IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru

C of A (CIV) 58/2018

In the matter between:

THATO MAURICE MOHASOA	**1ST APPELLANT**
RELEBOHILE JOHN LIPHOTO	**2ND APPELLANT**
NONKULULEKO FLORENCE ZALY	**3RD APPELLANT**
KHOTSO NTHONTHO	**4TH APPELLANT**

And

MABOEE JOHANNES MOEKO & 5 OTHERS	**RESPONDENTS**

CORAM	:	MOSITO P.
		MUSONDA AJA
		MTSHIYA AJA

HEARD	:	20 MAY 2019
DELIVERED	:	31 MAY 2019

SUMMARY

Administrative law – Appointing Board Members — Amounting to unilateral administrative act by Minister or delegate under their statutory powers under the Tourism Act 2002.
Administrative law
Practice – Peremption of Appeal — General principles as to — Review of authorities — Acquiescence in judgment — Conduct inconsistent with intention to appeal.
Appeal from judgment of the High Court – Section 6(3) of Tourism Act requiring appointment by notice in a Gazette – No such appointment being made – Purported appointment a nullity - Tourism Act – Section 7(3) on termination of membership of Board having not been preceded by a hearing – Revocation a nullity.
Appeal upheld with costs.

JUDGEMENT

DR MOSITO P

[1] This matter comes before us as an appeal against the judgment of the High Court (Mokhesi AJ). In CIV/APN/246/2018 that Maboee Johannes Moeko and Mamothibe Bernice Chaole brought an application against nine respondents. The Respondents were Thato Maurice Mohasoa, Relebohile John Liphoto, Nonkululeko Florence Zaly, Khotso Nthontho, Lesotho Tourism Development Corporation Board, The Chairman Lesotho Tourism Development Corporation Board, Minister of Tourism, Environment and Culture, The Attorney General and the Lesotho Tourism Development Corporation respectively.

[2] The Applicants sought an order in the following terms:

That Rule Nisi issue returnable on the date and time to be determined by this Honourable Court, calling upon the Respondents to show cause (if any) why:-

a) The Rule as to form and notice shall not be dispensed with on account of urgency;

b) The 5th and 6th Respondents shall not be restrained and interdicted from convening any meetings whatsoever pending the finalization hereof;

c) The 7th Respondent's decision to appoint the 1st to 4th Respondents as the members of the 5th Respondent shall not be stayed and suspended pending the finalization hereof;

d) The 7th Respondent's decision to appoint the 1st to 4th Respondents as the members of the 5th Respondent shall not be reviewed, corrected and set aside;

e) The 7th Respondent's decision to appoint the 1st to 4th Respondents as the members of the 5th Respondent shall not be declared unlawful, null and void and of no legal effect and price;

f) The 7th Respondent shall not be ordered and directed to gazette the names of the applicants as the members of the 5th Respondent with immediate effect;

g) The 7th Respondent's decision to nullify the appointment of the Applicants as the members of the 5th Respondent without any hearing whatsoever shall not be reviewed, corrected and set aside;

h) The 7th Respondent's decision to nullify the appointment of the applicants as the members of the 5th Respondent without any hearing whatsoever shall not be declared unlawful, null and void and of no legal force and effect;

i) The 7th Respondent shall not be ordered and directed to dispatch the record (if any) that led to the nullification of the

Applicants' appointment as the members of the 5th Respondent without any hearing whatsoever within fourteen days hereof;

j) The Respondents shall not be ordered to pay the costs hereof on attorney and client scale.

[3] The application was opposed by the Respondents. On 9 August 2018, the Attorney General filed a notice of intention to oppose. The notice of intention to oppose read in part as follows:

"Sirs,

***KINDLY TAKE NOTICE THAT** the <u>Respondents herein enter intention to oppose this matter.</u>*

***TAKE FURTHER NOTICE THAT** the said Respondents have appointed the Attorney-General's Chambers - Law Office, Unit 3, Sun Gardens Estates, Opposite Palace of Justice, P.O. Box 33, Maseru - as the address at which they shall receive notice of process and all documents in this matter.*

DATED AT MASERU THIS 2nd DAY OF AUGUST, 2018.

____
S. MATŠOSA
F/ATTORNEY - GENERAL
LAW OFFICE - MASERU"

[Underlining added for emphasis]

[4] On 24 August 2018 another notice of intention to oppose was filed by K.D. Mabudu & Co. That notice reads in part as follows:

"Sirs,

KINDLY TAKE NOTICE THAT *the 5th and 6th Respondents intend to oppose this application.*

TAKE FURTHER NOTICE THAT *the 5th and 6th Respondents have appointed the undermentioned office as the address at which it will accept all notices in these proceedings.*

DATED AT MASERU THIS 24TH AUGUST, DAY OF JULY, 2018 (*SIC****).”***

[Underlining added for emphasis]

[5] It is worth mentioning at this stage that, no notice of withdrawal was filed by the attorney general evidencing his withdrawal as attorney of record for the 5th and 6th respondents prior to the filing of the notice of intention to oppose by K.D. Mabudu & Co. I shall revert to this issue later in this judgment.

[6] The matter came before Mokhesi J on 10 September 2018. He handed down his judgment on 27 September 2018. The learned judge granted the application and gave the following orders:

“a) The 7th respondent’s decision to appoint 1st to 4th respondents as members of the 5th respondent is reviewed, corrected and set aside.

b) The 7th respondent’s decision to appoint the 1st to 4th respondents as members of the 5th respondent is declared unlawful, null and void and of no legal force and effect.

c) The 7th respondent's decision to nullify the appointments of the applicants as the members of the 5th respondent without according them a hearing is reviewed, corrected and set aside.

d) The 7th respondent is directed to gazette the names of the Applicants as the members of the 5th respondent within 30 days of this judgment.

e) Under a prayer for 'further and/or alternative relief', the applicants are re-instated as members of the 5th respondent forthwith.

f) The respondents (to the exclusion of 1st to 4th respondents) are ordered to pay costs on party and party basis."

[7] It is against the above orders that the present appellants have brought the present appeal.

FACTS

[8] The facts of this case are largely common cause. They are that during the month of February 2018, Mrs 'Mamotsie Motsie was a Minister responsible for the Ministry of Tourism, Environment and Culture (hereinafter Ministry of Tourism). Being a Minister in the aforesaid Ministry, there arose the need to appoint a new Lesotho Tourism and Development Board as she is enjoined by the provisions of section 6 of the **Tourism Act No. 5 of 2002 (the Act)**. Acting in terms of the aforesaid section, she *"nominated"* four individuals, two of whom were the two applicants, to be members of the board pending gazettement of the

members per the provisions of section 6(3) of the act. The said *"nomination"* letters (in relevant parts) provided:

> *"RE: **NOMINATION FOR APPOINTMENT AS A MEMBER OF LESOTHO TOURISM DEVELOPMENT CORPORATION BOARD***
>
> *Kindly take notice that I have nominated you to be appointed as a member of Lesotho Tourism Development Corporation Board. If you wish to decline the nomination, please notify me within 48 hours after receiving this letter, otherwise I believe you accept the nomination and will continue with further process to gazette the Board.*
>
> *Yours faithfully*
>
> *(Signed)*
> *HON. 'Mamotsie Motsie*
> *Minister of Tourism, Environment and Culture*
>
> *This letter was dated 8th February 2018."*

[Underlining added for emphasis]

[9] I may mention in passing that on 8 February 2018, there was a cabinet reshuffle. As a result, Minister Motsie was redeployed in the Ministry of Forestry, Range and Soil Conservation while Minister Motlohi Maliehe was redeployed at the Ministry of Tourism, Environment and Culture. The judgment in the court below seems to have revolved around this date. The issue as discussed in the court below appears to have been whether the "appointment" made by Minister Motsie could have been valid regard being had to the fact that Minister Maliehe was also

redeployed into the Tourism Ministry in which Minister Motsie had been posted on the same date.

THE LAW

[10] At the hearing of this appeal, it emerged that the crux of the appeal revolved on the proper interpretation of section 6 and 7 of the Tourism Act. These sections provide as follows:

> *"**Establishment and composition of the Board 6.***
>
> *6. (1) The governing body of the Corporation shall be a Board of Directors.*
>
> *(2) The Board shall consist of:-*
>
> *(a) the Director of Tourism, who shall be the Chairman;*
>
> *(b) the Chief Executive appointed under section 13, who shall be an ex-officio member; and*
>
> *(c) a member nominated by the Lesotho Council for Tourism, who shall be the Deputy Chairman;*
>
> *(d) a representative of the Hotels and Hospitality Association;*
>
> *(e) 4 other members.*
>
> *(3) Members shall be appointed by the minister, by notice published in the Gazette.*
>
> *(4) A person shall not be appointed to be a member of the Board under subsection (2)(c) unless he is in possession of qualifications or experience in any of the following:-*

(a) tourism;
(b) finance;
(c) environment;
(d) law;
(e) culture; or
(f) physical planning.

(5) A member, other than the Chairman and the Chief Executive, shall hold office for a period of 3 years and may be re-appointed.

(6) If the Chairman or Deputy Chairman ceases to be a member of the Board he shall cease to be the Chairman or Deputy Chairman, as the case may be.

Vacation of office

7. (1) A member of the Board, except the Chairman and the Chief Executive, shall cease to be a member and shall vacate his office if he-

(a) accepts or continues to hold office or employment with the Corporation;

(b) has had his estate sequestrated or is insolvent;

(c) is incapacitated by reason of physical or mental illness;

(d) had been absent from the meetings of the Board for more than 3 consecutive meetings without the permission of the Board;

(e) has been convicted of an offence without the option of a fine;

or

(f) is otherwise unable or unfit to discharge the functions of a member of the Board or is, in the opinion of the Minister, unsuitable to continue as a member.

> *(2) If a member dies, resigns or otherwise vacates his office before the expiry of the term for which he was appointed, the Minister shall, subject to section 6(4), appoint another person to fill the vacancy.*
>
> *(3) The Minister may terminate the appointment of a member if it is necessary in the interest of the effective performance of the functions of the Corporation under this Act or if the public interest so requires."*

[11] It is on the basis of the above two sections that, in my view, the appeal stands or falls.

THE ISSUES

[12] When the matter was argued before us, two issues emerged as likely to be dispositive of the appeal. These were:

(a) Whether the applicants in the court *a quo* had in law been validly appointed by Minister Motsie by means of letters of nomination of 8 February 2018.

(b) Whether the appellants were validly appointed by Minister Motlohi Maliehe by means of Legal Notice N0.51 of 2018.[1]

(c) Whether the subsequent appointment of different persons appointed by Minister Temeki Tšolo by means of Legal Notice N0.83 of 2018 was valid.

[1] 200/2016 [2017] ZASCA 13, copy of the judgment is hereunder attached

EVALUATION OF THE APPEAL

[13] The appellants have filed five grounds of appeal against the judgment of the court *a quo.* All the five grounds appear to be based on the disputed factual aspects of the judgment and, I do not consider that it is necessary, regard being had to the view I hold in respect of the 4th ground, to consider all other grounds.

[14] In the fourth ground of appeal, the appellants complain that:

> *The learned judge erred and misdirected himself by interpreting and or concluding that nomination is the same thing as appointment, while nomination gives a grace period of "48 hours" for acceptance which clearly depicts the process as not final, while appointment is final and goes with publication of a Gazette. Clearly the 1st and 2nd respondents were not appointed in terms of the relevant provisions of the Tourism act as nomination and publication are inextricably intertwined and should both be fulfilled to the letter.*

[15] Inelegance aside, what is clear is that the ground raises two fundamental issues and which were addressed in *extenso* before us, *viz*: (a) whether nomination and appointment are one and the same thing regard being had to the provisions of section 6(3) of the Tourism Act. (b) Whether a person who has been "nominated" in terms of the Act, but was not "appointed" by notice in a gazette can be said to have been legally appointed. A determination of these two issues in my view will dispose of the appeal.

[16] Before considering the above issues, I consider it convenient to advert to some peripheral arguments that were advanced before

us from the bar by counsel for the respondents in considering those arguments, I will also bear in mind the supplementary heads of argument filed on 21 May 2019 on behalf of the respondents.

[17] The learned counsel for the respondents argued from the bar that the appellants should be non-suited in respect of this appeal because, so argued the learned counsel they had not opposed the application in the court below. The argument advanced along the following lines: '(a) it is common cause that the 1st to 4th Respondents have not opposed this matter before the Court a quo. The statement of the law in this regard has been that where a party acquiesced in a judgment of the Court, such party has perempted an appeal from such order. The first consideration is therefore whether the 1st to 4th Appellants had acquiesced in the order of the Court a quo. (b), To answer that question, the decision of the Supreme Court of Appeal of South Africa in **Catherine Clarris Cilliers NO and Others v Edward Ellis and Another**[2], wherein the Court quoted with approval, the decision in ***Hlatswayo v Mare and Deas***[3], was relied upon.

[18] The learned counsel argued that the appellant's act of not having participated in the Court a quo and not filing any opposing affidavits is clear evidence that they acquiesced in the judgment of the Court *a quo.* He argued that, this left only one inference, that they had no intention of challenging the judgment of the Court *a quo.* He argued that it left the inference, that they had no intention

[2] 1912 AD 242 at 253
[3] Lesotho Tourism Development Corporation (Appointment of Members of the Board of Directors) Notice, 2018

of challenging the judgment of the Court and hence the appeal from that Court by them was perempted.

[19] As Solomon J said in ***Hlatshwayo v Mare And Deas***[4] it is an established principle of the Civil Law that a person who has acquiesced in a judgment cannot thereafter appeal from it. The rule is laid down in the well-known passage of the Code (7, 52, 5). That this principle was adopted in the Roman Dutch law is clear from many authorities, e.g., Voet, (49, 1, 2), PereziusIt on the Code (7, 52, 1), Damhouder's Practyk (Ch. 230), etc. The Learned Judge further points out that, the same rule is applied by the Privy Council in appeals from the Ecclesiastical and Admiralty Courts, and has apparently been taken over from the Civil Law. He then went on to hold that, in 'my opinion we are bound to hold that under our law, by acquiescence in a judgment the right to appeal from it is perempted. And when once the appeal has been perempted, there is an end of the matter; there is no going back from that position.' The question of the peremption of an appeal is part of the law of election, and it is simply this: that where a man has two courses open to him and he unequivocally takes one he cannot afterwards turn back and take the other. Where there has been no unequivocal act then whether an election has taken place or not is a question of fact. A person can only be deprived of his right of appeal upon proof of his waiver of that right, and that steps which are consistent with a continued exercise of such right do not constitute such waiver. Peremption is not a question of intention but of conduct in relation to the other party. It is settled law that the respondents bear the *onus* of showing conduct on the part of the appellants which points 'indubitably

[4] Hlatshwayo v Mare And Deas 1912 AD 242 p253.

and necessarily'[5] to the conclusion that the appellants' conduct is inconsistent with an intention to attack the judgment of the Court below.

[20] If the appellants' conduct is equivocal and consistent with some intention other than the intention to appeal, the respondents will have failed to establish peremption (See ***Dabner v South African Railways and Harbours***[6]).

[21] There are two main problems with this contention. First the learned counsel argued this issue from the bar, which issue had not been raised by way of cross-appeal or taken in *limine*. Peremption must be clearly proved. The case of ***Hlatshwayo v Mare & Deas***[7], is very much in point.

[22] Second, it is factually not correct that the appellants did not oppose the application in the court below. In that case a defendant, against whom judgment had been given by default, made two payments on account of the judgment debt after the issue of a writ of execution. It was held that the defendant had not by making such payments lost his right to re-open the judgment on showing reasonable cause. In any event, the Court is not precluded, by failure of party to appeal against it, from investigating soundness of judgment (See ***Government of the Republic of South Africa and Others v Von Abo***[8]).

[23] As it appears from the notice of intention filed by the Attorney General mentioned above, it is very clear that the Attorney General filed the notice of intention to oppose on behalf

---

[5] Natal Rugby Union v Gould 1999 (1) SA 432 (SCA).

[6] Dabner v South African Railways and Harbours 1920 AD 583 at 594.

[7] Hlatshwayo v Mare & Deas, 1912 AD 242.

[8] Government of the Republic of South Africa and Others v Von Abo 2011 (5) SA 262 (SCA).

of all the respondents. There is no evidence on record that the Attorney General's notice of intention to oppose even on behalf of the appellants, was ever contested in the court below.

[24] The learned counsel's argument that the appeal had been perempted lacks factual foundation. For this proposition he relied on the Clarries Cilliers N0 and Others case. In that case the court held that in a case where a party to an action has done an act from which the only reasonable inference that can be drawn by the other party is that he accepts and abides by the judgment and so intimates that he has no intention of challenging it, he is taken to have acquiesced in it.

[25] In the present case there was no evidence that the appellants ever drew to the respondents' attention that they accept and abide by the judgment of the court a quo. There is no evidence of record that the appellants ever intimated that they had no intention of challenging the judgment of the court *a quo* thereby acquiescing therein. There is no peremption as no act has been done inconsistent with an intention to prosecute an appeal.[9] Contrarily, the appellants have noted the appeal to this Court against the judgment of the court *a quo* in an application in which they were parties and in respect of which they were represented by the Attorney General. Therefore, in my view, there is no merit in this contention.

---

[9] See Hlatswayo v Mare (1912 AD 242); Union Government v Clay (1913 AD 385); Mostert v MacMillan (1912 AD 619); Dabner v South African Railways (1920 AD 583); Cape Town Municipality v Paine (1922 AD 568); Middelburg Agency v Solomon (1914 AD 417); Paruk v Paruk (1913 AD 314).

[26] The learned counsel for the respondents further argued that the appellants had no *locus standi* to prosecute the present appeal because Minister Tšolo had revoked their membership and substituted them by other persons. The learned counsel informed this Court that Legal Notice N0. 83 of 2018 was issued pursuant to paragraph 29 (d) of the judgment in terms of which the learned judge *a quo* made an order directing the Minister to gazette the respondents as members of the Board within 30 days of the judgment.

[27] In all fairness to the learned counsel, he conceded that should this Court find that the judgment of the court a quo could not stand on appeal, then the order directing the Minister to gazette the respondents will also have no legal consequence in as much as, the gazettement was made pursuant to the order of the court a quo. In my opinion, this concession was well-made. Regard being had to the view to which I have come on the outcome of the judgment on appeal, I am of the view that this contention cannot succeed.

[28] I have already indicated that this appeal turns on the issue of the proper interpretation of section 6(3) as well as section 7 of the Tourism Act. I am in respectful agreement with the South African Supreme Court of Appeal in ***Cloete Murray and Another NNO v Firstrand Bank Ltd t/a Wesbank***[10] that:

> *[30] … the inevitable point of departure in interpreting a statute is the language of the provision itself, read in context and having*

[10] Cloete Murray and Another NNO v Firstrand Bank Ltd t/a Wesbank 2015 (3) SA 438 (SCA) at para 30.

> *regard to the purpose of the provision and the background to the preparation and production of the document. It should, however, be borne in mind that, if the words of the relevant provision are unable to bear the meaning contended for, then that meaning is impermissible. See FirstRand Bank Ltd v Land and Agricultural Development Bank of South Africa 2015 (1) SA 38 (SCA) … para 27.*

[29] Section 6(3) of the Act provides that, "Members shall be appointed by the minister, by notice published in the Gazette." It is important to note that the section is couched in mandatory terms because the word "s*hall"* has been used. This is more so because in terms of section 14 of the Interpretation Act provides that:

> *"In an enactment passed or made after the commencement of this Act, "shall" shall be construed as imperative and "may" as permissive and empowering."* [11]

[30] It follows therefore that section 6(3) of the Tourism Act is mandatory and failure to comply with its provisions renders what has been done a nullity. What is more, Minister Motsie had made it patently clear that she had "nominated" the respondents. The word "nominate" is defined in the ***Concise Oxford English Dictionary*** as meaning "1. Put forward as a candidate for election or for an honour or award." The word "appoint" is defined in the dictionary to mean to "assign a job or role to."

[11] see section 14 of the Interpretation act N0. 19 of 1977.

[31] Upon closer examination of the Act, it becomes clear that it does not provide for the power to "nominate" a person as opposed to the power "to appoint." To "nominate" a candidate means to advance the name of the candidate so that the candidate can stand for elections or appointment, as the case may be. The Tourism Act requires an "appointment" to be made by notice in a gazette. It follows therefore that the court a quo erred in coming to the conclusion that Minister Motsie had "appointed" the respondents when she had not "appointed" them "by notice in a gazette." This disposes of the judgment of the court a quo.

[32] The next question is whether the appellants themselves were validly appointed by Minister Maliehe. The answer to this issue requires me to turn to the consideration of the provisions of section 7(3) of the Act. In my opinion, the answer is in the affirmative because they were appointed by notice in a gazette as per Legal Notice N0.51 of 2018.[12] This means that upon appointment in terms of the Act, they acquired legal rights as members of the board. There is a presumption that against the destruction of vested rights. The reasoning behind the presumption against this presumption is premised upon the unwillingness of the courts to inhibit vested rights. The general rule is that statutes should if possible be so interpreted so as not to take away rights actually vested at the time of their promulgation.[13] A further reason for its existence is that the creation of a new obligation or an imposition of new duties upon the appointee is not lightly assumed.

---

[12] Lesotho Tourism Development (Appointment of Members of the Board of Directors) Notice, 2018
[13] Curtis v Johannesburg Municipality 1906 TS 308 at 311.

[33] It is thus, obvious that where a provision had been used to effect an appointment of a person into a position, such appointment vests legal rights in the appointee as at the time the appointment is made and is deemed to have taken effect. Thus, where there are vested rights, it is the presumption that the Legislature intended to respect these, unless there is an unequivocal intention expressed to the contrary.[14] The presumption of law is in favour of vested rights being safeguarded.[15]

[34] If on one interpretation of the terms of section 7 of the Act on revocation of vested rights, it would destroy vested rights acquired in terms of the provisions of Legal Notice N0.51 of 2018, but on another interpretation it would not, that would provide, a strong reason for preferring the latter interpretation.

[35] It follows therefore that the appellants were validly appointed by the said legal notice and as such, they became members of the board as of 6 July 2018. The appointment was in terms of the Act.

[36] As indicated earlier, the learned counsel for the respondents sought to argue from the bar that Minister Tšolo had revoked the appointment of the appellants on 2 November 2018 by means of Legal Notice N0. 83 of 2018. In terms of this legal notice the Minister prescribed that the Lesotho Tourism Development Corporation (Appointment of Members of the Board of Directors) Notice, 2016 is revoked.

---

[14] Town Council of Springs v Moosa and Another 1929 AD 401 p.404.

[15] Guinsberg v Scholtz, 1903, T.S. 737); The British South Africa Company v The Bechuanaland Exploration Company Ltd 1913 AD 37 p 45.

[37] In terms of section 7(3), "the Minister may terminate the appointment of a member if it is necessary in the interest of the effective performance of the functions of the Corporation under this Act or if the public interest so requires." It was common cause that in purporting to revoke the appellants' membership, the minister did not afford them a hearing prior thereto. In terms of section 12(8) of the Constitution of Lesotho, the appellants were entitled to be afforded fair hearing before they could be divested of their aforesaid rights. That these are the requirements of our common law is also trite.

[38] Furthermore, regard being had to the terms of ***Legal Notice N0.83 of 2018***, there is no indication *ex facie* the legal notice whether the purported termination of appointment of the appellants was undertaken in the interest of the effective performance of the function of the corporation under the act or if the public interest so required. In my opinion therefore, and this was conceded by counsel for the respondents, there was no basis both on the facts before us and on the legal notice itself for inferring the jurisdictional fact for the purported termination of the appointment of the appellants.

[39] In the result therefore I am of the view that the purported termination of the appointment of the appellants was a nullity. I would therefore uphold this appeal with costs.

Disposition

[40] The following order is consequently made:

(a) The appeal is upheld with costs.

(b) The judgment of the High Court is set aside and replaced with the order that "the application is dismissed with costs."

____

DR K.E. MOSITO

PRESIDENT OF THE COURT OF APPEAL

I agree:

____

DR P MUSONDA

ACTING JUSTICE OF APPEAL

I agree: ______________________________

N.T. MTSHIYA

ACTING JUSTICE OF APPEAL

For the Appellants: Mr K Nthontho

For the Respondents: Adv. R Setlojoane