C of A (CIV) 1/94
CIV/APN/471/93

IN THE LESOTHO COURT OF APPEAL

In the appeal of :

LESOTHO CO-OPERATIVE HANDICRAFTS LTD	1ST APPELLANT
LESOTHO POULTRY CO-OPERATIVE UNION LTD	2ND APPELLANT
LERIBE DISTRICT CO-OPERATIVE UNION LTD	3RD APPELLANT
PHELA-U-PHELISE CO-OPERATIVE UNION LTD	4TH APPELLANT
MAFETENG DISTRICT CO-OPERATIVE UNION LTD	5TH APPELLANT

and

THE COMMISSION OF INQUIRY INTO COOPERATIVES	RESPONDENT

HELD AT MASERU

CORAM:
STEYN, J.A.
BROWDE, J.A.
TEBBUTT A.J.A.

JUDGMENT

STEYN, J.A.

Appellants applied in the Court below for an order in the following terms:

"Calling upon the Respondent to show cause, if any, on a date to be determined by this Honourable Court, why:

1. The decision of the Respondent of the 14th October, 1993 refusing the Applicants' attorney of record the right and/or the opportunity of putting questions to one NTSUKUNYANE MPHANYA who appeared as a witness before the Respondent shall not be set aside as constituting an irregularity.

2. The Respondent shall not be ordered to supply the Applicants' said attorney with an extract of the evidence of the said Mphanya and thereafter arrange a date and venue at which the Applicants' said attorney shall be allowed to question the said Mphanya like any other witness who appeared before the Respondent."

Certain ancillary relief was claimed including alternative relief and costs of suit.

The facts are the following:

By Legal Notice Number 114 of 1993 a Commission of Inquiry into Co-operatives (the Respondent) was constituted. Appellants aver that as Co-operatives they "are interested in the deliberations and conclusions of the Respondent." Some of their members have been called before the Respondent to testify and been subjected "to extensive questioning." Appellants go on to

aver that at the hearing of the Commission these witnesses were represented by their attorneys who were permitted to put questions to those who testified before it. These allegations are not denied on behalf of the Respondent. The Secretary of the Commission says however that the Commission is a "common law body" and that "in the absence of any statutory prescription is entitled to exercise its own procedure as to how they gather the facts." All witnesses were informed of their right to legal representation and that if anyone desired to put questions to a witness they could do so with the leave of the chairman. The Commission is according to the Respondent "a fact finding body pure and simple." (The "common law" nature of Commissions has been changed since the hearing of this matter. See in this regard the provisions of the Public Inquiries Act. 1994, published in Government Gazette Extraordinary of the 24th June 1994. The provisions of Sections 11 and 12 are instructive in regard to issues in this appeal.

The issue before us arises from events that occurred pursuant to the testimony of one of the witnesses who gave evidence before the Commission. According to Appellants, on the 14th of October 1993, the Minister of Agriculture, the Hon. Mr. Mphanya, appeared before the Commission as a witness. According to Respondent he did so at his own request and "as a public spirited citizen" and "not in his official capacity as Minister

of Agriculture and Co-operatives." A copy of his testimony, to which I will refer hereinbelow was placed before the Court a quo.

After he had given evidence, Appellants' attorney "made a request to put certain questions to the said witness, in considering (sic) that his evidence touched not only upon the Applicants and their rights and ultimate fate, but also dealt with evidence given by members of the applicants."

It is common cause that the Commission declined the request by the Appellants' legal representative to put questions to this witness. According to the Secretary of the Commission it "declined to allow him to do so on the sole grounds (sic) that there was nothing in the evidence which affected the Applicants in any manner."

Appellants submitted in their application that this ruling constituted a gross irregularity. It was, they contended, a breach of the audi alteram partem rule and caused them prejudice. They point to the fact that the Commission may well act on some of the evidence of the Minister and may even base some of its recommendations on it.

Respondent per contra contended that there was no right to cross-examination "envisaged in this fact-finding Commission of

Inquiries" and that the audi alteram partem rule did not apply to these proceedings. The duty of the Commission was to make a written report including recommendations to the Minister. The allegation that the Appellants could be prejudiced "is baseless and is denied."

For the purposes of deciding the issues before us it is necessary to advert to the evidence of the Minister. It is recorded at page 19-23 of the record and reads as follows:

" WITNESS NO. 72 HON. MINISTER NTSUKUNYANE MPHANYA
SWORN STATES

1. I am the Minister of Agriculture, Co-operatives and Marketing since or following the general election this year.

2. I do not know about the financial difficulties of BCBU because I was not in the executive Committee.

3. But I was present at the election of an executive Committee. Mr. Mokhehle was proposed by the BCP and Mr. Thomas Mofolo was suggested by others.

4. The fear of the Colonial Masters then was that the BCP would use cooperatives which were very strong than for political ends. As a result Mr. Mokhehle and his fellow Committee members were expelled and some white man took over.

5. The Committee was expelled during the course of the year so it cannot be correct that it was expelled because of any financial problems.

6. I was a member of a cooperative society at Mapoteng which I had started myself. I think we got benefits from the mother body in the form of inputs.

7. The distribution of inputs was done by BCBU.

8. My personal view is that government should not be involved in the running of cooperatives.

9. I am not sure of what Co-op Lesotho was of late. I am sure of what it was when it was BCBU.

10. I think of late it was just a government shop.

11. I do not think that kind of Co-op Lesotho has any place in the co-operative movement.

12. I think since it is government which led to the downfall of Co-op Lesotho, the present government should put it back in its feet and give it back to the movement.

13. Co-op Lesotho has made its name in the countryside among people who are not aware of its internal problems. It has amassed good infrastructure and it could provide good service to the public if restructured.

14. Co-op Lesotho was hijacked a long time back. It has existed as a cooperative in name only.

15. Co-op Lesotho has to be returned to the people and no company no matter how big should be allowed to run Co-op Lesotho.

16. I think past governments used Co-op Lesotho to misuse or misappropriate public funds.

17. As I speak now we are organising Co-operatives. And we have now 151 co-operatives mushrooming all over the country.

18. I am not saying Co-op Lesotho has to be handed back over-night. Perhaps this can take two to three years. What people have to be sensitised about is that it belongs to them.

19. Co-op Lesotho was run as a government shop without the knowledge of people at grassroots level.

20. True enough Co-op Lesotho is in a mess now. But what is important to note is that it is not co-operators who misappropriated its funds. I do not think people at grassroots level owe that much to Co-op Lesotho. I think they were paying cash.

21. The mess was not only in Co-op Lesotho. But even many societies had problems.

22. I think the Co-operatives we are forming now are doing so freely without any interference from us. Of course the Registrar guides them here and there.

23. Our manifesto did say we would encourage people to form co-operatives but we will not force them to do so. They will form them if they find that to be in their best interest.

24. The small co-operatives that are being formed are operating very well. It is just that they do not have the matter body. (sic)

25. I think genuine co-operatives have a right to claim back Co-op Lesotho. But as to whether they can have it back, I would know after going through the Commissioner's report, especially given the fact that those member never received any reports from Co-op Lesotho.

26. Co-operatives in Lesotho have been in the mess they were in because of the past authoritarian rule.

27. After the Commission's report we would have to call all co-operatives together and see if they would want to receive the mother body. If they do not want to, the newly formed Co-operatives have a right to do so. The problem that might arise is that of distribution of property if there is any. But I cannot comment on that now.

28. We are already assisting co-operatives. We have distributed 120 tractors to the constituencies and we are subsidising inputs. But we do not want to spoon feed people.

29. We do not want to use co-operatives as a political weapon at all. Hence we do not even mind about who gets elected.

30. There is no money out there waiting to be given to Co-operatives.

31. The only money I know about is the money from USAID concerning liquidation of Co-op Lesotho and grazing fees. We said the Americans could keep their money if to have it meant that they had to dictate to us as to what we ought to do.

32 The Co-operatives which have mushroomed are village Co-operatives.

33. I wonder if you have had time to listen to our speeches. We are totally against imposition of things on people.

This has led to many projects collapsing in the past.

34. The co-operatives that are being formed are all voluntary.

35. Yes Co-operatives have been with us for a very long time. In fact one co-operatives in Mafeteng was formed in 1939.

36. Co-operatives are not new to Basotho. What is new is the term. Basotho have all along used Co-operatives in the name of "Matsema".

37. I think Co-operatives have failed because they have tended to imitate foreign views and the laws were also foreign. Even the law that has to come will have to be referred to the co-operators.

38. Matsema have been strong all along. But they got distorted along the way when they were used to work on the chiefs' fields.

39. I am not sure about the education the new co-operators have been given. But I am sure about their activities. I have seen the "Mpate Shelengs" co-operate successfully. If they succeed in "Mpate Sheleng" I do not see why they should not succeed in "Ntemele Sheleng".

40. We do agree that we are understaffed and we are planning on increasing our staff.

41. The Co-operative laws are very old and they need to be up-dated.

42. Young people form companies and partnerships because they have learned about them in school. But Co-operatives are formed not because of what people have learned but because of a felt need. I hold a different view to yours. I feel young people are interested in co-operatives.

43. One other factor which has contributed to the downfall of the co-operative movement is unavailability of a Market.

44. I am thinking of one big supermarket with departments of pricing, statistics and bureau of standards and it should work hand in hand with the co-operatives as an outlet for these Co-operatives.

4.00 p.m. TEA BREAK.

4.15 P.M. Meeting called to order and Witness reminded he is still under oath.

45. The new Co-operatives are not being formed at the expense of old one. The old ones have to be revitalised. In fact some old co-operatives have already come to the office and we are dealing with their problems. For example one Co-operative in Mafeteng where a Committee was imposed in the past is being assisted now to hold elections for a new Committee.

46. We have had discussions with the University to have a faculty of Co-operatives and our discussions in that regard are very advanced.

47. We are working on having co-operative officers in every district and qualified supervisors in every constituency.

48. We are also working in upgrading the posts within the department of Co-operatives.

49. The Registrar's duty is to register co-operatives so long as their by laws do not contradict the main law. He should not be influenced in his decision making.

50. Yes for about a year or two I think government would have to play some role but afterwards it should pull out.

4.30 p.m. WITNESS EXCUSED."

The Court a quo dismissed the application. As I understand the judgment it did so on two grounds, namely that Appellants failed to take any steps to rebut the evidence of the Minister and/or that they failed to prove that they were prejudiced by the refusal to permit cross-examination of the Minister. In this regard the Court held that there was nothing the Minister said which made it imperative to ask him questions "in defence of Applicants' interests."

Mr. Tampi on behalf of the Respondent contended that to apply the *audi alteram partem* principle would be an unwarranted

extension of the rule. With reference to the fact that Commissions "are simply a number of individuals who are expected to co-operate and to operate within the confines of their commission" - see S v Sparks N.O. and others 1980 (3) S.A. 952 at 956 - he urged us to hold that the rules of natural justice did not apply to the proceedings of a Commission of Inquiry. Mr. Tampi also relied on the decision in Bell v Van Rensburg 1971 (3) SA 693 for the proposition that the rules of natural justice did not need to be observed by legal bodies (regsinstansies) except by Courts of Law and other legal institutions which had the capacity to take decisions with regard to the rights of persons. No right to the cross-examination of witnesses therefore existed in respect of Commissions of Inquiry under the provisions of the Commissions Act then in force in South Africa. The same approach Counsel urged should be adopted in the Kingdom of Lesotho. See also South African Defence and Aid Fund v Minister of Justice 1967 (1) SA 263 (A).

Baxter, Administrative Law at p.222 has the following instructive comment concerning Commissions of Inquiry and the manner in which their proceedings are conducted:

> " Institutions such as commissions of inquiry are an important channel through which individual and collective representations may be transmitted to decision-makers.

They are used regularly in South Africa, and their investigations may often lead to decisions which seriously affect individual rights and interests. The right to make representations ought to be construed as liberally as possible where the possibility of administrative action against individual rights exists. Yet in at least two South African decisions the courts have revealed a strange reluctance to apply the principles of fairness (which are designed to facilitate participation). For this reason it is worth noting the recommendation by both the Canadian Law Reform Commission and the New Zealand Public and Administrative Law Reform Committee that legislation governing commissions of inquiry should make adequate provision for the right of representations by individuals who may be adversely affected as a result of investigations, and that commissions should conduct their proceedings in public wherever possible. There is every reason to advocate similar reforms in South Africa."

It is pointed out with validity in footnote 218 to the above quotation (at page 223) and with reference to the Law Reform Commission of Canada - Commission of Enquiry: a New Act (working paper 17:1977,33) that in an enquiry of this kind "a man not suspected, let alone charged with wrongdoing may be ruined by irresponsible accusers whom he is not even able properly to

confront." Moreover as the author points out at page 554-555 of his work, cross-examination may often be the only means by which adverse evidence may be challenged. He goes on to say "that cross-examination may be a requirement of a fair hearing where it is necessary to serve the purposes of natural justice - especially that of promoting accuracy." (P.555.)

In the light of these comments and developments it may be necessary for a reconsideration of the approach to be undertaken towards the proceedings before a Commission of Enquiry as formulated in Bell v Rensburg (supra). However, in my view the facts of the present case are clearly distinguishable and created a situation in which the rules of natural justice should be enforced.

I say this for the following reasons: In Ridge v Baldwin 1964 A.C 40 the right to a fair hearing was reinstated by the House of Lords as a rule of universal application in the case of administrative acts or decisions affecting rights. (In this regard see also Lord Loreburn's statement that the duty to afford it is "a duty lying upon everyone who decides anything" (cited with approval in Wade: Administrative Law, (4th Ed.) 451.) However, it must be emphasised that "it is not possible to lay down rigid rules, as to when the principles of natural justice are to apply; nor as to their scope or extent. Everything

depends on the subject matter." (Per Lord Denning M.R. in R v Gaming Board for Great Britain etc. [1970] 2 Q.B.417 at 430.

The "subject matter" in the present case was a Commission of Enquiry presided over by a Judge of the High Court. The Commission was appointed to enquire into "(A) the operations of co-operative Societies in general and (B) the operations of Co-op Lesotho in particular." The Commission had settled on procedures which conformed to the principles of natural justice. Witnesses and individual parties were allowed legal representation (a right now enshrined in sec. 12 of the Public Inquiries Act of 1994) and the right to cross-examine was extended in respect of all witnesses. A witness - none other than the Minister responsible for the administration of the subject matter of the enquiry - is called and testifies. However, when the representative of a number of affected Cooperative Societies seeks to question him, the request is refused. The sole ground advanced is that "there was nothing in the evidence which affected the applicants in any manner."

I have cited the evidence of the Minister in extenso above. I have done so because a reading of his evidence demonstrates the unacceptability of the bald proposition advanced. Whilst it is true that the Minister did give evidence of a general import it was of a wide ranging and fundamental nature. Moreover, he was

the very person who was going to decide on the response to the recommendations of the Commission. Cross-examination may have elicited important information that could have had a direct bearing on the findings and recommendations of the Commission. Moreover, the Minister, having taking the unusual step to testify before the Commission he had appointed, should have been prepared to face those affected by his views and have been prepared to respond to their contentions and their views. They clearly gave evidence which cried out for further examination, elucidation and possible challenge.

I am satisfied that there is no substance in the contentions and the reasons advanced for a refusal to allow cross-examination to take place. The real reason may well have been to protect the Minister from what was bound to have been a confrontational, and challenging, experience. However, the Minister having decided to enter the fray, should have been treated in the same way as any other witness and not have been afforded the protection extended to him by the Commission. Moreover, if it is necessary for the party who alleges an irregularity of this kind to prove prejudice (a point which we do not find it necessary to decide) then, in these proceedings, such prejudice was proved. It was clearly insufficient for the Respondent simply to have sought to avoid the inference of prejudice by making the bald allegation it did.

I am satisfied, as a result of allowing cross-examination of other witnesses and then, to the prejudice of Appellants refusing such a request in their case, a failure of justice occurred. The proceedings, previously administered in accordance with natural justice, ceased to be so conducted.

It follows that Appellants have established that they are entitled to relief. However, it became clear during the hearing of the appeal that the Commission had already completed its task and had already reported to the Minister. Mr. Sello who appeared for the Appellants said that in these circumstances it would meet the exigencies of the case if the Court were to grant Appellants an appropriate declaratory order that their rights had been infringed. A precedent confirming the need for the rules of natural justice to be observed would be of considerable importance. Mr. Tampi for the Respondent was not heard to resist the Court following this course of action should it decide to grant Appellants relief.

I believe that it would be right in principle for us to accede to this request. In a country which has moved to a democratic order and has adopted a Constitution that enshrines democratic values, it is important for Courts to be supportive also in the establishment of a human rights culture. The

observance of the principles of natural justice including the right to a fair hearing as rules of universal application in decisions affecting rights, are important components of such a culture. In a case such as the present where the principles of natural justice had originally been followed but where thereafter a clear and discriminatory departure from these principles occurred, I believe that it would be right for us to exercise our discretion to grant a declaratory order. That we have this power is clear. Although the Appellants' Notice of Motion did not, in clear terms, ask for a declaratory order, it nevertheless sought an order setting aside, as constituting an irregularity, the Respondent's decision not to allow cross-examination of the Minister. The papers reveal a dispute in this matter which is sufficient foundation for a declarator. In any event the Notice of Motion asks "for further or alternative relief." With reference to the effect of that phrase see Queensland Insurance Co. Ltd v Banque Commerciale Africaine 1946 AD 272 in which at p286 Tindall J.A. refers to the Roman-Dutch practice of construing the phrase as meaning "such other relief as the Court may deem best for the plaintiff." The learned judge then said "The effect of the prayer for "such further or other relief as the nature of the case might require" in the English practice seems to be the same.

For these reasons we have decided to issue the following

declaratory order:

"1. The decision of the Respondent of the 14th of October 1993, refusing Applicants' attorney of record the opportunity of putting questions to the witness the Honourable Minister Ntsukunyane Mphanya, who gave evidence before the Respondent constituted an irregularity in as much as it prevented Respondents from receiving a fair hearing before the Commission.

2. The Respondent is to pay the cost of suit."

The appeal is allowed with costs and the above order is substituted for the order decreed in the Court below.

J. H. STEYN
ACTING PRESIDENT

I agree :

pp. J. BROWDE
JUDGE OF APPEAL

I agree :

P. H. TEBBUTT
JUDGE OF APPEAL

Delivered at Maseru this 28th day of July. 1994.