

IN THE HIGH COURT OF SWAZILAND

CIV CASE NO. 717/85

In the matter between

HENRY MAZIYA 1st Applicant

GCEBILE DLAMINI 2nd Applicant

and

MARTHA HLATSHWAYO 1st Respondent

THE COMMISSIONER OF POLICE 2nd Respondent

THE ATTORNEY-GENERAL 3rd Respondent

CORAM: HANNAH, CJ.

FOR APPLICANTS: MR. MAHLALELA

FOR RESPONDENTS : MR. SHILUBANE

JUDGMENT

(27/11/85)

Hannah, C.J.

I have before me a Notice of Motion in which the Applicants seek an order:

"Authorising the Deputy Sheriff for the District of Hhohho to seize and take a liquor licence presently in the possession of (The first Respondent) and return same to the 1st and or 2nd Applicant."

The brief facts set out in the affidavits in support of the application are as follows. Until 30th June 1985 the first Respondent leased shop premises from the first Applicant from which she carried on a retail liquor business having obtained a licence from the Liquor Licencing Board to do so. Her lease expired on 30th June and she vacated the premises. On 25th

2

July the first Applicant leased the premises to the second Applicant and, like her predecessor, she also intended to carry on a retail liquor business. She endeavoured unsuccessfully to obtain possession of the first Respondent's licence and, when it became plain that the first Respondent was not prepared to part with this particular document, she applied to the Liquor Licencing Board for its transfer into her name. Her application was granted by the Chairman of the Board under the interim provisions set out in Section 16 of the Act and then apparently with authority from the Clerk to the Board, she obtained from the Revenue Office a licence to sell liquor during the last quarter of the year. She started business but, unfortunately for her, the licence was confiscated by police officers who stated that they were investigating how the licence came to be issued when the full Board had not met to discuss the matter. She says the police told her that they had instructions to retain the licence until such time as she was able to produce the licence held by the first Respondent.

The lawfulness of the action taken by the police in impounding the licence obtained by the second Applicant is not an issue in this application because the Applicants have chosen to seek no relief at all

against the police although the Commissioner has been joined as a party. Instead, the Applicants are content, so it would seem, to accept the validity of the request made by the police for the production of the original licence and in consequence seek an order against the first Respondent only so as to enable them to produce it. That this was not a wise course to take will emerge shortly.

At the outset of the application Mr. Mahlalela on behalf of the Respondent took a number of objections in limine of which all but one were overruled. I indicated at the time that I would

3

give reasons for my rulings and now do so, albeit briefly.

The first objection arose from an order made by Hassanali J. on 23rd October when he dismissed an application in which relief identical to that in the present application was sought. Mr. Shilubane argued that as a result of this order the matter had become *res judicata*. However, the order made, when finally drawn up, clearly shows that the application was dismissed not on its merits but because the learned judge considered that the Commissioner of Police should have been joined as a party to the application. That being so it cannot be said that the issues now before me have been finally adjudicated upon or, for that matter, adjudicated upon at all.

The second objection appeared to have some substance at first glance. The first Respondent is described as a married woman and as such has no *legitima persona standi in judicio*. She can only be sued if assisted by her husband and no evidence is set forth in the founding affidavit that she was so assisted. However, in her own answering affidavit the first Respondent avers that she is fully assisted by her husband and, in my view, this is sufficient to remedy the defect.

The third objection had no substance and indeed was very faintly argued. The fact that no relief was claimed against the second and third Respondents cannot, in my judgment, be prayed in aid by the first Respondent as a bar to relief being sought against her.

The last objection did have merit. Save in a few well defined cases a married woman, under the marital power of her husband, cannot sue. The action can only be instituted by her husband or, in certain circumstances, when assisted by her

4

husband. The Applicants' attorney argued that the second Applicant could sue in her own right being a public trader but, as I understand the authorities, this only arises where the action is in contract and the action falls within the scope of her business. That is not the position here. The objection was, therefore, upheld.

Following my rulings on the preliminary points the second Applicant put in an affidavit by consent with a view to curing the defect arising from her lack of *locus standi*. I entertain the strongest doubts whether this affidavit comes anywhere near achieving the desired result but as Mr. Shilubane intimated that he wished to take no further point in the matter the merits of the application were then argued.

In my view, the application is completely misconceived and shows a misunderstanding of the nature of a licence and the scheme laid down by the Liquor Licencing Act. By virtue of Section 21 of the Act it is unlawful to sell liquor without a licence and a person wishing lawfully to sell liquor must first obtain a licence. He must satisfy the Board of a number of matters including the fact that he is a fit and proper person to hold a licence (section 20(2)) and that the premises are suitable. If the Board is so satisfied and a licence is granted it becomes personal to its holder and extends only to sales on the premises specified. If the holder no longer wishes, or for some reason is unable, to exercise the privilege thus granted or where, for example, he dies or disposes of his interest in the specific premises or his interest expires, then the privilege may be granted to another person. This, in the parlance of the Act, is termed a transfer but in reality it is not a transfer but the grant of a new licence or privilege to a different person. The matter

was admirably

5

summed up by Black J. in *Russel v Minister of Commerce for Northern Ireland* (1945) N.1 184 in the following words:

"Being in its nature a mere personal privilege and nothing more than a mere privilege - a privilege personal to the individual licensee - such a licence cannot be transferred by him to anyone else and it dies with the person to whom it was given ... There are, of course, different types of licence. A man may grant another a licence to use the grantor's property in some particular way. Or a statute may authorise the granting of a licence to carry on some trade or business which the statute does not allow to be carried on without such a licence. But whatever may be the type of licence, the presumption is that it is a purely personal privilege, that it is not capable of being assigned or transferred by the licensee to anyone else, and that it comes to an end on the death of the licensee. No doubt one frequently hears the phrase 'transfer of a licence especially in connection with the law relating to the sale of intoxicating liquors. But it is well established that even in this connection the phrase, though convenient, is nevertheless quite inaccurate and misleading. What is referred to as a transfer of a publican's licence is not in strict law a transfer at all. A licence to sell intoxicating liquors is a personal privilege granted to a named individual.

And what the assignee of licenced premises gets

6

is a new licence and not the old licence transferred ... When one finds the word 'licence' used in a statute the presumption is that it is intended to designate a purely personal privilege, a privilege not capable of being assigned or transferred by the licensee to anyone else and which comes to an end on the death of the licensee."

See also *Fick v Woolcott and Ohlsson's Cape Breweries Ltd* 1911 AD 214 and *Receiver of Revenue, Cape v Cavanagh* 1912 AD 459 where it was emphasised that a liquor licence of the type I am concerned with in this case is a privilege granted to a particular person and forms no portion of the reality to which it relates.

It must follow from the foregoing that while there is nothing to prevent a person such as the second Applicant from applying for a transfer of the licence issued in respect of the premises leased by her - under the provisions of the Act not even the consent of the existing licence holder is required - she has no right to insist that the licence, and by licence I mean the document evidencing the licence, be surrendered by the original holder. What is more, there should, in my view, be no need for such a surrender. A prospective transferee does not require it to make his application, the Act does not require its surrender to perfect a transfer and the transfer can adequately be evidenced by a fresh document issued in the name of the new licence holder. It cannot even be said that the administration of the liquor licencing laws will be adversely affected if the original form of licence remains in the possession of the prior holder because, having no further interest in the premises to which the licence relates, such holder cannot use it in its existing form. Accordingly, in my judgment not only have the Applicants failed to establish any right to

7

the physical possession of the licence retained by the first Respondent but the possession of that particular piece of paper is not a prerequisite to the lawful conduct of a retail liquor business on the premises in question. In the circumstances the application must be dismissed. The application is dismissed with costs.

N.R. HANNAH

CHIEF JUSTICE