CIV/APN/165/91

IN THE HIGH COURT OF LESOTHO

In the matter between:-

LESOTHO POULTRY CO-OPERATIVE SOCIETY — Applicant

and

THE MINISTER OF AGRICULTURE — 1st Respondent
THE REGISTRAR OF CO-OPERATIVES — 2nd Respondent
THE ATTORNEY-GENERAL — 3rd Respondent

RULING ON A POINT OF LAW

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 25th day of June, 1991

This is an application for an order in the following terms:-

1. Dispensing with the normal periods of notice fixed by the Rules of this Honourable Court.

2. Declaring that the special general meeting of the Lesotho Poultry Co-operative Society Limited, the Applicant herein, convened by the 1st and/or 2nd Respondents for the 17th May, 1991 is unlawful and the Respondents are interdicted from proceeding therewith or calling a similar meeting.

/2.....

3. That the Respondents pay the costs of this Application jointly and severally.

4. Granting Applicant such further or alternative relief as this Honourable Court may deem fit.'

In paragraph 4 of the founding affidavit the deponent avers that 'by letter dated the 12th April, 1991 the 2nd Respondent wrote to me and the constituent members of my society, a federal body, advising us that the 1st Respondent had directed him to convene a special general meeting of my society to be held on the 29th June, 1991 in Maseru for the purpose of electing a new Executive Committee for the Society. He stated that the 1st Respondent was acting in terms of the powers conferred upon him by Section 10 of the Co-operative Societies (protection) Act number 10 of 1966.'

It will be seen that in the Notice of Motion paragraph 2 the deponent refers to a meeting of the 17th May, 1991. The application was launched on the 7th June, 1991 so that it does not make sense to say the respondents should be interdicted from proceeding with that meeting.

In terms of Rule 8 (10) (c) of the High Court Rule 1980 the respondents' attorney raises . points of law which read as follows:-

"1. Respondents raise an exception to the Applicant's papers on the ground that no cause of action is disclosed against the Respondents in that the founding affidavit lacks averments necessary to support and sustain the order sought by the Applicant.

2. The Deponent to the founding affidavit has no authority to act on behalf of the Applicant in this matter in that:-

(a) The order which the Applicant is seeking is that the special general meeting of the Applicant convened by the 1st and/or 2nd Respondents for the 17th May, 1991, be declared unlawful.

(b) A resolution of the executive committee of the Applicant (annexure "A" to the founding affidavit) upon which the Deponent relies for his authority, specifically mandated him to sign all documents in relation to instituting proceedings for the prohibition of a special general meeting of the Applicant convened for the 29th June, 1991 and not the meeting of the 17th May, 1991."

On the 20th June, 1991 the applicant filed an affidavit in which he averred that 'as must be apparent to the Respondents and their attorneys, the date of the 17th May, 1991 appearing on the Notice of Motion is clearly a typographical error attributable to my attorneys' typist in as much as it is in conflict with the Founding Affidavit I deposed to as well as the Resolution upon which this Application is based. It is common cause between the parties that the meeting is indeed scheduled for the 29th June, 1991.'

It was averred that at the hearing of this matter an application shall be made for a suitable amendment of the Notice of Motion.

The applicant's attorney duly made the application on the 21st June, 1991. I reserved my ruling on the application because the points of law were also argued despite the fact that an application for amendment was made. Mr. Sello, for the applicant, submitted that the application be granted because the point of law raised by Mr. Putsoane, for respondents, had fallen away because of the amendment. He submitted that by raising a point of law without an answering affidavit on the merits Mr. Putsoane indicated that the merits were not disputed.

On the other hand Mr. Putsoane argued that if the Court made a ruling against him, he would be entitled to file the answering affidavits on the merits.

Rule 8 (10) reads as follows:-

"Any person opposing the grant of any order sought in the applicant's notice of motion shall:

(a) within the time stated in the said notice, give applicant notice in writing that he intends to oppose the application, and in such notice he must state an address within five kilometres of the office of the Registrar at which he will accept notice and service of all documents.

(b) Within fourteen days of notifying the applicant of his intention to oppose the application deliver his answering affidavit (if any), together with any other documents he wishes to include; and

(c) if he intends to raise any question of law without any answering affidavit, he shall deliver notice of his intention to do so, within the time aforesaid, setting forth such question."

My interpretation of sub-rules (b) and (c) is that if the respondent decides to raise any question of law without any answering affidavit, he cannot later when his question of law has been dismissed have two bites at a cherry. The respondent must fall or stand by his questions of law. The words "answering affidavit" which appear in both sub-sections (b) and (c) of Rule 10 clearly indicate that where the respondent raises a question of law it must be accompanied by an answering affidavit if he also disputes the facts. If he does not do so that is an indication that he accepts the facts stated in the founding affidavit as correct.

I am supported in this view by Corbett, J. (as he then was) in Bader and another v. Weston and another, 1967 (1) S.A. 134 (C.P.D.) at pages 136 - 137 states the procedure as follows:

> "It seems to me that, generally speaking, our application procedure requires a respondent, who wishes to oppose an application on the merits, to place his case on the merits before the Court by way of affidavit within the normal time limits and in accordance with the normal procedure prescribed by the Rules of Court. Having done so, it is also open to him to take the preliminary point that (in this case) the petition fails to disclose a cause of action and this will often be a convenient procedure where material disputes of fact have arisen which cannot be resolved without recourse to the hearing of oral evidence. On the other hand, I do not think that normally it is proper for such a respondent not to file opposing affidavits but merely to take the preliminary point. I say "normally" because situation may arise where this procedure is unexceptionable. For example, a respondent who is suddenly and without much notice confronted with a complex application and who would normally be entitled to a substantial postponement to enable him to frame opposing affidavits, might well be permitted there and then to take such a preliminary point. Generally speaking, however, where a respondent has had adequate time to prepare his affidavits, he should not omit to prepare and file his opposing affidavits and merely take the preliminary objection. The reason for this is fairly obvious. If his objection fails, then the Court is faced with two unsatisfactory alternatives. The first is to hear the case without giving the respondent an opportunity to file opposing affidavits: this the Court would be most reluctant to do. The second is to grant a postponement to enable the respondent to prepare and file his affidavits. This gives rise to an undue protraction of the proceedings, which cannot always be compensated for by an appropriate order as to costs and results in a piecemeal handling of the matter which is contrary to the very concept of the application procedure."

I am of the view that in the present case the applicant had all its witnesses here in Maseru and the case is not a long and complicated one. I am therefore of the opinion that the normal procedure had to be followed. The practice in this Court has always been that the respondent files his opposing affidavit on the merits and gives notice that he intends to raise certain points of law in limine and states them.

If the Notice of Motion did not have the mistakes that it has for which an amendment was sought and granted, I would have probably decided to hear the case without giving the respondents a chance to file their opposing affidavits; or I would have granted the respondents a postponement to enable them to file their opposing affidavits. I have chosen to grant a postponement. My reason for doing so is that both parties have to blame for this postponement. The applicant's Notice of Motion had mistakes for which it has to be blamed. The respondents' Notice to raise a point of law was also wrong because it was not accompanied by answering affidavits.

The order of the Court is that the matter is postponed to the 28th June, 1991 at 9.30 a.m. The respondents must file their opposing affidavits by 4.00 p.m. on the 26th June, 1991. The applicant must file its replying affidavits by 4.00 p.m. on 27th June, 1991. There is no order as to costs.

J.L. KHEOLA
JUDGE

25th June, 1991.

For Applicant - Mr. Sello
For Respondents - Mr. Putsoane.