IN THE HIGH COURT OF SWAZILAND

Civ.Case No. 1961/94

In the matter between:

MAKHOWE INVESTMENT (PTY) LIMITED	Applicant
and	
USUTU PULP COMPANY LIMITED	Respondent

CORAM:	Hull, C.J.
FOR THE APPLICANT	Mr. Fine and Mr. Shilubane
FOR RESPONDENT	Mr. Wise S.C. and Mr. Cloete

Reasons for judgment;
judgment on costs
(30/11/94)

On the afternoon of 9th November the applicant company ("Makhowe") obtained from Mr. Justice Roos a rule nisi, returnable on 25th November, calling on the respondent company ("Usutu") to show cause why it should not be interdicted from stopping Makhowe from taking and processing wild mushrooms from Usutu Forest. It also procured, pending the return date, an interim interdict to the same effect.

Makhowe had come before the learned judge on a basis of urgency. The application had been served, on Usutu itself, at 11 o'clock in the morning. By the time when the order was made, it had not had sufficient time to consult its lawyers.

In the founding affidavit, which had been sworn on 8th November, Makhowe's managing director said the following things:

(a) In 1973 Makhowe was issued under King's Order in Council No. 34/1973 (in other words, the Wild Mushroom Control Order, 1973) an exclusive licence to harvest and process wild mushrooms from "any forest or other area of land in Swaziland" for a period of fifteen years.

(b) When the licence expired in 1988, it was renewed and remains in force. To exploit its rights, Makhowe had set up a factory on Swazi nation land at Bhunya to enable it to harvest and process wild mushrooms from Bhunya forest.

(c) In breach of Makhowe's "right", Usutu had instructed it to stop collecting mushrooms from Usutu Forest and had "purported to call for tenders from other companies to collect wild mushrooms from the land '<u>leased</u>' by Makhowe". (My emphasis added.)

(d) The matter was urgent because Makhowe was suffering irreparable financial loss as it could not pick the mushrooms, it could not meet its overseas contractual obligations, and it had to lay off permanent workers temporarily - those workers therefore losing their wages. It was also said, though I do not think that it adds anything, that wild mushrooms have to be picked daily to be of any value.

To the founding affidavit, several documents were annexed. One was the original licence (not in dispute) for a term of fifteen years expiring in 1988. The second was a subsequent licence (also not in dispute in these proceedings) dated 10th September 1988, the term of which was expressed in paragraph 2(f) as being "for a period of five years which may be renewable at the instance of the licensee". A third was a general receipt issued on behalf of the Accountant-General of the Swaziland Government on 28th February 1994 for ten emalangeni, and expressed as being a "licence fee for Wild Mushrooms Control Order for period 1994".

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Then there was a letter dated 20th May 1994 from Usutu's financial controller to the managing director of Makhowe. This stated that the licence issued by the Minister of Agriculture to collect mushrooms from Usutu forest areas had expired in September 1993, and that Makhowe had been permitted to continue the collection of mushrooms beyond the expiry date. It went on to say that as Makhowe had been made aware, Usutu intended to call for tenders for the collection of mushrooms from its forests; and therefore to give Makhowe notice that it should stop collections by 30th June 1994. It concluded by saying that Makhowe would be invited to tender.

A copy of the public advertisement calling for tenders was also annexed. This was issued by the Usutu Royal Trust. It invited tenders in respect of land described as being leased to Usutu (the respondent). It specified 24th June 1994 as the closing date for receipt of tenders.

A copy of the King's Order in Council - the Wild Mushroom Control Order, 1973 - was also furnished to the judge with the application.

Both of the licence annexed to the application were expressed as being "exclusive" licences.

Usutu in due course filed answering affidavits.

The first of these was sworn by its financial controller. He said that Usutu is the registered owner of the land in question and he also disclosed the existence of two agreements in respect of the lands. Under the first, it had agreed to transfer them to The Ngwenyama in trust for the Swazi nation, in return for a leaseback to Usutu and the creation of a trust to administer the lands. The second provided for the establishment of the Usutu Royal Trust for that purpose, the donation of the lands by The Ngwenyama to it, and the appointment of Usutu (the respondent) by the Royal Trust to administer the lands. The financial controller explained that, since then, the Royal Trust and Usutu had in fact administered the lands and the forests on them.

The financial controller said that although Makhowe had obtained in 1973 an exclusive licence to harvest wild mushrooms, it had

nevertheless also negotiated with Usutu for permission to enter the latter's property to take mushrooms from its forests. He annexed to his affidavit a copy of an agreement that had been made for that purpose between the companies in 1982.

He also annexed a copy of a letter written by Makhowe on 26th October 1993. This letter is in the following terms:

"Manager Projects
Tibiyo Taka Ngwane
P. O. Box 181
KWALUSENI

26 October 1993

"ATTENTION: MR. D.D. MTETWA

"Dear Sir,

"RE: COLLECTION OF MUSHROOMS - USUTU FORESTS

"1. The validity of our 5-year licence, issued by the Ministry of Agriculture, on the above subject expired on 10 September 1993. Much as the collection season is about to start we are very apprehensive to commence with the collections operations because doing so would most likely be considered illegal and affect our position in the tendering exercise to be initiated by the Usutu Royal Trust Committee.

"2. Furthermore, we have been communicating with Tibiyo on normalising our position as a bona fide organisation whose actions in the past five years, though bona fide, were based on 'good faith' following the enclosed copy of the Ministry of Agriculture letter and unwritten traditional understandings with the Zondwako community chief on issues of land lease etc.

"3.We herein submit further evidence that Makhowe has endeavoured to keep its side of the bargain clean and did not deliberately try to take advantage of the loose arrangements governing our mushroom business.

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"We sincerely thank Tibiyo's General Manager for his encouraging note of February 17, 1993 assuring us that despite all the mistakes that have happened we stand a chance of being considered fairly in the tender proceedings to come.

"We plead that Makhowe be allowed to commence mushroom collections immediately for the current year whilst Tibiyo is formulating rules and regulations that will govern future collections. We certainly shall abide by such rules should we succeed in our tender.

"Yours faitnfully,

"MANAGING DIRECTOR".

The financial controller said that after Makhowe's licence had expired in 1993, Usutu in conjunction with the Royal Trust "and Tibiyo" had permitted Makhowe to continue picking mushrooms at will (i.e. the will of Usutu and the Royal Trust) pending the tender process, and that Makhowe had indicated that it was happy with and would participate in the tender process. He denied that Makhowe held any leases over the forests.

He also annexed to his affidavit the first two pages of Makhowe's eventual tender, undertaking to make the whole document available if required. These two pages are described as a summary of the proposal. It is apparent from the last paragraph that Makhowe contemplated a renewable five year lease. The financial controller said that the tender was awarded eventually to another company.

An affidavit was also sworn by Mr. Absalom Dlamini. In it, he said that he was the general manager of "Tibiyo TakaNgwane" and that he was "duly authorised" to make the affidavit. He stated that Tibiyo TakaNgwane is the "management arm" of the assets held in trust by The Ngwenyama for the Swazi nation and he confirmed that the facts alleged in the affidavit of the financial controller for Usutu were true, as far as they related to Tibiyo and the Royal Trust.

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Makhowe filed affidavits in reply from the managing director and from the business consultant to Makhowe.

The managing director now acknowledged that Makhowe did not hold any leases in respect of Usutu forest lands, explaining that his assertion to the contrary in his founding affidavit had been an error, occasioned by the urgency of the situation. Referring to the business consultant's affidavit, he explained that he himself, in signing the letter of 26th October 1993, had done so under the mistaken belief that it set out the correct position in fact and law, and that he had relied on the business consultant's grasp of the situation.

The managing director said that the Royal Trust had never had the right to call for tenders. He asserted that the tender advertisement had been false, misleading and calculated to prejudice Makhowe's rights under its exclusive licence. He raised allegations to the effect that the tender process had in fact been a "farce", the decision to select a tenderer having already been taken.

In his affidavit, the business consultant stated that at the time when he drafted the letter of 26th October, he had been misled into believing that the lands had been transferred to the Ngwenyama in trust for the Swazi nation, annexing a letter of 9th September 1991 from Usutu to Makhowe to that effect and a further letter of 13th November 1992 to the same effect.

He also asserted that this last letter "misled" him into believing both that the 1988 licence was non-exclusive and that it was renewable only at the option of the Minister for Agriculture.

I will not set out the letter in full. In the end, I think it is irrelevant to the issue. It is, however, a rather curious document. Acknowledging that an exclusive licence had been granted for 15 years initially, it goes on to assert that Makhowe had failed "totally and utterly" to honour the annual payments of E10, which it described (though the original licence does not do so) as "royalty" fees. The use of the word "royalty" may reflect linguistic differences. In other words, the writer may have meant to describe, simply, a fee payable to the Crown, whereas in commercial parlance the word usually

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refers to payments of some commercial significance in return for an advantage or benefit. On the other hand, the tone of the letter does to my mind tend rather to invest the alleged non-payment of the ten emalangeni annual licence fee with commercial significance.

The letter alleges other breaches. Then it asserts that in 1982, the licence was cancelled and rendered "non-exclusive", and that the new "non-exclusive" licence was to be for a period of five years, renewable only at the option of the Minister. After referring to the return of ownership of the lands to The Ngwenyama in trust, the letter also asserts that the agreement between Usutu and Makhowe had expired in 1985, and that Makhowe had been told in 1991 that Usutu no longer had the right to renew the agreement, and that it was open to Makhowe to submit a tender to the Royal Trust.

What is odd, of course, about the letter is that having earlier (in 1973) issued an exclusive fifteen year licence, on 10th September 1988 the Minister for Agriculture admittedly issued a second licence, described in its opening words as being "An Exclusive licence..." for a term of five years to Makhowe. Moreover, as I have already indicated, paragraph 2(f), of that licence provides: "The licence shall be for a period of five years which may be renewable at the instance of the licensee".

As I have mentioned, the 1973 and the 1988 licences were annexed to Makhowe's own founding affidavit. The business consultant, in describing how he was "misled" by the letter of 13th November 1992, explained that he had not read the 1988 licence when he drafted the letter of 26th October 1993.

In summary, therefore, the business consultant is saying that he was misled into writing the letter of 26th October; the managing director is saying that he signed it in reliance on his business consultant's advice; and Makhowe is thus - in reply - seeking to disavow it.

The present application falls, however, to be determined in accordance with principles of law. Whether or not and for whatever reasons, in the situation to which the two letters related, either Makhowe or

Tibiyo may have been confused as to the legal rights and obligations involved, or may have found it convenient or expedient at the time to put them aside, or in Makhowe's case may have felt forced to adopt a pragmatic approach rather than one based on a proper view of the legal position, it is irrelevant for present purposes whether the business consultant and, vicariously, the managing director, were in truth misled.

Although the parties to the present application have also argued whether Makhowe has a licence currently to harvest and process wild mushrooms - the applicant asserting that it does and the respondent denying it - I think with respect that this is also irrelevant.

Two issues arise on the application.

The first is whether the application should be dismissed as a matter of discretion, with an appropriate order for costs, because Makhowe obtained the order for urgency and the interim interdict effectively on an ex parte basis and, in doing so, failed to make full and frank disclosure to Roos J. of all the material facts that were within its knowledge.

The second is whether the rule should be discharged on the merits.

I was of the view that the rule should be discharged on the merits. I will give my reasons for that conclusion first, dealing with the issue of non-disclosure in relation to the matter of costs.

Even assuming for the argument that Makhowe does hold a current licence under the Wild Mushroom Order 1973, it could not have succeeded in this application unless it were able to show that that licence authorises it to go on to private property and to take wild mushrooms without the need to obtain the prior agreement of the landowner. It is common ground that at present it has no such permission from the registered owner, Usutu.

Makhowe argues that the intention of the Wild Mushroom Control Order 1973 is that a licence granted under it empowers the holder to enter

on any land in Swaziland - including privately owned land and whether or not the private landowner consents - to collect wild mushrooms.

In my judgment that is clearly an incorrect interpretation of the Order.

The long title, or preamble, to the Order is expressed as being "A King's Order-in-Council to provide for the prohibition of the sale, export and picking of wild mushrooms without a licence." Under a heading "Control of wild mushroom industry", section 3(1) prohibits the sale, the collection and processing (except for personal and family consumption) "from or in any forest or other area of land", and the export of wild mushrooms, without a licence.

Then under a heading "Wild mushroom licence", section 4(1) empowers the Minister on a written application to grant a licence to any person "to do all or any of the matters referred to in section 3(1)". The subsequent provisions of that section empower the Minister to stipulate conditions of a licence, including a fee, the period of the licence, and a requirement that the licensee shall engage the services of a qualified toxicologist, clearly for the protection of the public. The section also creates an offence of breaching any condition of a licence and, in subsection (5), requires the written consent of the Minister to the disposal of a licence.

Makhowe's case is simply that because, by the terms of section 4(1), a licence authorises the holder "to do all or any of the matters referred to in section 3(1)", a licensee can go on to private land, without the consent of the owner, and take his mushroom crop - in other words, for this is what it comes down to, regardless of the owner's proprietary rights in respect of his land and his crops.

A statute will be presumed not to interfere with rights of private property (such as the right to control who comes on to one's land or takes crops from it) unless the legislature has expressly or by necessary implication curtailed those private rights. This is particularly so where no provision is made for compensation. (See Attorney-General v. Horner (1884) 14 Q.B.D. 245, 257, Deeble v. Robinson (1954) 1 Q.B. 77).

In some instances a statute may, on its proper construction, have such an effect, but I do not consider that that is the intention at all here.

The purpose of the Order is to prohibit persons from harvesting wild mushrooms for commercial purposes without licences. One evident reason for that lies in considerations of public health. The Order is drafted in terms that are, I think, sufficiently wide to allow the Minister also to control commercial harvesting as a matter of policy for economic reasons, e.g. to treat the activity as one that may be permitted under franchise for the benefit of the public revenues. The concept of an exclusive licence, as well as the discretion of the Minister to determine the amount of a licence fee, both suggest that to my mind. On the other hand, the annual fee of ten emalangeni charged in respect of the 1973 and 1988 licences indicates that this was not done, as a matter of policy, on those occasions: an annual fee of that amount for an exclusive licence is nominal, rather than revenue-raising.

There are no provisions in the Order for applications for licences to be advertised or for affected owners to object; and there are no provisions for the payment of compensation to land owners whose crops, on Makhowe's argument, could be taken.

The Order does not explicitly say that a licensee may infringe the rights of a private landowner or take the property of a private person. On its proper construction, its purpose is to <u>prohibit</u> an activity without a licence - namely the commercial harvesting of wild mushrooms - and not to authorise intrusions on private property and the confiscation of private property. On a proper construction, all that a licence does is to permit the holder to carry on an activity <u>notwithstanding the prohibition</u>. The words in section 4(1) that deal with the effects of a licence are descriptive of the extent to which the licensee is released from the prohibition, but I do not consider that they are intended at all to confer prescriptive rights of any kind over private property.

For those reasons, I refused Makhowe's application, reserving the question of costs.

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As far as they are concerned, they must clearly follow the event. Ordinarily they would be on a party and party basis. There is, however, an issue as to whether in the way in which Makhowe procured the granting of urgency and the interim interdict, they should be on an attorney and client basis. Mr. Wise has gone further, contending that Makhowe's conduct in pursuing this application constituted a clear abuse of the process of this court. On that premise, he asked for costs on the English attorney and own client basis.

Two issues arise on the question of the kind of costs to be awarded. The first is whether Makhowe procured urgency, and the interim interdict, by failing to disclose material facts. The other is whether on the return date, the application was pursued vexatiously.

As to the first, a litigant who seeks an order ex parte is bound to display the utmost good faith by disclosing fully and frankly to the court all material facts within his knowledge: See Mantori International Limited v. Injobo (Pty) Limited (High Court Civil Case No. 324/88), and the cases therein cited. The reason for this is that the court hears only the applicant, and not the respondent. In entertaining his one-sided application, it therefore relies on his complete candour. If it transpires that the applicant has withheld wilfully or negligently material facts that might have influenced the decision of the court, then in its discretion the court may set the order aside for that reason alone.

Mr. Fine contended that because the application had been served on Usutu before it came before Roos J. it was not an ex parte matter. Formally (for what mere form is worth) that may be so, but I am satisfied that in substance it fell to be governed by the principle that applies to ex parte applications. Usutu was not given sufficient time to respond to the application. On the facts as they emerged later, but were not disclosed in the founding affidavit, there was no good reason why Usutu should not have been allowed a more reasonable period of time in which to respond. At the time when it brought this application, Makhowe had already been aware, for many weeks, that it was being denied any right that it may genuinely have believed that it had to go into the Usutu forests to harvest mushrooms without Usutu's permission.

It is obvious in those circumstances that it could have allowed Usutu, at the very least, a day or so in which to respond. Its own founding papers were prepared the day before they were filed, but it goes further than that. Given the time over which the two companies had been in discussion, there is a question whether there was immediate urgency at all. I do not consider that there was. The way in which Makhowe requested urgency smacks of a tactical move. To my mind, it tells heavily against Makhowe that to try to justify the way in which it chose to act, it had to seek to rely strenuously in the end on its replying affidavits because of its initial, inadequate disclosure. If Roos J. had been informed of the background to the matter, I do not think he would have made the order for urgency on 9th November. Certainly he might well have decided not to do so.

In seeking to persuade the judge to grant interim relief on that day, I consider that it was also incumbent on Makhowe to tell him that - whether mistakenly or otherwise - it had in the past acted as if it needed to obtain the consent of the private land owner (Usutu) to go into the forests, in addition to obtaining a licence to do so under the Order. My own conclusion, as I have said, is that on the correct interpretation of the Order, Makhowe's licences never did authorise it to intrude on private property without the consent of the landowner. If Roos J. had heard the contested application on the return date, I have no doubts that he would have come to the same view.

One implication of that might be thought to be that as the outcome of the application eventually turns on a point of law - of statutory interpretation - the non-disclosure of facts could never be material. In this case, however, I do not consider that it was at all obvious from the founding papers that the application did turn simply on the construction of the Order. The founding affidavit did assert, incorrectly, that Makhowe held a lease or leases, and in my view it does give something of an impression that that company (and not merely because of the licence alone) was carrying out its mushroom - gathering activities under some colour of right. I do not consider that the disclosure of Usutu's letter of 20th May 1994 and of the advertisement for tenders dispels that impression. It was important, in my view, to ensure on this urgent application that the judge understood the position clearly.

Even if Makhowe had been misled by the correspondence to which I have referred, as to the true position in law and fact , its subsequent explanation in its affidavits in reply is irrelevant. What mattered was that it was for the company to tell the judge fully, at the time when it came to him for interim relief, how and for whatever reason it had in fact conducted itself. It was for him, and not for Makhowe in retrospective justification after it had procured interim relief, to decide what to make of those things. If the judge had been informed fully, I do not think that he would have granted an interim interdict on 9th November; and again I certainly think that he might well have refused it.

As I indicated during the hearing, I did myself have a concern, too, as to whether Makhowe was on and after the return date acting vexatiously. Mr. Fine had objected in limine that Mr. Dlamini had not demonstrated his authority in giving his affidavit. On my questioning, counsel made it clear that he was saying that (but saying not more than that) Mr. Dlamini's statement that he was so authorised was too bare, and not adequate. His affidavit, nevertheless, had been filed by Usutu in the proceedings, and it plainly relied on it. I do not consider that this objection to Mr. Dlamini's authority can be glossed over gently as a "technical" legal point. In my view, it had no merit at all.

Mr. Fine also argued in limine that the contentions set out in Usutu's replying affidavits, that Makhowe had withheld material information, were somehow nothing short of scandalous and should be struck out accordingly. I said at the time that I would consider this objection in the light of the whole evidence. It will be apparent that I disagree entirely with that view, and that I do not consider that it could be seriously maintained, except on a misconceived attitude that attack is the best means of defending a bad cause.

I also had concerns, as the hearing on the return date progressed, that Makhowe was clinging doggedly to a submission that was patently untenable - namely that a licence under the Order in itself authorises incursions into private proprietary rights. In principle, there is no reason why an unsound submission in law should not, in

appropriate circumstances, be held to be vexatious, but on balance in this case I do not think that it would be right to do so.

The concepts of urgency and of interim relief pending the outcome of litigation are very important in the legal process. When they are invoked properly, they enhance its efficacy, but they are not to be abused. In the present case, putting the matter as simply as I can in summary, I am of the view that Makhowe procured orders for urgency and for interim relief without making full and frank disclosure of the relevant, surrounding circumstances as known to it. The result of that was that pending the judgment of this court on the merits of Makhowe's complaint, Usutu was obliged contrary to its own rights to allow the other company to come wrongly on to its own land and take away produce that rightfully belonged to Usutu.

It was said in argument that it has thereby had to bear the loss involved in the taking of mushrooms during the period that the interim interdict remained in force. I doubt , with respect, that that is right. An interlocutory interdict does not determine the eventual legal rights of the parties. It merely imposes an interlocutory regime pending final judgment. If, in the outcome, one party's rights - in this case, Usutu's - are affected, I can see no reason why it should not be entitled, if it chooses, to enforce them by recovering its losses.

Whether or not that is so, however, in procuring court orders as it did, Makhowe in my judgment did abuse the process of this court and thereafter to a degree tried to sustain its position vexatiously. As in Mantori, and the cases cited in that judgment, I consider that it is appropriate to award costs to Usutu on an attorney and client basis. However, after consideration, I am not persuaded that I should go further than that.

I so order, and I also direct under rule 68(2) of the High Court Rules that in taxing the costs of senior and junior counsel, the taxing master is not to be bound by the amounts set out in that section.

D. Hull.

DAVID HULL
CHIEF JUSTICE