HELD AT MBABANE

Civil Appeal No. 11/93

In the matter between:-

Johannes Nkambule NO ..... Appellant

And

The Attorney General..... First Respondent

And

Licensing Officer, Piggs Peak ..... Second Respondent

P.R. Dunseith for the Appellant

F. Graham for the Respondents

Coram : Melamet JP,

Schreiner JA and

Dunn AJA

JUDGMENT

Schreiner JA: This is an appeal from a decision of the learned Chief Justice refusing confirmation of a rule nisi which called upon the Second Respondent to show cause why, inter alia, his order dated the 18th December 1992 revoking the trading license for the "Kuhle Kathula Grocery" at the Emkhuzweni area of the Hhohho District should not be set aside. The remainder of the rule dealt with

rule dealt with condonation of the Appellant's failure to appear before the Second Respondent, affording the Appellant an opportunity of making representations before the license was revoked and the payment of costs. The judgment of the Court is very short and it appears that the rule was discharged simply upon the ground that the Appellant had indeed been given an opportunity to be heard but, for his own reason, did not avail himself of that opportunity.

I do not propose to set out in great detail the history of this matter. A short summary will suffice.

The Appellant is the executor dative in the estate of Thandabantu Kunene who died in March 1992. Until his appointment on the 20th November of that year there was a curator who carried on the business of the grocery store.

The original license was granted during 1989 and it had been renewed thereafter so that, in 1992 it was still in force. According to the Second Respondent the license had been granted subject to two conditions one of which was that the holder had to obtain written permission to conduct his business from the Ngwenyama as the land on which it was conducted was Swazi

Nation Land. This permission was specifically required by the proviso to section 8(1)

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to section 8(1) of the Trading Licences Order,1975 ("the Order"). On the wording of the proviso it would seem that permission should have been obtained before the grant of any license, but it seems to have been interpreted as permitting the grant of a license subject to the condition that the necessary permission be obtained, presumably, within a reasonable time after grant.

Whatever the position might have been about the terms of the license which, on the face of the document itself, was not subject to any condition but which, according to the Second Respondent, should have been issued subject to two conditions one of which was the written consent of the Ngwenyama, Section 8(1) of the Order requires such consent and it is common cause that this was not obtained.

Before the appointment of the Appellant as executor at the end of 1992 the Second Respondent had attempted to revoke the license, but, as set out above because no opportunity had been afforded to the curator who was conducting the business to make representations ad this revocation was set aside by the High Court. In December 1992, when the Appellant had been appointed as executor, another attempt was made to close the business. This was the cause of the present proceedings. In this instance the learned Chief Justice found

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Justice found that there had indeed been an opportunity to make representations and so he discharged the rule which had been issued in March 1993.

Section 11(2) of the Order provides that every licence shall expire on the 31st December of the year for which it is granted or subsequently renewed as the case may be. In this regard, the Appellant states:-

"On the 12th day of January 1993 I attended on the Second Respondent with a view to renewing the licence for the year commencing January 1993 and ending December 1993. The Licensing Officer refused to renew the said licence and in turn I was handed a letter dated the 18th December 1992 informing that the licence has (sic) still being revoked."

The letter of the 18th December 1992 had been sent to the offices of the Appellant during the period when he was away on his Christmas holiday and, it seems, did not come to his notice until a copy was handed to him on the 12th January 1993.

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The Second Respondent in his answering affidavit admits that no license was granted to operate during the year 1993 but denies that the Appellant made a formal application for the renewal of the license which is the subject of it.

The Appellant in his replying affidavit states that an attempt was made by him on the 12th January 1993 "to renew the license for the current year but[l] was referred to second Respondent by one Mr Mavuso of the Licensing office, Pigg's Peak." He says that the Second Respondent refused to see him when he was told that he had come in connection with the grocery license and was later told to consult the Attorney General's Office. It was Mr Mavuso who drew the attention of the Appellant to the letter of the 18th December. Though there may be some doubt as to whether an Application was made to renew or whether the Licensing Oficer refused to consider the Application, this does not afect the matter.

The position at the stage when the application was made to the High Court in March 1993 was therefore that the Second Respondent had purported to revoke the license which had been renewed for the year 1992 and an application to the second respondent to renew it for the year 1993 had been refused or not entertained on the ground, that no license was in operation at the beginning of that year because of the revocation in December 1992. The validity

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of the revocation was in issue before the Court, but the validity of the refusal to renew the license was not. If the High Court had seen fit to set aside the December revocation of the license, there would still have been no license for the coming year. Any order made by the Court on the application as framed, would have been academic in the sense that there could have been no lawful operation of the grocery business pursuant to it. The Second Respondent had seen fit not to grant the renewal for 1992 and that decision was not been challenged. On the papers one cannot find a reason why the decision not to renew the license was not challenged, but it could well have been the realisation that the written permission of the Ngwenyama to the grant of the license had not been obtained over a period of more than two years and that it must be assumed that it could not then be obtained.

We were told during argument before this Court that, due to administrative hold-ups, it was, from a practical point of view, not possible to obtain written consent as required by the proviso to section 8 (1) of the Order for the establishment of all businesses on Swazi Nation Land. In the present case there is no indication that this was even attempted. Despite the death of the original licensee this could, if it had occurred, have been established from the office of the Ngwenyama. There is no indication on the papers of any intention on the part of the Appellant to re-open the question of the renewal for 1993.

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I am therefore of the view that the rule nisi should have been discharged on the ground that, if it had been granted in March 1992, it would have been of no practical effect to the parties. If the rule was confirmed it would have amounted merely to a declaration of rights concerning the state of affairs during the previous license year and not for the year 1993, and thus hypothetical and not proper subject matter for adjudication.
I should mention that in argument before us it was pointed out that, in terms of section 8 bis (1) of the Order it is a precondition of the revocation of a license by a licensing officer that, where the license entitles the holder to carry on business on Swazi Nation Land, there should be written consent to such revocation by the Ngwenama or a person authorised by him in writing. There is no suggestion on the papers before us that any such consent from the Ngwenama or his agent authorized in writing was sought or obtained. The matter was not raised by the Appellant but it is arguable that it was for the Second Respondent to establish that the necessary written consent to the revocation had been obtained. In view of my finding in regard to the jurisdictional point, it is not necessary to express any opinion as to the correctness of this contention.

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The same applies to the ground upon which the Learned Chief Justice dismissed the application, namely, that, as a matter of fact an opportunity to make representations to the Second Respondent had indeed been given.

In conclusion I think that I should emphasize that the dismissal of this appeal on the above grounds is not based upon the fact that at the time when it came before this Court the matter was clearly academic. It relates to the time of the application before the High Court- It is not necessary therefore to go into the question of the correctness of the view expressed in

Lendalease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola and Others 1976 (4) SA 464 (A) at 486 E where the Appellate Division in South Africa held that the fact that an issue had become academic during the time between the decision of the Court a quo and the hearing of an appeal in the Appellate Division did not preclude the Appellate Division from hearing the matter. In the present case the matter in issue ceased to have relevance to the relationship between the parties when it came before the High Court.

I would therefore dismiss the appeal with costs.

WHR SCHREINER JA

I agree and it so ordered. Melamet JP

I agree

Dunn AJA

Judgment delivered on . .1st. . . . day of . . July.....