

IN THE SUPREME COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case Nr. : 4311/2004

In the matter between:

BANENG LESOTHO (PTY) LTD

Applicant

and

**THE COMMISSIONER OF CUSTOMS AND
EXCISE**

1st Respondent

**THE CONTROLLER OF CUSTOMS AND
EXCISE, FICKSBURG BORDER POST
FICKSBURG, FREE STATE**

2nd Respondent

HEARD ON:

21 DECEMBER 2004

JUDGMENT:

HATTINGH J

DELIVERED ON:

21 DECEMBER 2004

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- [1] On 10 December the applicant had notified the respondents that an order in terms of the Notice of Motion would urgently be sought on 14 December. On the latter date the “urgent” application was postponed to 17 December. On this date the

application was once again postponed to 21 December for hearing of the matter. Counsel were also requested to file heads of argument timeously.

- [2] On 20 December, the day preceding the hearing of this application and at 15:00 I requested my secretary to call the respective attorneys of the parties, and to ascertain from them why the heads of argument were not filed timeously. Short after the call respondent filed his heads of argument. At approximately 15:15 counsel for applicant, made a direct telephone call, unasked for, and informed me that he is experiencing some difficulty with the typing of his heads of argument and that it would be ready at 16:00. I might add, that the Court, at that stage, already concluded its preparation for the hearing of the application on the following day, except for that which counsel might contribute in their written arguments. Unexpectedly, and shortly after 16:00, another telephone call was forthcoming from Mr. Grewar. To my dismay he announced that, at the hearing of the urgent application, on the following day, he will move for a motion

postponing it. Be that at it may, he did not bother to file any heads of arguments at all.

[3] At the hearing, Mr. Grewar, asked that the matter be postponed. The Court indicated that the application for postponement can only be considered, once the matter was enrolled as an urgent application, and due to the respondents' intended opposition and arrangements which were then agreed upon between the parties, the application lost its urgency. This fact was, at last, not contested by counsel, for applicant.

[4] As often happens in urgent applications, permission was sought to enrol otherwise than in accordance with the Court Rules. The issue, I must now decide, is whether irregular enrolment should be permitted.

[5] It would be correct to condone non-compliance with the rules and permit enrolment if that is warranted by the need to grant urgent relief. However, it happens too frequently that counsel unexpectedly rises with a file in his hands, and asks that the matter which would have had some urgency, if the urgency had not disappeared, should be enrolled, only so that some postponement and some agreement in regard of costs should be ordered. That is ill-founded and blatantly wrong. Vanished urgency is not a reason for enrolment.

VENTURE CAPITAL v MAUERBERGER 1991 (1) SA 96
(W) 98 A.)

[6] Respondent's counsel contended that no urgency, whatsoever attached to the application from its inception. I agree.

[7] (i) Applicant avers that the matter is urgent on the basis that it has a customer for the goods in question, and that such goods are due to be delivered to such customer. Glaringly, the applicant does not say when.

ii) In the founding affidavit, paragraph 20.3 avers:

“The further the detention of the property of the applicant would lead to a definite financial loss for the applicant and given the fact that arrangements for the shipping of this container and its contents, by sea, have already been made, the cancellation of such space on the ship lead to a forfeiture of the deposit paid in respect thereof, and given the fact that we are nearing the holiday season, the possibility of obtaining airfreight for the shipment is minimal and total cancellation of the shipment and any further orders, is therefore not excluded”.

No documentation in support of this allegation is attached, not even in the replying affidavit, after the challenge, posed

by respondents in their answering affidavit.

iii) The co-called shipping instruction (Annexure “M19”) does not even contain a date.

iv) The applicant has still not apprised the Court what the amount of the deposit is that was already paid, in order to assist the Court to come to a decision whether such amounts justifies the applicant approaching the Court on an urgent basis.

[8] It is incumbent upon an applicant to set out clearly in his founding affidavit the grounds of any alleged urgency. This is trite law. **(LUNA MEUBEL VERVAARDIGERS (EDMS)**

BPK v MAKIN AND ANOTHER 1977 (4) SA 135 (W).)

[9] What applicant in fact did was to approach the Court under the veil of urgency, which did not exist, bearing in mind that the course this application followed, starting off on 10 December to today, 21 December, which was brought about by applicant’s own delay in bringing this application to fruition.

[10] The attitude and approach adopted by the applicant and his legal advisors by bringing the application, as a matter of urgency, even out of term must be discouraged. Especially when during

recess a Judge is called upon to prepare (the application consists of 155 pages) and to hear the matter at his own considerable inconvenience.

[11] There is another aspect, and that is that the application was brought with unwarranted haste and unfounded urgency. Applicant (and his legal advisors) have wrongly adopted the attitude that any matter can just be brought at any time as a matter of urgency and on the date of the hearing of the “urgent” application, (when the urgency had disappeared) asks that the matter be enrolled only, so that some postponement or procedural arrangement, and the like, should be ordered. This approach is unjustifiable and untenable. It merits a special order as to costs, as a mark of the Court’s disapproval, of the conduct of applicant in bringing the abortive application over hastily and on ill advised grounds. Applicant’s behaviour amounted to stubbornness bordering on vexatiousness and was highly reprehensible. His conduct smacks of petulance and is vexatious and an abuse of the process of Court.

[12] Moreover, applicant’s legal advisors, to persist in the application in such circumstances, evinced a total disregard for the rights of the respondents who were put to great expense in resisting the relief claimed. Such conduct which is not only preposterous, but somewhat reckless, if not vexatious and frivolous and clamours for correction by means of a punitive order for costs. **(MAHOMED & SON v MAHOMED** 1959 (2) SA 688 (T); **LEMORE v AFRICAN MUTUAL CREDIT ASSOCIATION AND ANOTHER** 1961 (1) SA 195 at 199 E – H; **HAYES v BALDACHIN AND**

OTHERS 1980 (2) SA 589 (R); **JAMES v JOCKEY CLUB**
OF SA 1954 (2) SA 44 (W) and **MAKHUVA AND OTHERS v**
LUKOTO BUS SERVICE (PTY) LTD AND OTHERS 1987
 (3) SA 376 (V).)

[13] In all the circumstances it is in my opinion necessary that an attorney and client costs order be made, and I do so after careful reflection.

[14] In the result applicant's request for condonation and for enrolment of the matter is refused with costs on the attorney and client scale including the wasted costs occasioned by the postponements on 14 and 17 December.

G.A. HATTINGH, J

On behalf of applicant:	Advocate D. Grewar Instructed by: Naudes BLOEMFONTEIN
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On behalf of respondents:	Mr. Gough State Attorney BLOEMFONTEIN
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