IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) 43/2016

CIV/APN/49/2016

In the Matter Between:

COOPERATIVE LESOTHO LIMITED	**APPELLANT**

AND

MINISTER OF SMALL BUSINESS DEVELOPMENT, COOPERATIVES AND MARKETING	**1ST RESPONDENT**
PRINCIPAL SECRETARY – MSCM	**2ND RESPONDENT**
COMMISSIONER OF COOPERATIVES	**3RD RESPONDENT**
ATTORNEY- GENERAL	**4TH RESPONDENT**
MAMOEKETSA MOLEFI	**5TH RESPONDENT**
TIEHO MOHAPI	**6TH RESPONDENT**
THABO SELAPANE	**7TH RESPONDENT**
LEBOHANG MASUPHA	**8TH RESPONDENT**

MAPALESA PASANE **9TH RESPONDENT**

KATISO MOHLOAI SEOLA **10TH RESPONDENT**

MALEBOHANG RAPASE **11TH RESPONDENT**

Coram **I.G. FARLAM AP**

N.J. MAJARA CJ

W.J. LOUW AJA

Heard : 3rd May 2017

Delivered : 12th May 2017

SUMMARY

Declaration of legislative powers – Commissioner of Cooperatives, Minister of Small Business Development, Cooperatives and Marketing, the Board of a Society – The Commissioner giving instructions to the Manager of the Appellant to desist from taking instructions from the Board of the Appellant and to hand over business documents to the 2nd respondent – whether such instructions lawful – Cooperatives Societies Act No. 6 of 2000 and Cooperative Societies Regulations No. 107 of 2001.
Commissioner acted beyond the ambit of her powers under section 3(2) of the Act – Cooperative Society a juristic persona with powers to run its own affairs – Powers of the Minister limited to oversight, regulation and making provision for the administration and management of cooperative societies – Appeal upheld.

JUDGMENT

MAJARA CJ (ex officio JA)

[1] The enquiry in the present appeal centres around three issues *viz*; whether the acts of the 1st to 3rd respondents which

the appellants complained about, constituted unlawful interference with the administration and management of the appellant; whether the point raised on the authority of the deponent to the founding affidavit i.e. absence of a resolution by the Board was correctly dismissed by the court a quo and lastly, whether at the material time, the Board of the appellant was in existence or had been dissolved.

[2] The facts that culminated in the institution of this case in the Court a quo are by and large common cause and can be summarised thus; Sometime in September 2014, the 3rd respondent suspended some members of the management committee of the appellant. Subsequent to that, the 3rd respondent also suspended from office, Mr. Shale who is the Manager of the Applicant. The suspension was later set aside by the High Court per Monapathi J in terms of a consent order issued in November 2015. On the 18th December, 2015, Mr. Shale received another letter of suspension which was later withdrawn by the 3rd respondent on the 7th January 2016.

[3] After the applicant instituted a case in the court a quo, in which it cited the 1st to 4th respondents only, the 5th to 11th respondents herein successfully made an application to intervene in the proceedings as interested parties, namely, employees of the appellant.

[4] In its judgment of the 26th August 2016, the Court a quo per Hlajoane J found that the acts of the 1st to 3rd respondents did not constitute unlawful interference as they were carried out on the basis of the law, namely **section 3 (2) of the Cooperatives Societies Act No.6 of 2000** (the Act) and **Regulation 18 (g) of the Cooperatives Societies Regulations No. 107 of 2001** (the Regulations).

[5] It is worth noting that in her judgment, the learned Judge did not cite the 5th to 11th respondents despite their having been successful in their application to intervene. Although it is not clear why this came to be, it might have been an oversight

brought about by the fact that the said respondents were not seeking a remedy against the appellant save to try and protect their interests as employees of the appellant, who, as far as it can be gleaned from the facts, believed that the acts of the 1st to 3rd respondents were lawful and justified.

[6] After judgment was handed down in favour of the respondents, Mr. Tlapane who has at all material times been representing the appellant herein, filed the present appeal but also omitted to cite the same respondents or to serve them with the notice, grounds and record of appeal yet he stated in his Certificate of Compliance that the record in this appeal comprises the entire record of the court a quo. I will come back to this point later.

[7] After the matter was enrolled to be heard on the 3rd May 2017 the 5th to 11th respondents through their legal representative Mr. CJ Lephuthing brought this omission to the attention of the Court on the 28th April, 2018, having learned about the appeal from Mr. Moshoeshoe, Counsel for the 1st to 4th respondents. After Mr. Lephuthing was heard, he was given directions to file Heads of Argument on the 28th April 2017 which he did. The appeal is a challenge to the finding of the court a quo that the 1st to the 3rd respondents' acts were justified by the law.

[8] I now to turn to deal with the issue whether the court a quo was correct in finding that the acts complained about by the appellant did not constitute unlawful interference. In this connection, **section 3(2) of the Act** provides that:

"*The Commissioner shall –*

(a) Register and protect co-operative societies in accordance with the provisions of this Act;
(b) advise the Minister on any matter relating to co-operative societies;
(c) encourage the establishment of co-operative societies in all sections of the economy and help co-operative societies to increase their efficiency; and

(d) *perform such other duties as may be assigned to him by the Minister or under this Act.*"

In turn **Regulation 18(g)** reads thus:

"The Minister may –

Provide the appointment, suspension and removal of the members and other officers, and for the procedure at meetings of the committee, and for the powers to be exercised and the duties to be performed by the committee and other officers;"

[9] In my opinion, while the provisions of **section 3(2) of the Act** empower the 3rd respondent to carry out certain functions, there is nothing in it to suggest that these include carrying out the administration and management of the appellant.

[10] Similarly, a proper reading of **regulation 18(g)** reveals that the Minister's powers are only limited to his prescribing, regulating and providing for the functions listed therein throughout all its sub-paragraphs. In other words, his powers are not so broad as to include carrying out the stated functions. It is also worth noting that it is only in this specific regulation that the word 'for' after 'provide' is missing which leads me to the conclusion that it was an error of omission or inelegance in the drafting at worst.

[11] I am fortified in this view by the provisions of the principal law/Act which among others provides that a registered society shall be a body corporate and shall exercise the powers and functions of a legal persona[1]. The Act also vests the supreme authority of a society in the Annual General Meeting of its members.[2] It further establishes a Management Committee whose functions include doing the following in relevant parts;

"conduct and manage the affairs and business of the society and, subject to any restrictions contained in the by-laws or in any other resolution taken at a meeting of members;

[1] Section 19 of Act No.6 of 2000
[2] Section 50 of the Act

> *Exercise all the powers required to ensure* ***the full and proper administration and management of the affairs, business and property of the society****, except those powers reserved to the Annual General Meeting of the Society;"* (emphasis mine).

[12] This is in terms of **sections 58 and 60 of the Act.** In addition, **Regulation 7(1**) provides that:

> *"A member of a Committee shall be elected, removed or suspended in an Annual General Meeting by a majority vote of members present."*

[13] Now, when read together, all these provisions lead me to the inescapable conclusion that the Act and Regulations cannot be understood to have provided for concurrent administrative and managerial powers between the 1st respondent, the 3rd respondent, the AGM and the Management Committee. This would clearly cause confusion and disruption in the proper administration and management of the affairs of a society which is a juristic person with corporate personality and thus legally capable of running its own affairs[3]. Thus, the instructions of the 1st and/or 2nd respondent upon which the 3rd respondent acted, were improperly founded on the provisions of **section 3(2) of the Act** read with **Regulation 18 (g) of the Regulations**.

[14] Indeed, while I agree with the finding of the Judge a quo that regulations and by-laws are there to give effect to the principal legislation, the powers prescribed under the relevant provisions that were relied upon by the 1st to 3rd respondents do not extend to carrying out administrative and managerial functions in concurrence with those of the other bodies that I have already mentioned.

[15] In the circumstances, the finding of the court that the acts of 1st to 3rd respondents did not constitute interference was flawed and cannot be upheld. The only involvement that is

[3] Ngwase and Others v Terblanche No & Others 1977 (3) SA 796 (A)

allowed by the law is limited to powers of oversight, prescriptive, regulatory and making provision for proper administration and management of societies. Indeed the language used in all the sub-paragraphs of **Regulation 18** which is relied upon by the respondents bears me out on this.

[16] Coming to the submission that the 1st to 3rd respondents also relied on the enquiry that was instituted pursuant to the provisions of **section 75 of the Act**, it is my view that it is not necessary for this Court to investigate the veracity of this submission. This is because it is common cause that at the material time that the 3rd respondents acted in the impugned manner, the said enquiry had been set aside by an order of the court a quo. Further, the 1st to 3rd respondents also did not cite the said enquiry as the basis and/or justification of their actions both in the court a quo and in this appeal. Thus this argument also falls away. **Section 75 of the Act** reads thus in relevant parts:

> 1. *"The Commissioner may, where he deems it is necessary, or on the application of a majority of the members of the management committee or one third of the members, hold an enquiry or direct any person authorised by him in writing to hold an enquiry into the constitution, operation and financial condition of society or any other affairs of a society.*
> *2. ...., ..., ..., ...,*
> *3. ...., ..., ..., ...,*
> *4. The Commissioner may, following an enquiry made under this section, issue an order which shall be binding on all members of a co-operative society, committee and employees.*

[17] In addition, the letter Annexure **CCL2** which purported to give the impugned instructions to Mr. Shale was not written by the 3rd respondent but by the 2nd respondent. However, even if it had been written by the 1st respondent, I have already stated that his powers do not extend that far under **section 3(2) of the Act** quoted earlier in this judgment.

[18] In turn, Annexes **CCL4** and **CCL5** respectively, i.e. letters that the 3rd respondent wrote to the tenants of the appellant to pay rent at Boliba Savings pursuant to **section 3(2) (a) of the Act**, had been overtaken by events because it is common cause that at that time, the appellant had not been wound up, the process having been suspended/stopped by the 3rd respondent. Accordingly, the submission that Mr. Moshoeshoe made on behalf of the 1st to 3rd respondents on the basis of the winding-up also falls away. The same applies to the instruction that the 3rd respondent issued to MMA Security Company in which she was relying on the same reason.

[19] It is accordingly my view that while it is apparent that the 1st to 3rd respondents had reason to believe that the appellant was going through difficulties, they unfortunately took actions that fell outside the perimeters of the law and the entire scheme of the Act and Regulations.

[20] The second issue of enquiry is whether the Board was dissolved. In this connection, Mr. Moshoeshoe made a concession that Mr Tlapana was correct in his submission that the evidence has shown that the Board was never dissolved but that sometime in 2014, only three of its members namely the Chairperson, Treasurer and Secretary, were suspended by the 3rd respondent and the vacancies filled. This alone brings the matter to rest.

[21] The last issue is that of the authority of the deponent to the founding affidavit to institute proceedings in the court a quo which the court was satisfied that it was properly established by the evidence that was placed before it. In the light of the fact that as it was correctly conceded, the Board of the Appellant of which Mr. Seisa is the Chairman, was never dissolved, it is my view that the Judge a quo was correct to find that Mr. Seisa had the requisite authority to institute the mater even in the absence of a resolution of the Board. Authorities are legion in support of this finding. Thus, in quoting with approval the case of **Tattersall**

and Another v Nedcor Bank Ltd[4] in **Lesotho Revenue Authority and Others v Olympic Off Sales**[5] and other authorities quoted in the court below this Court per the judgment of the learned Steyn P had this to say:

> *"…. a copy of the resolution of a company authorising the bringing of an application need not always be annexed. This is particularly so where there is sufficient* ***aliunde*** *evidence of authority and where the denial of authority is a bare one, like in the present case."*

[22] In my view, this is a typical example of such a case, since the evidence that was placed before the court a quo showed that the Board of the appellant of which Mr. Seisa is the Chairman was never dissolved as was alleged or at all. As it has been held by this court in **Central bank of Lesotho v Phoofolo**[6], *"there is no invariable rule which requires a juristic person to file a formal resolution, …. if the existence of such authority appears from other facts."* I therefore find that this objection was without substance and was correctly dismissed by Hlajoane J.

[23] Consequently I make the following order:

1. The appeal is upheld;
2. The order of the court a quo is set aside and replaced with the following:
   (a) The 1st to 3rd respondents are hereby interdicted from unlawfully interfering with the administration, management, and day to day operations of the applicant.
   (b) The 1st to 3rd respondents are ordered to pay the costs of this appeal.
   (c) Counsel for the appellant is ordered to pay the costs occasioned by his omission to file the entire record of the court a quo and to serve the 5th to 11th respondents with the notice, grounds and record of appeal.

[4] 1995 (3) SA 222 (A) at 228 G-H
[5] LAC 2005 – 2006 531 at 542
[6] LAC (1985 -1989) 253 at 259

N. J. MAJARA
CHIEF JUSTICE (EX OFFICIO JA)

I agree

I.G. FARLAM
ACTING PRESIDENT OF APPEAL

I agree

W. J. LOUW
ACTING JUDGE OF APPEAL

For the appellants: Adv. M.P. Tlapana

For the 1st to 3rd respondents: Adv. L.P. Moshoeshoe

For the 5th to 11 respondents: Adv. C.J. Lephuthing