

CIV/APN/433/93

IN THE HIGH COURT OF LESOTHO

In the Application of .

LESOTHO POULTRY CO-OP

Applicant

and

THE MARKETING OFFICER
MINISTRY OF AGRICULTURE
ATTORNEY GENERAL

1st Respondent
2nd Respondent
3rd Respondent

J U D G E M E N T

Delivered by the Hon. Mr. Justice W.C.M. Maqutu,
Acting Judge on the 10th day of January, 1994.

This is an application for :

"1 The granting of a Rule Nisi calling upon the Respondents to show cause, if any on a date to be determined by this Honourable court why:

(a) The 1st Respondent shall not be directed to issue to the Applicant, forthwith, a permit in terms of the Agricultural Marketing (egg Control)

Regulations (Legal Notice Number 35 of 1969) authorising the Applicant to import eggs into Lesotho

- (b) The 1st Respondent shall not be restrained from desisting, except in accordance with the law to issue such permit to the Applicant at any future time except in accordance with the law
- (c) The Respondents shall not show cause why they have elected to allow egg producers to act contrary to the law by selling their produce to any person or body of their choice and upon the Respondents failing so to do, why they shall not be directed cause to be put to a stop, forthwith, such practice.
- (d) The 2nd Respondent shall not be directed to cease interfering by means of instructions influence or any other means with the exercise of her statutory powers by the 1st Respondent which powers flow from the legislation dealing with the marketing of eggs in Lesotho
- (e) The Respondents shall not be directed to pay the costs of this Application jointly and severally.

2 An order directing that prayer 1(a) operate as an interim interdict having immediate effect.

This application, which was brought on the 15th October, 1993 is part of a series of applications. In these applications the sole issue for determination

is in general the Marketing officer's power to issue permits especially for the import of eggs. These were given to the first Respondent, the Marketing Officer, under the Agricultural Marketing (Egg Control) Regulations of 1969.

Regulation 3(1) of these Agricultural Marketing (Egg Control) Regulations of 1969 prohibits the importation or bringing in of eggs into Lesotho unless the importer of eggs has first obtained a permit issued by the marketing officer who is the First Respondent in this case. By this I understand that the intention of the legislator was to protect the Lesotho Egg Market from foreign competition. This must have been done in the interests of Lesotho's egg producers. Both sides in these legal proceedings agree on this.

These Egg Control Regulations of 1969 go further by Regulation 3(3) which provides.

"No person shall export or remove eggs from Lesotho unless he is authorised to do so by permit issued by the marketing officer "

It seems to me that the intention of the legislator

was that eggs produced in Lesotho were supposed to satisfy domestic demand and only when this had been done and the Lesotho Market saturated with eggs would Lesotho's eggs be permitted to go to markets outside Lesotho. Furthermore, if eggs were exported or left Lesotho in an uncontrolled way, artificial scarcity of eggs might be created and thereby eggs from outside Lesotho would flood the Lesotho market bringing down prices to the detriment of Lesotho's eggs producers. Both parties were in agreement that this was a good thing

Applications for export and importation of eggs were to be directed to the Principal Secretary for Agriculture who is the First Respondent's (Marketing Officer's) superior. In issuing permits the Principal Secretary for Agriculture was 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," Regulation 4(2) of the Agricultural Marketing (Egg Control) Regulations of 1969.

I have underlined "available egg supplies in Lesotho." The reason being that applicant's permit was refused for precisely that reason. First Respondent is (in

December, 1993) of the view that there are a lot of eggs in the country. This was not his view in October 1993 when these proceedings were instituted.

If my understanding of Regulations 4 and 5 of the Agricultural Marketing (Egg Control) Regulations of 1969 is correct. The decision whether or not to issue a permit for the import or export of eggs must be that of the Principal Secretary for Agriculture who if he approves "shall cause a permit prescribed in the Second Schedule to be issued to the applicant authorising the importation or exportation of eggs through the South African Egg Control Board or other officially recognised channels . . ." Regulation 5(1) of the Egg Control Regulations of 1969 . It seems to me the powers of decision are with the Principal Secretary. The Marketing Officer merely gets instructions to issue permits. In this application, the First Respondent who merely gets instructions seems to have assumed the powers he does not have. It seems to me the application for a permit must be rejected in writing by the Principal Secretary for Agriculture if Regulation 4(3) of the (Egg Control) Regulations of 1969 is followed to the letter.

The Marketing Officer (First Respondent) and the Attorney General (Third Respondent) have not taken this point. The court has no option but to assume that the Principal Secretary probably was in the picture. Indeed, if he was not, he ought to have taken remedial action. It is most unfortunate that the Principal Secretary for Agriculture has over the years abdicated his responsibility according to Law and handed the public to minor officials when the law is specific on the point. The chaos that accompanied this neglect of duty will soon be apparent. For purposes of determining issues in this case, I will regard what was done by the First Respondent (the marketing officer) as having been in fact done by the Principal Secretary.

This disregard of the letter of Agricultural Marketing (Egg Control) Regulations of 1969 has blinded both applicant and the Respondent to the fact that in this case in terms of Regulation 4(4).

"Any person dissatisfied with a decision of the Permanent Secretary (Now styled Principal Secretary) for Agriculture in connection with any matter relating to his application for a permit may within 30 days of receiving the notification in terms of sub-regulation (3) appeal in writing to the Minister against such decision ... The

decision of the Minister on such appeal shall be final."

The court was not apprised of this provision. The Respondents did not take the point that applicant has not exhausted all remedies. Consequently, the court was not addressed on this point. The impression that was given by Counsel for Respondents was that the Court would find everything in CIV/APN/256/93. In that application according to Respondent, the Minister had complained at a public meeting that there were a lot of eggs in the country but people were applying for permits to import eggs see paragraph 19 of 'Mabaitse Motsamai's affidavit. According to that affidavit, the Minister was temporarily correct. It was in October, 1993 necessary that permits for the importation of eggs be issued. The First Respondent in these proceedings does not deny there was at that time a shortage of eggs but says applicant is no more the proper authority to acquire eggs from producers and to market eggs through licensed dealers. Applicant relies on Legal Notice No. 34 of 1993 which amended the Eggs Trading Regulations of 1973 and which substituted District Poultry Co-operative Societies wherever applicant appears. The court is called upon to determine the effect of this amendment.

See paragraph 8 and 10 of Motena Marathane's Answering Affidavit in this application.

As already stated, the Second Respondent who is the Minister of Agriculture, Co-operatives and Marketing has not taken the point that applicant has not exhausted all available remedies. Second Respondent has appellate jurisdiction in this matter of importation and export of eggs in terms of Regulation 4(4) of the Agricultural Marketing (Egg Control) Regulations of 1969. The Court will assume that he accepted the need to import eggs at the material time of the application. No affidavits have been filed on behalf of Second Respondent.

The Replying Affidavit of Applicant did not make the task of the court easier by annexing First Respondent's letter dated 1st December, 1993 which states there were plenty of eggs in the country. The period in issue is that of October, 1993. The court in making this observation is mindful that applicant was trying to make a different point from that of mere availability of eggs.

Applicant and later on the District Poultry Co-

operative Societies come into the picture in terms of the Agricultural Marketing (Egg Trading) Regulations of 1973. These took the place of Regulation 8 of Agricultural Marketing (Egg Control) Regulations of 1969. These Egg Trading Regulations of 1973 also created a monopoly for acquiring eggs from producers and marketing it through licensed dealers or to the general public. Producers in terms of Regulation 5 of the Egg Trading Regulations of 1973 (as amended) were allowed to sell only 2 dozens of eggs to any one person per week, otherwise all eggs were to be sold to and through applicant (the Lesotho Poultry Co-operative Society) Except for this change and other minor changes brought by the 1973 egg Trading Regulations the old Egg Control Regulations of 1969 remain in operation. Care had not been taken to make the two sets of regulations to fit into each other. The problem has been compounded by the recent Agricultural Marketing (Egg Trading) (Amendment) Regulations of 1993 (Legal Notice No. 34 of 1993).

The Respondent was the first to begin by arguing the application to strike out the following words paragraph 3 (a) of the Applicant's Replying Affidavit:

"in the persons of the Permanent Secretary and ultimately the Minister with First Respondent merely doing the issuing of permits I crave leave to emphasise that when these regulations were promulgated neither applicant nor any district or other Poultry Co-operatives Society were in existence "

During argument, it became clear that these words really explained applicant's view of the history of egg trading legislation and applicant's interpretation of it. Consequently Respondent could not have been surprised or prejudiced by those words. That being the case, the matter was argued for two days and by common consent each of the parties asked for and was given liberty to traverse whatever issues he thought could assist in the ventilation of this dispute.

At the inception of the argument both parties kept on referring to CIV/APN/221/93 and CIV/APN/256/93. These matters are pending only on the questions of costs but they were otherwise amicably settled. By consent of both parties the court was authorised to take the averments therein as if they were made in this application because they were relevant and pertinent to this applicant.

Nevertheless, the Respondents were of the view

that proceedings in CIV/APN/221/93 and CIV/APN/256/93 and the settlements of legal issues therein should not preclude the court from deciding the same legal issues differently. Applicant was of the view that the court will find it impossible to ignore the legal issues that were expressly or impliedly conceded by consent in those matters. What the parties wanted was that the facts of those applications be taken into account but that this court should approach legal issues with an open mind.

The Egg Trading regulations of 1973 were made in terms of powers conferred on the Minister of Agriculture in terms of Section 4 of the Agricultural Marketing Act of 1967. Mr. Mohapi for Respondent said this court should read this section along with Section 6. Both parties did not call upon the court to decide whether or not these Agricultural Marketing (Egg Trading) Regulation of 1973 (as amended) were ultra vires.

The matter before court involves the marketing of agricultural produce and is governed by the Agricultural Marketing Act No 26 of 1967 and Regulations made thereunder.

The long title of the act gives the purpose of the Agricultural Marketing Act of 1967 as being

To control, improve production, preparation of agricultural products and the marketing of agricultural supplies, and to provide for incidental and connected matters.

In terms of Section 2 of the Agricultural Marketing Act, 1967 defines "Marketing"

"selling, or purchasing, and includes any activity related thereto, and the word "marketed" shall be construed accordingly,"

The Minister of Agriculture is in terms of Section 4 of the Agricultural Marketing Act 1967 empowered by Notice in the Gazette to.

- (b) prohibit any person from dealing in the course of trade with a product in Lesotho ...
- (g) prohibit the importation into or exportation from Lesotho of a product
- (h) empower in order to carry out the provisions of a regulation, a person generally or in a particular case .

I have been invited to direct my attention to

Section 6 (2) of the Agricultural Marketing Act of 1967 as being the source of the authority by which the Regulations that are subject of this application were made

The Minister may further provide by regulation that a provision of a regulation shall apply -

..to one person, group or class of persons producing . . or dealing in the course of trade with a product ... but not apply to another person group or class of persons producing . or dealing with a product.

It was in the exercise of the powers in Section 4 of the Agricultural Marketing Act of 1967 that The Agricultural Marketing (Egg Control) Regulations of 1969 were made.

In 1973, in terms of Legal Notice No 7 of 1973, Agricultural Marketing (Egg Trading) Regulations of 1973 were made. This were made by the Minister in terms of Section 4 of the Agricultural Marketing Act of 1969 There is no Agricultural Marketing Act of 1969 I believe, therefore, that page 276 of the Laws of Lesotho 1973 has a printing error The same printing error was made of Supplement No.5 to Government Gazette No 2 of 26th January, 1993 The effect of publishing regulations under a non-existent

law would be interesting to explore. Was a rectification of this printing or clerical error ever made? This error is inconsequential and prejudices nobody. Therefore, the court will treat it as if it was not made. The court will (in any event) assume that it probably was rectified. Furthermore in the body of the regulations proper reference is made to the Agricultural Marketing Act of 1967.

What seems abundantly clear is that the Egg Trading Regulations of 1973 make it impossible for any trader institution or individual to import or export eggs. Only the applicant was henceforth to have this facility because only the Lesotho Poultry Co-operative Society had the monopoly to acquire eggs from producers and to market them.

The reasons for this seems to be that the policy of government changed. The Minister used the powers of subsidiary legislation given to him by the Agricultural Marketing Act of 1967 to implement his new policy. Using legislation is a two edged sword because once there is a law, it binds both the Minister and the general public. Subsidiary legislation both empowers and fetters ministerial

operation depending on its terms. The Minister, therefore, decided to deal with all acquisition and marketing of eggs in Regulations 3 and 4 of the 1973 Egg Trading Regulations. In terms of these regulation, traders were no more to be allowed to obtain eggs directly from egg producers whether in Lesotho or outside Lesotho. All these traders or dealers in eggs were henceforth

"required to acquire eggs, whether by purchase or otherwise, for consumption, resale or any other purpose SOLELY from the Lesotho Poultry Co-operative Society registered in terms of the Co-operatives Societies Proclamation or from a source authorised by the marketing officer "

Vide Regulation 3

In the courts view a monopoly was given to the Poultry Co-operative Society and Respondents' counsel agrees. I have underlined the word "solely" in the above quotation from the 1973 Regulation on Egg Trading. Nevertheless, First Respondent claims she has extensive powers of interference.

In this case, the Lesotho Poultry Co-Operative Society is the Applicant while the Marketing Officer is the First Respondent. They are fighting and have been fighting over the meaning of the word "OR". It

appears in both Regulations 3(2) and Regulation 4. of the 1973 Agricultural Marketing (Egg Trading) Regulations. First Respondent is of the view that although the legislature has said traders should only buy eggs from Applicant and producers should only sell eggs to applicant, the legislature by adding the words "or" "a body authorised by the marketing officer" did not intend the Applicant to have the sole monopoly of marketing eggs. Alternatively the legislature intended the First Respondent to have a right break Applicants monopoly as a collector and distributor of eggs whenever applicant so desires.

Prime facie, the word "or" denotes an alternative. The word "or" has been the subject of various interpretations. Courts very seldom interpret the word "or" as meaning "and". Nevertheless the meaning of "or" depends on the context in which it is used. See the case of Reiborg Holdings (Pvt) Ltd v. Galloway 1973 (1) S.A. 530 at 531 CD where Macdonald J.P. said:

"A court of law will, of course, not lightly substitute the word "and" for the word "or" but, of course, it is clear that where to give the word "or" its literal meaning would result in manifest absurdity and where it is clear that this result could not have been

intended by the Legislature, a court of law will construe the word "or" to mean "and" .."

At page 532E after discussing the facts at great length and checking similar laws in other countries, Macdonald J.P. in Relborg (Pvt) Ltd (supra) concluded:

"Any suggestion, therefore, that the word 'or' was introduced inadvertently can be dismissed "

The Pocket Oxford Dictionary defines "or" as a conjunction introducing or marking an alternative.

In this case we have to exclude the possibility that the legislature might have used the word "or" in the sense of "and/or" This happened in R. v Lucknow Transport 1957(2) S.A. 85 where the word "or" had in that context a potentially cumulative effect where Selke J. at page 85 G H said.

"In my opinion, the word 'or' has here a potentially cumulative effect, and is to be construed as the equivalent of 'and/or' I am led to this conclusion not only by the language itself but also by the remarkable consequences which, it seems to me, would ensue .. "

The language used in the Regulations 3(2) and 4

of the 1973 Egg Trading Regulation does in the courts view puts the intention of the legislature beyond doubt.

Regulation 3(2) of the 1973 Egg Trading Regulation surrounds the word "or" with the following words:-

"Institutions and the traders and licensees . . . are required to acquire eggs . . . for consumption, resale or any other purpose solely from Lesotho Poultry Co-Operative Society or from a source authorised by the marketing officer "

Similarly, Regulation 4 of the same 1973 Regulations clarifies the legislature's intention in the following terms.-

"Any producer shall sell eggs produced by him only to Lesotho Poultry Co-operative society . . . or to a body authorised by the marketing officer "

The words "solely from" and "only to" qualify the "or" and put the disjunctive context intended beyond question. There is no doubt that the words "or . . . a source authorised by the marketing officer" were intended to convey purely alternative connotation to

the word "or" that being the case, the marketing officer is obliged to respect and uphold Applicant's monopoly. First Respondent (the marketing officer) can only provide a source authorised by her to do the functions of applicant if applicant cannot discharge his duties and an alternative has to be provided.

In Respondent's answering affidavit sworn to by Mamotena Marathane at paragraphs 5 and 7, the court (in this multifaceted dispute) puts under the spotlight the following

"1. It is Government's firm policy to encourage local producers so that Lesotho becomes self-sufficient in egg-production and therefore I had issued authority to purchase eggs directly from producers in terms of Regulation 4 of Legal Notice No 4 of 1973. It is correct that applicant has instituted proceedings in CIV/APN/221/93. There is nothing in regulation 4 that obliges the Marketing Officer to consult applicant or anybody before exercising the powers vested in her. Such a legal misconception would clearly be contrary to law." - Paragraph 5 of Answering Affidavit.

2. Paragraph 7 of Motena Marathane's Answering Affidavit.

"The statement that Makokos have

been selling their eggs on the basis of a carte blanche permission granted to all egg producers to sell their produce to any trader or consumer contrary to law, is false and is denied. Again I want to reiterate that traders like wholesalers and chain stores can only buy eggs from producers if duly authorised by the Marketing Officer. If the applicant is unable to purchase eggs because he offers them a low price, it is their own business. What the Ministry would like to do is to encourage competition so that producers would get a better price for his produce. If the applicant is suffering any misfortune, it is only because it is not prepared to offer the producer market prices."

Government policy in matters of administration is often unfettered by legislation. In which event as against government's administrative discretion individuals have no rights that are specifically protected by law. Courts, therefore, cannot ordinarily interfere except very reticently in order to prevent abuses. Where, however, government policy is embodied in legislation and uses the legislative machinery to overcome resistance, then everything depends on what the law prescribes. If rights are given to individuals, courts will protect them.

The practice of giving a Minister broad powers to interfere in agriculture, trade and commerce is an old one. In the past it was relatively rare, in modern times it has reached alarming proportions because of what Baxter in Administrative Law at page 13 calls Keynesian economics

A short study of the English economic history shows that protection of British agriculture was embodied in the Corn Laws which were abolished in 1846 because of the Irish famine. There was a swing to the opposite extreme of free - trade. The result of this was that British agriculture was decimated by imported grain from the United States of America. The two World Wars led Britain and France to protect agriculture in order to provide food security in case of war. Japan falls into this category. Agricultural interests naturally put pressure that protection of local agriculture from foreign competition be maintained. The post Cold-War era has made free-trade and absence of state protection a much talked about alternative. State policies swing between the two extremes of free -Trade and State protection of either agriculture or industry

Keynsian economics is not wedded to one of the two extremes (protection or free trade) The State is given extensive powers of intervention, and flexibility of response. It may allow free trade or move to protection if the situation calls for such a solution. These powers of massive intervention are normally given by a broadly phrased statute giving the Minister of Agriculture, Finance or Trade and Industry powers through delegated or subsidiary legislation. If the Minister adjusts his policy, in this legal regime, he does so by changing regulations. He does not do so in the usual way of departmental directives. Although this avenue of discretionary administrative measures is open to him, it is not resorted to because existing laws and traditional agricultural and commercial practices would be in the way. Therefore, the Minister resorts to delegated legislative powers given to him by statute in order to force his policies through

The effect of delegated legislation is spelt out in Section 24 of the Interpretation Act of 1977 as follows:

"Subsidiary legislation shall have the same force and effect and shall be as binding and

shall be construed for all purposes as if it had been contained in the Act conferring the power to make such subsidiary legislation "

That means in the light of foregoing, because this aspect of Agricultural Marketing "Egg Trading" is governed by statute, it is not subject to the usual administrative discretion which normally accompanies the implementation of Ministerial policy. The Minister and his departmental or ministerial servants are bound by Egg Trading regulations as a matter of law. Departmental policy ought never to conflict with the law. If the Minister finds there have to be adjustments, Parliament has given him the legal means through subsidiary legislation.

It, therefore, seems in the light of what I have said above, it is the First Respondent (Marketing Officer) whose "legal conception would be contrary to law". If "what the Ministry would like to do is to encourage competition so that the producer will get a better price for his produce" the Minister has been given the subsidiary legislative powers to do so. It has to be noted, however, that if the system was operating efficiently, applicant ought to be representing the egg producers. In fact my

understanding is that when the Egg Trading Regulations of 1973 were made it was because applicant was deemed to represent egg producers. Applicant was therefore given the monopoly to buy eggs from producers and to sell eggs to licensed traders in order to raise prices for the benefit of egg-producers. By destroying this monopoly the marketing officer is taking away from egg-producers the collective power to influence and determine prices.

The next facet of this wrangle between applicant and First Respondent involves the importation of eggs. It was the expectation (and indeed the basis of granting applicant this monopoly to acquire eggs from producers and then market them through licensed traders) to enhance egg production in Lesotho and to prevent foreign competition in Lesotho.

In granting this monopoly to applicant, the Minister was creating a situation in which applicant could never be in a position to complain that they had no market. Every egg produced in the country could be bought at a price satisfactory to the producer who in fact controlled the price through the applicant of whom that producer would be a member. If egg

production fell it would be the applicant who would on behalf of egg producers (who were expected to be his members) who would ask for an import licence to get enough eggs to meet the short fall Is this what is happening?

At the request of the parties, I had occasion to look at the Answering Affidavit of Fani Makoko who was the First Respondent in CIV/APN/221/93 brought by Applicant. In that application the Marketing Officer is the Second Respondent. Although Fani Makoko is wrong to say applicant has not been granted a monopoly (in the light of what the court has found above) he raises other problems. Among these is the fact that the current chairman's terms of office expired seven years ago. If that is so, this is an internal matter of applicant It is not for the marketing officer to interfere

The problem that has been created by the disregard of the monopoly of applicant by First Respondent is neatly put by Fani Makoko in paragraph 6.3 of his Opposing Affidavit in CIV/APN/221/93 in the following words:-

"I am presently selling eggs to traders pursuant to the permit issued to me by the marketing officer as I am the source authorised by the marketing officer My prices will obviously be lower than the prices of Applicant because applicant has to increase the prices to make a profit for itself as well as for the producer selling to it "

That frank admission that this interference with applicants monopoly must put applicant out of business undermines the intention of the legislature (as put through the Minister's subsidiary legislative machinery) through regulations. Applicant as a co-operative must of necessity seek to make profit for producers cover its expenses and make what profit is necessary to keep it going without defeating its objects. The monopoly was created for the benefit of the egg farmers and competition was also eliminated to enhance the interests of producers as represented by applicant.

If applicant has problems of paying producers, these are problems that have proper remedies. If, indeed, First Respondent has been at pains to create financial problems for applicant by creating unauthorised competition, First Respondent cannot use this to justify his issuing of permits to all and

sundry If big dealers no more have to buy eggs from applicant, this of necessity must lead to a situation in which the eggs collected by applicant from producers must rot for lack out outlets. The problems of applicant should have been faced squarely and if they were frustrating the purposes of the Egg Trading Regulations of 1973 First Respondent should have (after hearing applicant) recommended to Second Respondent who is the Minister to find remedies.

The Minister is clothed with extensive powers, including powers to make subsidiary legislation. Unfortunately, First Respondent chose to compound the problem by making herself to be counted among applicant's possible problems of failing to perform. This First Respondent did by illegally and unilaterally abolishing Applicant monopoly and thereby exposing applicant to ruinous competition which the monopoly conferred was intended to prevent. This action of first Respondent as already stated was ultra vires.

The third point that was extensively argued was that the powers of applicant in terms of the Agricultural Marketing (Egg Trading) Regulations of

1973 have since the publication of the Agricultural Marketing (Egg Trading (Amendment) Regulations of 1993 been removed from the Applicant. These powers according to Counsel for Respondents were now given to District Poultry Co-operative Societies because the name Lesotho Poultry Co-operative Societies had been deleted and in its place District Poultry Co-operative Societies had been substituted. This was according to Respondents' counsel what the 1993 Egg Trading (Amendment) Regulations had in fact done. The question for determination was whether or not the applicant ought to be still buying eggs from producers and distributing them to licensed dealers

Mr Sello for applicant referred me to CIV/APN/221/93 to back up the argument that applicant and District Poultry Co-operative Societies are one and the same thing. Mr. Mohapi for Respondents consented that I should refer to this application provided I also referred to and used the facts in CIV/APN/256/93. To this Mr. Sello for Applicant had no objection I have referred to CIV/APN/221/93 and found identical extracts of Minutes of the Leribe Poultry Co-operative Society Ltd, Berea Poultry Co-operative Society Ltd, Mafeteng Poultry Co-operative

Society Ltd, Mohale's Hoek Co-operative Society Ltd and Quthing Co-operative Society Ltd, marked "C", "D", "E", "F" and "G" respectively. They are all dated 19th May, 1993. They are all to this effect.

RESOLVED

- "1. To clarify, for the avoidance of doubt, the Lesotho Poultry Co-operative Union Ltd is a body composed of the above mentioned Co-operative Society together with other Poultry Co-operative Societies in Lesotho and that as each member Co-operative Society is represented on the Committee of Lesotho Poultry Co-operative Union Ltd, we regard and have always regarded the Executive Committee of the Lesotho Poultry Co-operative Union Ltd as having the authority to protect the interests of its members societies including instituting legal proceedings if it found it necessary to do so.

- 2 In so far as this perception may be wrong in law, we hereby adopt the proceedings instituted by the said Lesotho Co-operative Union Ltd and referred to as CIV/APN/221/93 as being our proceedings and confirm that the Lesotho Poultry Co-operative Union is acting on our behalf therein or, in so far as this may be necessary, we hereby authorise the said proceedings on our behalf.

I CERTIFY THIS IS A TRUE EXTRACT

Sgd.

These extracts of Minutes all describe applicant as a Union when in fact applicant is a Society

In paragraph 4 of the First Respondent's Answering Affidavit in this application, the respondents say of applicant:

"Lesotho Poultry Co-operative Society being the mother body is supposed to do general management and oversee District Societies. Hence Lesotho Poultry Co-operative Society is not supposed to sell and buy eggs.

According to the Opposing Affidavit of First Respondent sworn to by Mabatse Motsamai in CIV/APN/256/93 around July 1973 at paragraph 14.

"As far back as July 1985 the Lesotho Poultry Co-operative Society made a decision that the selling of eggs to consumers be done by District Poultry Co-operatives so that the mother body performs functions relating to major activities such as co-ordination and improvement of poultry production. In that respect a written report by the Lesotho Poultry Co-operative was given by one Monne Majalle to the Ministry."

According to First Respondents' Affidavit in CIV/APN/256/93 at paragraph 13 "pursuant to Legal Notice Number 7 of 1973, the Maseru Egg Circle was

directly managed by the Lesotho Poultry Co-operative Society Limited whereas in the districts, the management continued to be in the hands of the constituent members being the District Poultry Co-operative Societies. Acute problems arose in relation to the Maseru Egg Circle managed by the said Lesotho Co-operative".

Applicant and its constituents, the District Poultry Co-operatives are bodies co-operative. The Marketing Officer (First Respondent) cannot and is not empowered to interfere in the Poultry Co-operatives domestic affairs and fight their internal affairs for them. It seems to the court it is not First Respondent who should be fighting the internal battles of applicant and its constituents. Consequently since applicant continues to manage the Maseru District Co-operative, Applicant should buy eggs from producers and market these eggs from the Maseru Egg Circle. If this is against the interests of the Maseru District Poultry Co-operative that body will take action.

The court also went through the First Respondents affidavits in CIV/APN/256/93. It found allegations of lack of training, incompetence, inefficiency that

cause serious management problems. Numerous problems such as lack of uniformity in prices were alleged. Rightly or wrongly acquiring and marketing eggs through District Egg Co-operatives was expected to be an improvement. Applicant had authorised this since 1985. In the courts view, the Minister has been given extensive powers of rapid response including those of regulation making. I see no reason why this court can ignore the existing law and allow public servants to undermine it by doing as they see fit. The Opposing Affidavit of 'Mabaitse Motsama, the Chief Marketing Officer in CIV/APN/256/93 at paragraph 18 thereof states that she is issuing licences to acquire eggs from producers and market them through licensed dealers is not done with the Minister's permission. Nevertheless if the Minister had been informed of the above-mentioned problems and chosen to act, the minister would not have been without administrative, legal and legislative remedies.

It should be noted that I am not seised with applications CIV/APN/221/93 and CIV/APN/256/93. But, as these applications have already been decided by consent, and are being referred to by consent of the parties, I am really looking at them for information

only. Facts and the law have led me to the conclusion that what was agreed by the parties was the only conclusion they could have reached if properly advised. If they had been decided differently and I was called upon to decide the legal issues as I see fit, I would have had to grapple with issue estoppel or res judicata. In view of what I have said above I do not have to do so.

In resisting the December, 1993 application of applicant to import eggs from South Africa, the Chief Marketing Officer has put her position succinctly in the letter of 1st December, 1993 to applicant:

Dear Sir,

re : Application for permit to
import eggs.

By this communication are informed that your application for the importation of 1500 dozens of eggs dated 1.12.93 has not been accepted. The reason being that eggs are still available in the Maseru district.

However, you have cash you can get assistance from our office as to where you can get eggs

Yours faithfully,

M. Motsamai

Chief Marketing Officer

If Regulation 4 of the Agricultural Marketing (Egg Trading Regulations of 1973) was being followed as it ought to be, then there could be no eggs for sale from producers that could be sold to any one but Applicant or District Poultry Co-operative Societies who are by common consent applicant's constituent members. If there were eggs in the country which were being sold to any one but the applicant and applicant's constituent bodies then a criminal offence was being committed. The people committing this offence were liable to a fine not exceeding M200.00 or to both fine and six months imprisonment, on a second or subsequent conviction they were liable to a fine not exceeding two thousand Maluti or imprisonment for a period not exceeding two years, or to both such fine and such imprisonment. See Regulation 6 of the said Egg Trading Regulations of 1973. What is disturbing is that in adding this breach of the law, the Marketing Officer (First Respondent) was confident he was upholding the law in diverting eggs from applicant by issuing permits to other people or bodies.

There should be some producers who obeyed the law and who sold eggs to District Poultry Co-operatives

Societies and to applicant as manager of the Maseru Egg Circle on behalf of the Maseru District Poultry Co-operative Society. Similarly, there should be institutions and licensed traders who acquired eggs for consumption, re-sale or other purposes from applicant or District Poultry Co-operatives. Applicant and the District Poultry Co-operatives were obliged to buy their eggs or to sell their eggs in terms of Regulations 3 and 4 of the Egg Trading Regulations of 1973 as amended by the 1993 Egg Trading Regulations. When their supply of eggs is exhausted, applicant and District Co-operatives are obliged to import them. It follows that if such a situation arises, First Respondent is obliged to facilitate the acquisition of eggs from outside Lesotho by issuing the required egg permits.

What strikes the court as most disturbing is that a civil servant of the rank of First Respondent should be able to frustrate national policy as embodied by in the Laws and Regulations of this country. It seems to this court that First Respondent is wrong in saying that what is in issue here is that applicant should not be directly involved in the eggs monopoly but should only manage and supervise District Poultry Co-

operative Societies It seems there was a scheme to break the statutory monopoly of Poultry Co-operatives to acquire eggs from producers and to market them. The 1993 Egg Trading amendment is only being used as an excuse. The reason for this conclusion is that in CIV/APN/256/93 the applicants were The Berea and Buttha-Buthe Poultry Co-operatives. In paragraph 10 of Ramaisa founding affidavit in CIV/APN/256/93 says the present applicant and other District Poultry Co-operatives "applied, at different times to First Respondent for permits to import eggs" In reply thereto First Respondent represented by the 'Mabaitse Motsama said:

"I admit the first sentence, I further admit that applications were turned down, but I vehemently deny it was advanced as a reason that applicants would supply Lesotho Co-operative. The applicants were denied for good and valid reasons given. Sometime in May 1993, the applicants had a meeting with the Minister of Agriculture and it was at this meeting publicly declared they were over-supplied with eggs "

The Minister gets information from public servants such as First Respondent. It would put the Minister in a difficult position as the final appellate body in terms of Regulation 4(4) of the Agricultural Marketing (Egg Control) Regulations of 1969 to have pre-judged

the matter. This ought not to happen. If eggs were many in the country and they were not getting to District Poultry Co-operatives, it was because First Respondent activities in issuing permits was frustrating national policy by the issuing permits to other people to burst the monopoly of the Poultry Co-operatives over eggs. What First Respondent says in the present application is the opposite see paragraphs 5 and 7 of her Answering Affidavit, where First Respondent now says Government policy is that of free competition and it was because of this policy that eggs no more get to applicant from suppliers.

There is the case of N.S Maseribane and Others v J.R.L Kotsokoane 1978 LLR 451 in which the court of Appeal of Lesotho was dealing with ministerial power. The facts of this case are not very different from this case. In Maseribane v Kotsokoane the marketing of livestock and livestock products was controlled by a Livestock Marketing Corporation whose Board is appointed by the Minister of Agriculture. In this case Egg Trading is controlled by Poultry Co-operative Societies which should be composed by the egg producers themselves. Egg Trading was handed to Poultry Co-operative Societies by the Minister through

1973 Regulations made through subsidiary legislative powers. The Livestock Marketing Corporation was established and run by a Board by statute in terms of the Livestock Marketing Corporation Act of 1973. The courts in Maseribane v Kotsokoane would not allow the Minister to dismiss the Board he had appointed without a hearing. In this case the right to a hearing when actions prejudicial to the economic interests of the applicant is even greater.

The court's functions are to apply the law in an even-handed way. Parliament makes the laws and it is Parliament which through the laws has given the Minister powers and by the same process sometimes protects the individual. Nevertheless, there are certain legal principles protecting the individual which are read into all laws unless expressly excluded by the legislature. Courts immediately insist on a right to a hearing where rights of property are involved. In saying this, I am fortified by what Ogilvie Thompson J.A. in N.S. Maseribane v J.R.L. Kotsokoane 1978 LLR 451 at page 455 to 456 dealing with administrative decisions that affect the rights of others said:-

keep a watchful eye to see that in terms of Section 3(a) and (d) of the Agricultural Marketing Act, 1967

that:

"Each producer is paid prices which adequately reflect the value and quality of his product in Lesotho and on external markets." - Section 3(a)

Ministers in the past have also failed :

"to obtain adequate information to assess the activities relating to production and marketing of products and supplies" in relation to eggs - Section 3(d)

If the Minister does his duty in relation to egg production and marketing then the existing problems in relation to eggs will receive attention. Suspect allegations will not be made by First Respondent and First Respondent will not change the policy in egg trading that is embodied in the law and regulations as he sees fit. That is something that is beyond his powers. Even the Minister cannot change the policy embodied in regulations except through other regulations.

What remains for the court to do is to make an appropriate order. The court has its own function and

its own area where it is by law expected to exercise discretion. The court is not supposed or expected to take responsibility for the import and export of eggs. The legislature has provided for that. Similarly, the court is not expected to acquire eggs from producers and market them for the egg producers. This matter together with the protection of the domestic egg market are the concern of the Minister. Even if the law permitted the court to shoulder these responsibilities (which it does not) the court would be most reluctant to do so. These are functions of government. The court's function is not to govern, make policy or implement it administratively or through legislation. In this particular case, Parliament has armed the Minister with extensive powers including those of subsidiary legislation.

The Court had an opportunity to examine the permit market "MM2" attached to First Respondent's affidavit in this application. The court is puzzled that it does not conform with Regulation 5 of the Agricultural Marketing (Egg Control) Regulations of 1969 in that it is not on the face of it:-

"issued to the applicant authorising the importation of eggs through the South

African Egg Control Board or other
officially recognised marketing channel
....."

That permit authorises that eggs should be obtained only from Range Poultry Farm. The Court does not have the full facts but it seems odd in the light of Regulation 5 above, for both the application from Berea Poultry Co-operative Society marked "MM1" and the permit "MM2" to make no reference to the South African Egg Control Board. If circumstances have changed, it seems to me that regulations should be changed accordingly. The court will, therefore, not plunge headlong into this chaotic area.

I am not happy with the orders that applicant seeks. They are phrased in terms that are too broad. At places they are difficult to understand.

Nevertheless, the court has a duty to resolve this dispute and to see to it that existing laws are followed. That being the case (to put the derailed process back on track) the circumstances of the case call for an order in the following terms.-

- (a) The interim orders in terms of which applicant was authorised to

import 20000 (twenty thousand) eggs on the 18th October 1993 and on the 22nd December, 1993 are confirmed.

- (b) Prayer (b) of the Rule Nisi (in so far as it means permits should always be granted or refused according to law) is confirmed.
- (c) First Respondent is restrained from issuing to other bodies permits for acquisition of eggs and marketing of egg in competition with Poultry Co-operative Societies (which include applicant) contrary to the provisions of Regulations 3 and 4 of the Agricultural Marketing (Egg Trading) Regulations of 1973 (as amended).
- (d) Respondents are directed to conform with the Agricultural Marketing Act of 1967, the regulations made thereunder and the procedures for modifying or changing the said Regulations provided for in the Agricultural Marketing Act of 1967.
- (e) The Respondents are directed to pay the costs of this application jointly or severally



W.C.M. MAQUTU
ACTING JUDGE.

10th January, 1994.

For Applicant Mr. Mohapi
For Respondent : Mr. Sello