

THE HIGH COURT OF SWAZILAND

GARY MUIR

Applicant

And

WINNIE MUIR

1st Respondent

THE CHAIRMAN OF THE LIQUOR LICENSING BOARD

2nd Respondent

LIQUOR LICENSING BOARD SWAZILAND

3rd Respondent

Civ. Case No. 1187/02

Coram

S.B. MAPHALALA - J

For the Applicant

Advocate J.M. Van Der

Walt (Instructed by C.J. Littler & Co).

For the 1st Respondent

MR. P.M. Shilubane

JUDGMENT

(07/05/02)

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This is an application filed under a certificate of urgency and in which the applicant prays for an order in the following terms:

1. That the normal rules pertaining to applications be dispensed with and that this application be disposed of on an urgent basis.
2. The validity of the three liquor licences issued to the applicant, namely a restaurant liquor licence, wine and malt liquor and club liquor licence be extended until finalisation of this application, alternatively by the above Honourable court for such period as the above Honourable court may deem reasonable in the circumstances.
3. The relief sought in prayer 2 above operate with immediate effect.
4. The first and second and third respondents be called upon to show cause on 31 May 2002 at 09h30 why the following relief should not be granted to the applicant.
  - 4.1 The validity of the liquor licences referred to in prayer 2 above should not be extended pending the applicants application for a renewal of the licences and a decision on such application by the second and third respondents, such application and determination thereof to take place in the normal course of applications and renewal of liquor licences for the year 2002.

4.2 Why the second and third respondents should not be directed to hear the applicant's application for a renewal of the said liquor licences.

4.3 Why a declaration order should not be granted that the first respondent has no locus standi to represent the estate of the late Martin Robert Muir in objecting to the issue of the liquor licences to the applicant.

4.4 Declaring that the disputes with regard to the ownership of the licences and the ownership of the businesses known as KamXhosa Restaurant and KamXhosa Wine and Malt business is not an

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impediment to the renewal and/or granting of the licences to the applicant and that same are irrelevant for purposes of the granting of the licence aforesaid.

4.5 Why the first respondent should not be ordered to pay the costs of this application?

4.6 Why the second and third respondents should not be ordered to pay the costs of this application jointly and severally with the first respondent, the one to pay the other to be absolved in the event of the second and third respondents opposing the relief herein sought.

4.7 Further and/or alternative relief.

The application is founded on the affidavit of one Gary Muir who related at great length the facts giving rise to this dispute.

The respondent, in opposition has filed a notice to raise points in limine. The applicant further moved an application for condonation that the applicant's non-compliance with the rule of practice and as such having omitted to file a certificate of urgency be condoned. The matter was enrolled before me at 9.30am on the 29th ultimo where I heard submissions on both the application for condonation and the points in limine and I reserved judgement to the following day the 30th April 2002. However, on that day I could not deliver judgement and reasons for such were given in open court. The matter adjourned to the 7th May 2002 for judgment. Following is my judgment on these matters.

I shall proceed to determine first the application for condonation and then the points in limine.

a) Application for condonation.

The applicant prays for an order inter alia that the applicant's non-compliance with the rule of practice and as such having omitted to file a certificate of urgency be condoned or that applicant be granted leave and/or submit a certificate at the hearing

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of the application. The applicant has filed a supporting affidavit of his attorney Cecil John Littler who offers an explanation for the omission at paragraphs 4 and 5 of the said affidavit.

I have considered the matter and my view is that such an omission is a technical formality and as such prejudice occasioned to the respondents is negligible. I agree in toto with the submissions made by Miss Van Der Walt in this regard and would thus grant the application for condonation in terms of prayer 2 of the notice of motion.

b) The Points in limine.

The first respondent has raised a number of points of law which may be capsuled as follows:

1. The matter is not urgent as much as: a) the notice of motion is not accompanied by a certificate of urgency as is the practice of this court; and b) the applicant knew as early as January 2002 that the first respondent would object to a further extension of the validity of the liquor licences but did not bring the necessary application to extend the validity of the said licences. The so called urgency is of the applicant's own making;

2. The notice does not comply with Rule 6 (10) of the rules of court as it does not give the respondents time within which to oppose the application;

3. The notice of motion is fatally defective in that one of the objectors (A.D. Taylor) to applicant being granted the licences in question has not been cited as a respondent in the application in as much as he has a direct and substantial interest in the matter;

4. The court has no jurisdiction to grant liquor licences in as much as that power is vested in the Liquor Licensing Board of the Hhohho district; 4.2 - interfere with the decisions of the Liquor Licensing Board save by way of review in terms of Section 12 (1) of Act No.

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30 of 1964. The applicant should have appealed against the decision of the Board in terms of Section 11 bis of the Act to the Minister but failed to do so;

5. The applicant has failed to make out a case for a mandamus in that;

5.1 The applicant has not proved that the Liquor Licensing Board failed to carry out its statutory duties; and

5.2 The court has no power to direct the Liquor Licensing Board to hear the application for renewal of the licences in question in as much as the Board is now functus officio;

6. The litigation between the parties have gone long enough and it is in the interest of the public that it should end;

7. The D.H. Muir Trust has no power to enter into mercantile transactions such as leasing its property for the purpose of carrying a retail liquor licences (sic);

8. The application is *Us pendens* before this court under Case No. 3550/01, and;

9. The third respondent has no *locus standi in judicio* in as much as there is no entity called "Liquor Licensing Board Swaziland".

I thus proceed to deal with the above points of law in *seriatum*:

1. The Question of Urgency.

In view of my finding immediately above granting the application for condonation point (a) under this head, viz that the notice of motion is not accompanied by a certificate of urgency falls away and any further discussion thereto would not be necessary. What remains to be determined is point 1 (b) being an allegation by the

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first respondent that the applicant knew as early as January 2002 that the first respondent would object to a further extension of the validity of the liquor licences but did not bring the necessary application to extend the validity of the said licences. The so-called urgency is of the applicant's own making.

It would appear to me that there was a lot of correspondence between the parties who have been engaged in negotiations to find an amicable conclusion to this matter. This is clear when one reads paragraphs 8.8, 8.8.1, 8.8.2, 8.8.3, 8.8.4, 8.8.5, 8.8.6, 8.9, 8.9.1 and 8.9.2 of the applicant's founding affidavit. These attempts to settle the matter out of court culminated to a stalemate being reached. Thereafter it was necessary for the applicant to launch these proceedings to protect his rights in the matter.

For the above reasons I find that the applicant has satisfied the court that the matter is urgent and the point in limine in this regard ought to fail.

2. Whether the notice of motion comply with Rule 6 (10) of the rules of the court  
Mr. Shilubane on behalf of the first respondent contended that the present application does not comply with Rule 6 (10), as it does not give the respondents time within which to oppose the application.

Rule 6(10) reads as follows:

"(10) In such notice the applicant shall appoint an address within five kilometres of the office of the Registrar at which he will accept notice and service of all documents in such proceedings, and shall set forth a day, not less than five days after service thereof on the respondent, on or before which such respondent is required to notify the applicant in writing whether he intends to oppose such application, and shall further state that if no such notification is given the application will be set down for hearing on a stated day, not being less than seven days after service on the respondent of the notice".

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On the other hand it is argued for the applicant that this application has been brought as an *ex parte* application within the ambit of Rule 6 (4) of the Rules.

Rule 6 (4) reads as follows:

"(4) Every application brought *ex parte* by way of petition or notice of motion shall, save in matters of urgency, be filed with the Registrar and set down not later than midday on the court day preceding the day on which the application is to be heard.

Further, sub-rule (5) provides as follows:

"(5) If such application is brought upon notice to the Registrar, it shall set forth the form of order sought, specify the affidavit or affidavits filed in support thereof, request him to place the matter on the roll for hearing, and be as near as may be in accordance with Form 2 of the first schedule"

It appears to me that the instant application was brought in terms of Rule 6 (4) and (5) as outlined above and conforms with Form 2 of the first schedule.

The point in limine in this regard thus fails.

3. Non joinder of a party.

It is contended on behalf of the first respondent that the notice of motion is fatally defective in that one of the objectors (A.D. Taylor) to applicant being granted the licences in question has not been cited as a respondent in the application in as much as he has a direct and substantial interest in the matter.

On reading the affidavit of the applicant and considering the *au contraire* arguments advanced by Miss Van Der Walt for the applicant I come to the conclusion that it was not necessary to cite A.D. Taylor as the matter before the court is not the one concerning objections but is for the determination of legal issues as per the directives made by the Board.

I rule in this regard that this point in limine ought not to succeed.

4. Whether the court has jurisdiction in this matter.

I shall proceed to determine point 4.1, 4.2, 5, 5.1 and 5.2 at the same time as they are inter-related. Mr. Shilubane argued at great length in this connexion that the crux of the matter is that this court has no power to grant a liquor licence. If there is a body set up by statute to perform certain acts the court has no power to interfere. The courts can only intervene either on appeal or on review. This court has no power to interfere with the decisions of the Liquor Licensing Board save by way of review in terms of Section 12 (1) of Act No. 30 of 1964. The applicant should have appealed against the decision of the Board in terms of Section 11 bis of the Act to the Minister but has failed to do so.

It appears to me from reading of the papers before me that Miss Van Der Walt is correct that the source of the problems in this matter is the ruling by the Liquor Licensing Board of the 29th November, 2001 which gives the High Court the power to determine certain issues connected with the application for liquor licences before it. The determination of these legal issue became a condition precedent to its hearing the applications for these licences.

Annexure "GM3" being a copy of the said order reads in extenso as follows:

"[a] The current licences which are by consensus by the applicants and the first objector and issued on the orders of the High Court cannot be renewed by the Board, as the conditions attached to their issuance, that is, the finalisation of the disputes between the first objector and the applicants had not yet been fulfilled. The applications are for that reason refused.

[b] The applicants are advised and directed by the Board to seek assistance of the High Court, especially to determine:

1. Who owns the businesses, who should appear before the Board and who should hold the licences on behalf of the business;
2. In the meantime, the parties may also approach the High Court as to a further extension of the consensus licences issued on the authority of the High Court for the

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year ending 31st December 2001, while the dispute is being determined by the High Court;

3. For the above reasons, the Board sees no wisdom in deciding the question of postponing the hearing as prayed for by both objectors", (my emphasis).

The attorneys for the applicant by letter dated the 26th February, 2002 (annexure "GM4") directed the following to the Board:

"2. We are given to understand that your honourable self as well as your Board is not prepared to entertain the legal issues as to the ownership of the licences and/or any issues emanating therefrom and have indicated that the matter must be resolved by the High Court.

3. We have further been informed that you are not prepared to entertain any new application by our clients for the issue of liquor licences until the disputes existing between our client and Winnie Muir have been resolved by way of some or other order of the High Court.

On the 11th March, 2002 the Board answered in a letter marked as annexure "GM5" as follows:

"Your paragraphs numbered 2 and 3 correctly reflect the Board's stand on the matter".

It is abundantly clear, therefore that this matter has been referred to this court by the Board for determination and it cannot be said that the court has usurped the powers of the Board in these matters under these circumstances. Further on the strength of the dicta in the case of Airoadex Press (Pty) Ltd vs Chairman, Local Road Transportation Board, Durban and others 1986 (2) S.A. 663 referred to me by Miss Van Der Walt I am of the view that the court has power to hear the matter because of the special circumstances outlined above.

I find also that points 5.1 and 5.2 has no merit in view of what I have found immediately above.

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5. That the litigation between the parties have gone long enough and it is in the interest of the public that it should end.

It is not clear how this point is qualified in law as a point in limine and its relevance in these proceedings. It would only apply, perhaps when an application for postponement that such considerations would apply.

For the above reason the point ought to fail.

6. Whether the trust has power to enter mercantile transactions.

Mr. Shilubane contended that the trust being D.H. Muir has no power to enter into mercantile transactions such as leasing its property for purposes of carrying liquor licences. In this regard he referred me to the authority of Meyerowitz on Administration of Estates, (6th ED) at 23 - 33 where the learned author state that the trustee derives his power from the trust instrument and he is confined to the powers granted thereunder. Unless such power is given to him by the instrument he cannot mortgage estate property, or purchase or sell property nor ordinary has the power to carry on mercantile transaction or a business (see Ex parte Bellingan 's Executors 1936 CPD 515 and I A Essack Family Trust vs Soni 1973 (3) S.A. 625 (D)).

He argued that the will in casu does not confer to the trustee such a power. The said will at Clause 6 (a) reads as follows:

"It is my special will and direction that the whole residue of my estate shall vest in my administrator herein before appointed in trust for my children as heirs aforesaid and my administrator shall be entitled to administer my Estate in its sole, absolute and undisturbed discretion for the benefit of my estate with full powers of realisation, investment and reinvestment and subject to the further terms of my will"

It would appear to me that the will does not restrict the administrator on what business to undertake on behalf of the estate. It is my view, that the fact that the estate is deriving an income from the sale of liquor falls within the ambit of Clause 6 (a) of the said will. The clear intention of the testator was that the administrator was to have

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"sole, absolute and undisturbed discretion" for the benefit of the estate. It does not limit the powers of the administrator in anyway. If the trust were precluded from engaging in "mercantile transactions" how could the trustee carry out his duties by investing the properties of the estate? The will is clear that the trustee has full powers of "realisation, investment and re-investment".

I hold therefore, in this regard that the point in limine cannot stand in the face of the above reasoning.

8. Whether the application is Us pendens.

Mr. Shilubane argued that this application is lis pendens before the court under Case No. 3550/01. It was

pointed out during the course of arguments by Miss Van Der Walt that the correct case number in this case is 3250/01. My view in this regard is that the matter is not *lis pendens*, in so far as this application is founded on a different set of facts which arose subsequent to the other application where new prayers are being sought.

9. Whether third respondent has *locus standi in judicio*.

It is contended on behalf of the first respondent in this regard that the third respondent has no *locus standi in judicio* in as much as there is no entity called "Liquor Licensing Board Swaziland ". That the Liquor Licensing Act (*supra*) clearly spells out the various boards in the four regions of the country.

Miss Van Der Walt argued *per contra* that this is a very technical point. I agree with these submissions on the basis that is clear who the party is from the papers. There is correspondence between the parties as I have already mentioned earlier in the course of this judgment when reference was made to annexure "GM3" and "GM4". This is merely a misnomer and such an objection as put forth by the first respondent is of a purely technical nature and cannot advance her case in anyway and certainly cannot vitiate the applicant's case.

This point in *limine* cannot succeed.

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10. The Court Order.

In the result, the following order is recorded:

- a) The application for condonation is granted in terms of prayer 2 of the notice of motion (in the application for condonation);
- b) A rule nisi to be issued in terms of prayer 2, 3 and 4 of the notice of motion;
- c) The first, second and third respondent to file their answering affidavits on or before the 17th May 2002 and thereafter the applicant to file his replying affidavit on or before the 20th May 2002 and the matter enrolled in the contested motion of the 24th May 2002.
- d) Costs to be costs in the main application.

S.B. MAPHALALA

JUDGE