of jurisdiction.

27.2 There is no costs order.

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A.R. MATHABA J
Judge of the High Court

For the Applicant: Mr. T. Lesupi
No appearance for Respondents