

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) NO. 31/2012

In the matter between

**LESOTHO PUBLIC SERVICE
STAFF ASSOCIATION**

APPELLANT

AND

**RETHABILE MAKAKOLE T/A
PURPLE UNION**

RESPONDENT

CORAM: RAMODIBEDI, P
SCOTT JA
HURT JA

HEARD: 3 APRIL 2013
DELIVERED: 19 APRIL 2013

Summary:

*Authority to contract on behalf of Association -
provisions of Constitution specifying persons with*

such authority - regional branch of Association, represented by Regional Secretary, ordering catering services without authority from Executive Committee - Regional Secretary not having contractual authority - similar orders placed in the past and honoured by Association - conduct by Association clothing Regional Secretary with ostensible authority - Association estopped from denying liability for payment for catering services rendered.

JUDGMENT

HURT JA

[1] The appellant is a registered association of employees of the Lesotho Public Service, constituted under the provisions of the Public Service Act, No 13 of 1995. In terms of its constitution it has an Executive Committee which has "authority to enter into any transaction and execute any contract in the name of and on behalf of the Association, subject to the provisions of this constitution". Clause 14 of the constitution empowers the Executive Committee, in defined circumstances, to demarcate "Regions" in

which Regional Committees (with duly elected office-bearers) conduct the affairs of the Association for the region in much the same way as the Executive Committee conducts the affairs of the Association for the whole of Lesotho. There is an express provision in the constitution to the effect that the Regional Committee is subordinate to the Executive Committee, which has the power to "confirm, amend or reverse" any decision taken by the Regional Committee. A "Region" as contemplated in clause 14 is constituted as the Maseru Region.

[2] As part of its activities, the Maseru Region holds an annual general meeting of its members. The AGM for 2011 was scheduled to take place on 14 and 15 May. A venue was arranged and the services of a professional caterer, the respondent in this appeal, were retained. The meeting was duly held on the set dates and the respondent provided catering services for the 200-odd members in attendance. On 17 May, the respondent submitted its invoice for M 30 000. The appellant rejected the invoice, contending that the order placed with the respondent had not been authorized by the Executive Committee and that

there was no valid contract against which the respondent could claim payment.

[3] On 15 July, 2011, the respondent instituted action against the appellant for the payment of M 30 000. Annexed to the Declaration was the written order, No. 0147, dated 9 May and set out on what appears to be an official order form emanating from the appellant, requesting the respondent to provide the catering services. It was signed by Ms M Raphuting, the secretary for the Maseru Region. In keeping with its initial response, the appellant delivered a plea effectively denying liability and asserting specifically that Ms Raphuting had no authority to bind the appellant contractually.

[4] The pleadings having closed, the respondent delivered two unsworn witness' statements, the one being by the proprietor of the respondent and the other by the chairperson of the Executive Committee of the Maseru Region. The appellant delivered one unsworn statement by the President of the appellant, Mr P Moleko.

[5] It is unnecessary, for the purposes of this judgment, to refer to these statements in detail. It is recorded in the judgment of Molete AJ in the court *a quo* that the parties agreed that the matter could properly be decided on the statements as they stood, all three of which were to be accepted as "sufficient testimony" and that the matter was argued on this basis.¹

[6] The following relevant facts emerge as common cause from a consideration of the statements, admissions in the pleadings and documents in the record which were apparently placed before the learned Judge by consent:

- (a) The Annual General Meeting of members of the Maseru Region was scheduled to be held on 14 and 15 May, 2011.

¹I should record that, at the commencement of argument in this appeal, counsel for the appellant handed up some additional Heads of Argument supporting a submission that no such agreement had been reached and that the proceedings in the High Court had been irregular because the appellant had not been given an opportunity to cross examine the respondent's witnesses. These submissions are plainly inconsistent with the record. It is inconceivable that, if the arrangement recorded in the Judgment had indeed been reached without the agreement of counsel for the appellant, such a fundamental departure from the rules would not have been relied upon to challenge the judgment, both in the Grounds of Appeal and in the original Heads of Argument. Neither of these documents contains the slightest mention of any such irregularity. Counsel for the appellant was accordingly not permitted to develop any argument along these lines.

- (b) The Region had no direct authority under the appellant's Constitution, to bind the appellant contractually.
- (c) On 29 March 2011, Ms Raphuting, the secretary of the Maseru Region, addressed a letter to the appellant's office requesting the Executive Committee for funds for the AGM which included provision for catering costs for the 200 members who were expected to attend.
- (d) On 3 May, the general secretary of the appellant's Interim Executive Committee replied, declining the request on the ground that there were no funds available.
- (e) Notwithstanding this negative reply, the Regional Secretary signed a written order, in the form of the letter addressed to the respondent, asking the respondent to supply the catering services at the AGM.
- (f) The form on which the order was written had been supplied to the Region by the appellant,

was under the official letterhead of the appellant, was headed by the number 0147 and had all the appearance of an official order emanating from the appellant. The address set out in handwriting at the start of the letter is the address of the appellant's main office at Mandlebe Building, Private Bag A475, Maseru. There is nothing on the form which indicates that the order emanates from the Region as opposed to the main office.

(f) This procedure for procuring services in connection with the holding of the AGM had been adopted on a number of occasions in the past.

(g) The AGM was held on the set dates at the Convention Centre, Maseru, where the catering services were rendered and accepted.

[6] In support of its denial of liability, the appellant's primary assertion was simply that the Region did not have authority to order the catering services on the appellant's behalf and that this was an "*a fortiori* situation" in that there had been an

express refusal to assist the Region with funding. That contention, though, is not a complete answer to the respondent's claim. The issue, as the learned Judge *a quo* correctly construed it, was whether the respondent could reasonably assume, from all the outward appearances, that the Regional Secretary could validly bind the appellant in respect of the contemplated contract, in other words, whether the respondent had established that the Regional Secretary had ostensible authority to contract on behalf of the Association. He referred to the judgments of **Schutz JA** in ***NBS Bank Ltd v Cape Produce Co. (Pty) Ltd* 2002 (1) SA 396 at 412 (SCA)** at p 412, where the elements of proof of such ostensible authority are usefully set out and of **Lord Denning MR** in ***Hely-Hutchinson v Brayhead Ltd and Another*[1968] 1 QB 549 (CA) at 583**. In the latter case, **Denning LJ** pointed out that, although actual authority and ostensible authority are often co-extensive,

". . . sometimes ostensible authority exceeds actual authority. For instance, when the board appoint the managing director, they may expressly limit his authority by saying he is notto

order goods worth more than £500 without the sanction of the board. In that case his actual authority is subject to the £500 limitation, but his ostensible authority includes all the usual authority of a managing director. The company is bound by his ostensible authority in his dealings with those who do not know of the limitation. He may himself do the 'holding-out.' Thus if he orders goods worth £1,000 and signs himself 'Managing Director for and on behalf of the company,' the company is bound to the other party who does not know of the £500 limitation . . ." (p583G).

Also particularly apposite to the decision of this matter is the following comment by **Schutz JA** in **Cape Produce** in para 32, p 414:

"When the enquiry becomes focused upon ostensible authority, evidence about the internal controls of the bank is largely irrelevant, despite the fact that the bureaucratic mind believes that things may not happen, do not happen, and finally, cannot happen, unless the regulations are complied with. The outsider does not think that way. Nor does the

law. . . What emerges from the evidence is not a nude appointment, but an appointment with all its trappings, set in a context."

[7] To paraphrase the previous quotation, what emerges from the evidence in this case is not an isolated order, but an order preceded by a course of conduct which had been repeated "on a number of occasions". Furthermore, I hardly think that one can disregard the circumstances that:

(a) the Maseru Regional AGM would not be without importance to the Association, or at least to the Executive Committee;

(b) the meeting was to be held in Maseru, the city in which the Association's main office is situated and its Committee operates; and

(c) a substantial number of members (and probably some members of the Executive Committee) would be in attendance;

which would all create the impression on the part of the onlooker that the meeting and the facilities arranged for it would have the imprimatur of the

Association.

[8] It follows that the learned Judge in the High Court was quite correct in holding that the appellant could not be heard to say that the catering services had been ordered without its authority.

[9] The appeal is dismissed with costs.

N.V. HURT
JUSTICE OF APPEAL

I agree

M.M. RAMODIBEDI
PRESIDENT OF THE
COURT OF APPEAL

I agree

D.G. SCOTT
JUSTICE OF APPEAL

For Appellants: Adv B.H. Sekonyela
Adv. Tjelle

For Respondent : Adv A.M. Chobokoane