

C OF A (CIV) NO.26/94

IN THE COURT OF APPEAL OF LESOTHO

In the Appeal of:

LESOTHO POULTRY CO-OPERATIVE SOCIETY LTD  
BEREA POULTRY CO-OPERATIVE SOCIETY LTD1st Appellant  
2nd Appellant

and

THE MINISTER OF AGRICULTURE  
THE ATTORNEY-GENERAL  
THE PRINCIPAL SECRETARY - AGRICULTURE  
THE SENIOR MARKETING OFFICER - MOTSAMAI  
THE MARKETING OFFICER - MARATHANE1st Respondent  
2nd Respondent  
3rd Respondent  
4th Respondent  
5th RespondentHELD AT  
MASERUCORAM:STEYN, A.P.  
KOTZE', J.A.  
TEBBUTT, A.J.AJUDGMENTKOTZE' J.A.

The appellants (applicants in the Court *a quo*) applied for and obtained on 22nd March 1994 from Maqutu J. in the High Court a **rule nisi** calling upon the respondents *inter alia* to show cause why the first respondent and any of his officers shall not be directed to issue to the applicants ... permits in terms of the Agricultural Marketing (Egg Control) Regulations 1969 (the 1969 regulations) authorising the applicants to import eggs into Lesotho. On 25th April 1994 the same learned Judge discharged the rule each of the parties to bear its own costs. His reasons for discharging the rule will appear later.

The 1969 regulations provide, so far as is relevant, that

- (a) No person shall import or bring eggs into Lesotho unless he is in possession of a permit issued by the Marketing officer and that no person shall purchase or acquire in any manner whatever, eggs imported or brought into Lesotho unless such eggs have been imported or brought into Lesotho under a permit issued by the Marketing officer;
- (b) Importation permits in terms of (a) are issued pursuant to applications submitted on a prescribed form and considered by the Permanent Secretary for Agriculture;
- (c) Consideration in terms of (b) is to have regard to factors such as grade and quality standards, prevention of the spread of disease in poultry and available egg supplies in Lesotho.

Reference is made in the judgment of the Court **a quo** to the Agricultural Marketing (Egg Trading ) Regulations 1973 (the 1973 regulations) in addition to the 1969 regulations. (Although the 1973 regulations were repealed on 30th March 1994 with effect from 6th April, 1994 by Legal Notice No.31 of 1994 they were still extant when the present proceedings were initiated in the

Court *a quo*). The 1973 regulations provide, so far as is relevant, that

- (a) No person shall purchase, acquire or receive any eggs from a producer on his behalf or on behalf of any other person;
- (b) Traders etc are required to acquire eggs for consumption, re-sale, or any other purpose solely from the first appellant or from a source authorised by the marketing officer (emphasis added);
- (c) Any producer shall sell eggs produced by him only to the first appellant or to a body authorised by the marketing officer, (emphasis added).

Maqutu J. in his judgment in the Court *a quo* embarked upon a long-ranging discussion of what he terms "a continuing titanic struggle ... between the Ministry of Agriculture and the Lesotho Poultry Co-operative Association and its affiliates". Having done this the learned Judge comes to a somewhat abrupt conclusion that the 1973 regulations create a monopoly in favour of the first appellant and that as such were ultra vires the powers conferred upon the Minister by the enabling statutory provision viz. **Section 4** of the Agricultural Marketing Act No.26 of 1967 (the Act). From this finding flows the ultimate

conclusion arrived at by Maqutu J. that the 1973 regulations being without force and effect "obliged" him to refuse confirmation of the rule.

I am of the view that to regard the 1973 regulations as creating a monopoly in favour of first appellant is to exaggerate their effect. A monopoly conveys the idea of an exclusive possession of the trade in some commodity (cf. The Shorter Oxford English Dictionary s.v. monopoly). The 1973 regulations do not go that far: they envisage that the privilege of acquiring or selling eggs should rest in first appellant or in any other source or body authorised by the marketing officer in the Ministry of Agriculture. The 1973 regulations do no more than to provide that the marketing, acquisition and sale of eggs have to take place through the first appellant or source or body authorised as aforesaid. In framing the 1973 regulations in these terms the Minister of Agriculture, Co-operatives and Marketing clearly exercised his powers within the confines of the following powers conferred upon him by **section 4** of the Act.

(a) to control and improve the... marketing of products (sub-section (a));

(b) to prohibit any person who is dealing in the course of trade from purchasing a product (sub-section (c) );

(c) to prohibit any person from selling a

product or an amount of a product in excess of a specified quantity (sub-section (d) (i));

- (d) to prohibit any person dealing in the course of trade from purchasing a product or an amount of a product in excess of a specified quantity (sub-section (d) (ii) ).

The above are extensive powers sufficiently wide to render the 1973 regulations which do not impose total prohibitions **intra vires** the enabling provisions of the Act. It follows that the decision arrived at by Maqutu J. cannot be upheld.

But the above is not an end of the matter. Mr. Sello contended that first appellant was denied the right of being heard - a right to which it was entitled by virtue of the special interest created by the 1969 regulations. These regulations contemplate that importation permits have to be applied for in writing in terms of a prescribed form. As indicated above the Permanent Secretary is enjoined to consider such applications and in doing so to pay regard to certain prescribed criteria. That this has been done in the present case appears from a copy of a letter dated 1st March, 1994 addressed to the first appellant by the Permanent Secretary. It is clear from the said letter that a substantial reason for the refusal of the application is "that there are a lot of producers who have plenty of eggs in their farms". The letter furthermore advises first appellant that

should it so desire, local sources of supply will be identified in a spirit of co-operation if requested. It is important to note, in this regard, that there is an undisputed allegation in the respondents' main replying affidavit that "the application was rejected because there were plenty of eggs within the country".

The issue of importation permits is an administrative function depending upon the exercise of a discretion by the Permanent Secretary ~~for~~ Agriculture. What is required in such a case is that the discretion should be exercised fairly and reasonably. The power to grant import permits is vested in the Permanent Secretary and in no one else. He is told what criteria to follow. In the present case in his capacity as the appropriate designated official he exercised the discretion conferred on him. He exercised his administrative discretion by having regard to an entirely relevant consideration viz. the available egg supplies in Lesotho. The decision was based on an undisputed adequate existing supply of eggs in the country. No right to an oral hearing exists **Heatherdale Farms (Pty) Ltd. v. Deputy Minister of Agriculture**, 1980 (3) SA 476(T) at 486. On the papers there is no suggestion of an unfair and unreasonable exercise of discretion, or a valid ground for disturbing same. Indeed the appellants received the ~~precise~~ type of hearing contemplated by the 1969 regulations. They were heard by the receipt and consideration of the prescribed application. There is no suggestion that they were not heard as envisaged by the 1969 regulations. On the contrary the dismissal on the ground of one of the enumerated criteria is persuasive proof of proper

consideration by the Permanent Secretary.

In my view the discharge of the rule was correctly granted albeit for a wrong reason.

The appeal is dismissed with costs.

*G.P.C. Kotze*

G.P.C. KOTZE  
JUDGE OF APPEAL

I agree

*J.H. Steyn*

J.H. STEYN  
ACTING PRESIDENT

I agree

*P.H. Tebbutt*

P.H. TEBBUTT  
ACTING JUDGE OF APPEAL

Delivered at Maseru This *26th* Day of *July* 1994.