

IN THE HIGH COURT OF LESOTHO

In the matter between:

BASOTHO MINEWORKS LABOUR CO-OP LIMITED  
PUSELETSO SALAE

1st Applicant  
2nd Applicant

and

THE REGISTRAR OF COOPERATIVES  
(Mr. E.P. Moeketsi)  
MOSES MOEKETSI MOKHEHLE  
THE ATTORNEY GENERAL

1st Respondent  
2nd Respondent  
3rd Respondent

J U D G M E N T

Delivered by the Honourable Chief Justice Mr Justice  
J.L. Kheola on the 17th day of February, 1995.

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

1. dispensing with ordinary Rules of this Honourable Court pertaining to the modes and periods of service.
2. A Rule Nisi be and is hereby issued returnable on the date and time to be determine by the Honourable Court calling upon the respondents to show cause (if any) why:-

- (a) The first respondent shall not be restrained from proceeding with the purported appeal of the second respondent against the applicant's finalisation hereof.
- (b) The said purported appeal shall not be declared null and void and of no force and effect.
- (c) The first respondent shall not be interdicted from recognising the second respondent as a member and/or official of the first applicant thus not entitled to bring any proceedings before the first respondent.
- (d) The second respondent shall not be ordered to comply with the Court Order in CIV\APN\286\89.
- (e) The respondents shall not be ordered to pay the costs hereof, the first and third respondents

paying only in the event of opposition.

(f) The applicants shall not be granted such further and/or alternative relief as this Honourable Court may deem meet.

3. Prayers 1, 2(a) and (d) to operate with immediate effect as interim orders.

The facts of this case are as follows:

The second respondent lodged a complaint with the first respondent in terms of section 51 of the Co-operative Societies Proclamation No.47 of 1948. He asked for intervention by the first respondent and the latter appointed an arbitrator, a certain Mr. E.M. Kobeli who delivered his decision on the 27th February, 1989. (See Annexure "A" to the founding affidavit). The decision of the arbitrator was that the second respondent and his colleagues should register all members and cause them to pay their subscription and that elections should be held before the 25th April, 1989.

On the 22nd April, 1989 a meeting of the applicants' General

Conference was held and elections were held for the Executive Committee. (See Annexure "B"). After the meeting, the minutes were taken to first respondent for him to be informed as to what transpired in the meeting and to be registered as such. The first respondent confirmed the minutes and expressed the view that he or they were aware of the lawful elections that took place on the 22nd February, 1989 that put new office bearers in office of management responsibility in terms of the Co-operative laws then in force. This was an endorsement made by the first respondent at the bottom of the minutes on the 25th April, 1989.

It is common cause that the second respondent never accepted the results of the elections and continued to hold himself out as the President of the first applicant. In CIV\APN\286\89 the first applicant was granted a final court order restraining the second respondent from holding himself out as the President of the first applicant and from doing certain acts (See Annexure "K"). Prayer (d) in the present application the second respondent is ordered to show cause why he shall not be ordered to comply with the Court Order in CIV\APN\286<sup>41</sup>\89. This is a somewhat novel procedure where a person who is allegedly defying a valid order of this Court is again asked to appear before Court and show cause why he should not be ordered to comply with a Court Order. The proper procedure is that he must show cause why he should not be committed to prison forthwith.

The second respondent alleges that on the 28th March, 1989 he lodged an appeal against the decision of the arbitrator (See Annexure "RB" to the answering affidavit).

On the 14th April, 1989 the first respondent wrote a letter to the first applicant informing it of the fact that the second respondent had lodged an appeal against the decision of the arbitrator. He apparently enclosed the reasons of appeal as well as the proceedings and the judgment of the arbitrator. (See Annexure "RA").

The second respondent's contention is that he never received the first respondent's Annexure "RA").

The second applicant's contention is that he never received the first respondent's Annexure "RA" together with all the accompanying documents. He became aware of the appeal on the 13th September, 1993 when Annexure "A" was served upon him. Annexure "A" is a notice of set down of the appeal. There is a serious dispute of fact whether the second applicant received the appeal. He alleges that the appeal was not lodged within one month after the date of communication of the award to him in terms of Rule 32(d) of the Co-operatives Societies Rules in High Commissioner's Notice 174 of 1948. It is alleged that the award was communicated to the parties on the 27th February, 1989.

Mr. E. Kobeli, the arbitrator, has filed an affidavit in which he alleges that he is the former Law and Administration Section Officer in the Co-Operatives Department of the government of Lesotho since 1975 to 1992. His duties involved registration, administration and arbitration for the whole of Lesotho in respect of co-operatives societies. In paragraph 6 of his affidavit he alleges that

"I deny that the appeal of second respondent was ever made and filed after I had delivered the judgment at anytime before 1992 when I left. I must have known when it was filed because, first the files were kept by me, secondly, I was the one who had to prepare copies for the respondents in the appeal, and also the district officers in the respective Cooperative departmental sections of the department. No appeal was ever filed while I was still in employment by the second respondent for indeed I would even have had to sign such an appeal and dispatch the record thereof to the higher authority being the first respondent. What I suspect has happened with the present so-called appeal is that it has been filed very late in 1993 and the rubber stamps were back-dated by the first respondent. I was

never ever received a letter from the second respondent of the nature and contents of Annexure "RC" referred to by him. In fact if I had received such a letter I would have placed a date stamp on it thus signifying when I received it and could have signed it. This letter is a fabrication."

This is a very serious allegation of fraud and fabrication of evidence by the respondents. However, there is documentary evidence by the first respondent showing that the appeal was launched on the 28th March, 1989. The allegation by the second applicant is that these documents on which the respondents are relying were cooked in order to create the impression that the appeal of the second respondent was lodged within the time prescribed by the rules. The arbitrator goes so far as to say that the official date stamps were back-dated in order to bring the appeal within the prescribed time.

As I have said above this is a very serious allegation of fraud or corruption allegedly committed by the first respondent in collusion with the second respondent. These allegations are strongly denied by the first respondent. I have come to the conclusion that there is a genuine dispute of fact which cannot be resolved on affidavit. The applicants persisted in seeking

for a final order despite the obvious dispute of fact and did not apply for the hearing of viva voce evidence. In a recent case of *The Management Committee of Emanuel and Others v. The Eighteenth Episcopal African Methodist Episcopal Church C. of A.* (CIV) No.25\94 Kotze, J.A. said at pages 2-3:

"The approach of the learned Judge was wrong. The respondent (unrepresented at the appeal) approached the Court *a quo* on motion. The crucial allegation was disputed. The respondent did not apply for the hearing of viva voce evidence and chose to let the matter run its course on the disputed crucial allegation. In the circumstances the proper approach would have been to assume the truth of the denial of the factual allegation. In the circumstances of appeal is upheld with costs."

In the present application I shall adopt the same approach and assume the truth of the denial of the factual allegation.

In the result the rule is discharged with costs.



J. L. KHEOLA  
CHIEF JUSTICE

17th February, 1995.

For Applicants - Mr Maieane  
For Respondents - Mr. Sooknanan.