

IN THE HIGH COURT OF LESOTHO

In the matter between:-

LERIBE TAXIS ASSOCIATION

Applicant

and

ROAD TRANSPORT BOARD  
MINISTER OF TRANSPORT COMMUNICATIONS  
THE ATTORNEY GENERAL

1st Respondent  
2nd Respondent  
3rd Respondent

R U L I N G

ON A POINT OF LAW  
RAISED IN LIMINE.

Delivered by the Honourable Mr. Justice J.L. Kheola  
on the 19th day of March, 1990

This is an application for review of the proceedings of the first respondent in the matter between the first respondent and the applicant's members. The applicant seeks an order in the following terms:-

1. Directing and calling upon the Respondents to show cause (if any) why the Proceedings and decision of the First Respondent as confirmed by second Respondent in the matter between the First Respondent and the Applicant's members dated the 31st day of December, 1988 shall not be reviewed, corrected and set aside;

2. Directing and calling upon the First Respondent to despatch within 3 days of the receipt of the Notice to the Registrar of this Honourable Court, the record of proceedings and the decision aforesaid, and to notify the Applicant in writing that it has done so;
3. Declaring that the First Respondent flouted the audi alteram partem Rule in not according the Applicant a hearing before it made the decision of the 31st day of December, 1988.
4. Declaring that the decision aforesaid is unreasonable in the circumstances.
5. Declaring that the First Respondent failed to exercise its discretion as required by Law in making the decision aforesaid.
6. Directing the First Respondent to consider and apply its mind to applications for "C permits" by individual Applicant's members as required by Law.
7. Directing First Respondent to afford the Applicant's members a hearing upon or before making a determination on their applications for "C permits".
8. Dispensing with the forms and service provided for in the Rules of Court, regard being had to the urgency of the matter;

9. In the event of their opposition, the Respondents be directed to pay costs hereof.
10. Such further and or alternative relief.

The opposing affidavit on behalf of all the respondents was made and signed by one Lerato Mahata who alleges that she is employed in the Ministry of Transport and Communications, in its Department of Transport and Traffic whereat she also serves, amongst other duties, as the Secretary to the first respondent. She concludes her paragraph 1 by saying she is therefore entitled to file this affidavit.

Mr. Phafane, counsel for the applicant, has submitted that the person who has filed the opposing affidavit has no authority to file it and/or to represent the respondents. She has not even alleged to represent the respondents. Nowhere does she even claim to have been duly authorised to make the affidavit on behalf of the respondents.

It is trite law that where a person institutes civil proceeding on behalf of a company, some evidence should be placed before the Court to show that the applicant has duly resolved to institute the proceedings and that the proceedings are instituted at its instance. (See Mall (Cape) (Pty) Ltd v. Merino Ko-operasie Bpk., 1957 (2) S.A. 347 (C.P.D.).

The best evidence that the proceedings have been properly authorised would be provided by an affidavit made by an official of the company annexing a copy of the resolution. But as it was pointed out in Mall's case (supra) that form of proof is not necessary in every case. Sometimes the allegation by the deponent that he is duly authorised to make the affidavit is enough proof of authority.

It seems to me that the above principles must apply where an official of a company decides to oppose an application brought against his company. There must be some evidence that the company has resolved to oppose the application.

In the present case there is no evidence that Lerato Mahata was authorised by the respondents to oppose this matter and if the respondents were a company I would have no alternative but to reject her affidavit. The difficulty I have is that the first respondent does not seem to be an artificial person because sections 3, 4, 6 and 7 of Road Transport Act 1981 which establish it and specify its duties and functions do not say it shall be a body corporate with limited liability, and perpetual succession and many other things which are the normal qualities of a body corporate, such as being capable of suing and being sued; owning property. (Compare section 2 (2) of The Lesotho Sports Council Order 1970; section 3 (2) of Lesotho National Development Corporation Act No.20 of 1967; section 3 (2) of The Lesotho Bank Order 1971). The first respondent is just a statutory board established

for the purpose of implimenting certain provisions of the Road Transport Order 1981. It is a board of the Ministry of Transport and Communications and cannot legally be regarded as an independent artificial person separate from the Ministry for which it was created.

It follows that the present proceedings are against the Government of Lesotho represented by the second respondent and the third respondent. In the proceedings against the Government no power of attorney is necessary because The Government Proceedings and Contracts Act 1965 provides that in such proceedings the Attorney-General shall be nade the nominal defendant or respondent. The Government has its lawyers at the Law Office in Maseru who are entitled to represent the Attorney General in all litigation against or by Government. In the present case the Notice of Intention to Oppose is signed by Mr. A.M. Lenono for the Attorney General.

In Mall (Cape) (Pty) Ltd. v. Merino Ko-operasie Bpk. 1957

(2) S.A. 347 (C.P.D.) at p. 351 Watermeyer, J. said:

"An attorney is an officer of the Court and it must be presumed in the absence of any evidence to the contrary that he has satisfied himself that he has authority from the applicant to commence proceedings before doing so. By appending his signature to the notice of motion he in effect certifies that he has authority to act on behalf of the applicant. I say that the Court will presume the attorney's authority in the absence of evidence to the contrary, for it is of course always open to a respondent, if he has reason to believe that the proceedings have not been properly authorised by the applicant, to file an opposing affidavit setting out the grounds of his belief, in which case a triable issue of fact arises."

Mr. Lenono is an officer of this Court and by virtue of his appointment may act as a legal representative of the Attorney General in all litigation against Government. The Court must presume that by appending his signature to the Notice of Intention to Oppose he in effect certifies that he has authority to act on behalf of the respondents. The affidavit of Lerato Mahata cannot be challenged on any ground because, unlike a company, the Government does not have to pass any resolution to oppose any proceedings against it. It would be very inconvenient that whenever the Government is sued the Cabinet must sit and pass a resolution.

The Notice of Intention to Oppose states that the affidavit of Lerato Mahata attached shall be used to support the opposition of the application. What more authority does the applicant want when the document which founds the opposition sets out whose affidavit is going to be used? There is absolutely no doubt that the present proceedings are being opposed by the Government of Lesotho and that the applicant must rest assured that in the event of costs being awarded in its favour, the Government of Lesotho will have to pay them.

In the result the point raised in limine is dismissed with costs.

J. L. KHEOLA  
JUDGE

19th March, 1990.

For Applicant - Mr. Phafane  
For Respondents - Mr. Lenono.