

**THE COURT OF APPEAL OF LESOTHO**

**HELD IN MASERU**

**C. of A. (CIV). No. 59/2018  
CCA/0039/2018**

**In the matter between:**

**WILLIAM MAFOSO t/a MAFOSO BUTCHERY 1<sup>st</sup> APPELLANT  
BENJAMIN RADIOPELO MAPAHTHE  
t/a FRESH FARM MEAT MARKET 2<sup>ND</sup> APPELLANT**

**MOKALANE (PTY) LTD t/a BENSONS MEAT  
MARKET 3<sup>rd</sup> APPELLANT**

**TANKI INVESTMENTS (PTY) LTD  
ECONO FOODS 4<sup>th</sup> APPELLANT**

**AND**

**PRINCIPAL SECRETARY MINISTRY  
OF SMALL BUSINESS 1<sup>st</sup> RESPONDENT**

**PRINCIPAL SECRETARY MINISTRY  
OF TRADE 2<sup>nd</sup> RESPONDENT**

**PRINCIPAL SECRETARY  
MINISTRY OF AGRICULTURE 3<sup>rd</sup> RESPONDENT**

**ATTORNEY GENERAL 4<sup>TH</sup> RESPONDENT**

**MERAKA LESOTHO (PTY) LTD 5<sup>th</sup> RESPONDENT**

**CORAM: MAHASE ACJ  
DAMASEB AJA  
CHINHENGO AJA**

**HEARD: 17 JANUARY 2019**

**DELIVERED: 01 FEBRUARY 2019**

## **SUMMARY**

*Review Proceedings – To review the alleged decision by Government to restrict importation of meat products into the Kingdom – Restriction by government alleged to have been unreasonable and irrational as there is no sufficient supply in the country – Review proceedings not fully used to the advantage of the Appellants to request for the record of the decision making procedures – although entitled to waive such benefit, consequences are attached that the absence of record has a bearing on whether there is sufficient basis to justify review – Legislative framework not establishing basis for review and locus standi of Appellants – Appeal dismissed with costs.*

## **JUDGEMENT**

### **DAMASEB AJA**

Damaseb AJA (Mahase ACJ and Chinhengo AJA concurring):

[1] The appellants carry on the business of butcheries that import meat products from South Africa into the Kingdom for the local market. Their wish is to import animals on hoof into the Kingdom for slaughter locally. They do not enjoy free reign to import meat products into the Kingdom as their imports are subject to the laws of Lesotho governing the importation of meat and meat products.

[2] The restriction imposed by the Government has a direct impact on the business of the appellants who feel aggrieved thereby because they take the view that the restriction is aimed at

benefiting the fifth respondent which is the sole abattoir in the Kingdom and whom they consider to be a competitor.

[3] On 18 May 2018 the appellants approached the High Court and on an urgent basis obtained from Chaka-Makhooane J interim relief, interdicting the Government of Lesotho from restricting their import of ‘meat in general and predominantly red meat from South Africa’ pending finalisation of the application. The interim order also reviewed and set aside ‘the decision of the government’ (a) to impose restrictions on their import of meat from South Africa and (b) to compel applicants to buy meat from the fifth respondent.

[4] The High Court also granted a declarator that the appellants have the same rights as the fifth respondent to import meat into Lesotho. The Government was also interdicted from ‘creating a commercial monopoly for the financial benefit of the fifth respondent in respect of importing meat from South Africa’.

[5] After the respondents filed their answering papers and the appellants their reply, and after hearing argument, Chaka-Makhooane J discharged the *rule nisi* on 18 September 2018.

[6] No reasons have ever been provided for that order. The appellants appeal that order to this court in the absence of the reasons.

[7] The issue in the appeal is whether the order of the High Court was justified.

## **The pleadings**

### *The appellants*

[8] The appellants who make common cause relied on an affidavit deposed to by Mr William Mafoso who is cited as the first applicant in the proceedings *a quo*. He alleged that from March 2018 the Government imposed an ‘embargo’ on granting permits for the import of meat into Lesotho. As a result, the appellants are ‘forced to buy meat products from the fifth respondent’ while the latter also imports meat from South Africa.

[9] Mr Mafoso alleged that the ‘policy’ prohibiting the import of meat has not been published; and if indeed it exists, is ‘irregular, unlawful’ and ‘flies in the eyes of the constitution of Lesotho, commercial customs and international conventions on free trade’. Because they are restricted in that way the appellants are unable to expand their businesses. Before the imposition of the embargo they were able to import live animals from South Africa.

[10] Mr Mafoso alleged that there are no cattle in Lesotho to produce *Grade A* meat. He added that the fifth respondent, from whom they are ‘coerced’ to buy meat, is unable to meet all local demand and at all events competes with the appellants for public tenders. According to the deponent, there is no legal basis for preferring the fifth respondent as the only importer of meat and

that it purchases meat from South Africa at the same sources as the appellants.

[11] Mr Mafoso describes the ‘embargo on meat’ not to be based on any ‘commercial feasibility study’ and is ‘so unreasonable that there is no government which can make such a decision’. And because Lesotho does not produce *Grade A* cattle and other high grade meats, the embargo is ‘irrational’.

[12] Mr Mafoso states as a fact that (a) the Government has suspended meat imports when there is no sufficient supply in the country, (b) that the butcheries are as a result required to source the product from the fifth respondent turning it into a monopoly, and that these actions of the Government are (c) unreasonable and liable to be reviewed and set aside.

[13] It was on the strength of those allegations that the appellants obtained the interim relief, both interdictory and declaratory in nature that I referenced at the beginning of this judgment.

### *The respondents*

#### *(i) The Fifth Respondent (Meraka Lesotho)*

[14] The General Manager of Meraka, Mr Mosito Khethisa, deposed to an answering affidavit in opposition to the appellants’ application. He asserts that the appellants failed to set out any

viable ground for review either on the basis that the restriction of meat imports into Lesotho is irregular or unreasonable.

[15] According to Mr Mosito Khethisa, Meraka is an abattoir and not a butchery and does not import meat into Lesotho and therefore is not a competitor to the appellants. According to the deponent, Meraka slaughters animals and does not import meat from abattoirs.

[16] Mr Mosito Khethisa avers that the appellants' review is defective in the absence of an allegation that the Government does not have the power to restrict the importation of red meat and that any such restriction infringes or violates any law or regulation. He states that the appellants had singularly failed to provide evidence as to when the purported decision was taken and its content. As he put it:

*'Nothing is put before Court to show ...that a decision in whatever terms was made by the Government on a particular date. In effect, the honourable Court is being asked to review a decision that has not been explained and/or that has not been outlined at all in the applicants' papers.'*

Crucially, Mr Mosito Khethisa adds:

*'[T]here is no evidence that any of the applicants before Court made an application for an import permit having followed due process of law and had his application rejected for whatever reasons as it may have been rejected.'*

[17] Although not citing any specific legislation, Mr Mosito Khethisa states that it is lawful for the Government to impose restrictions on some imports and that whatever restrictions are imposed apply equally, including to Meraka.

(ii) *The Government*

[18] On behalf of the first to fourth respondents (the Government), the Principal Secretary of the Ministry of Small Business, Mr Lerata Pekane, deposed an answering affidavit.

[19] Mr Pekane denies that the Government has created a monopoly on imports in favour of Meraka. He asserts that Meraka is an abattoir which prepares and processes meat and supplies to butcheries. He states that as butcheries the appellants are not prohibited from importing livestock for the supply of *Grade A* red meat. He acknowledges that the Government has imposed restrictions on the import of meat other than *Grade A* red meat in order to protect Basotho farmers. According to him, that is done on the authority of s 3(e) (i)<sup>1</sup>, read with s 4(c)<sup>2</sup> of the Agricultural Marketing Act 26 of 1967.

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<sup>1</sup> Why it is cited is a mystery because it only states that the 'The purposes of this Act are to ensure that exportation and importation of products and supplies occurs at a time, in quantities and by means most beneficial to Lesotho.'

<sup>2</sup> This provision states: 'The Minister may by Notice in the Gazette make regulations for carrying out the purposes and provisions of this Act ...' Counsel for the Government did not point us to any regulation made under this provision.

[20] Mr Pekane denies the existence of a Government policy in the terms alleged by the applicants and states that the appellants (as butcheries) are not prohibited from importing meat which Lesotho farmers cannot produce. He states positively that the appellants are not prohibited from buying live animals in South Africa for *Grade A* meat. The witness states that when restrictions of any kind are imposed in terms of the applicable law, they apply equally and also affect Meraka.

### **Unfortunate election by appellants**

[21] The circumstances of this review application are rather unfortunate. It stems primarily from the election that the applicants made to seek judicial review without taking advantage of the procedural safeguards afforded to an applicant under Rule 50 of the Rules of the High Court of Lesotho.

[22] Had the appellants followed rule 50, they would have been entitled to the record of the decision-making process<sup>3</sup>; to compel further discovery if the circumstances justified<sup>4</sup> and to vary and supplement their papers<sup>5</sup> before the respondents answered and still challenge in reply any averments the respondents would have made in answering affidavits.

[23] But as Mr Molati for the appellants reminded us during oral argument, the appellants were entitled to seek review without asking for the production of the record of the decision making. But

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<sup>3</sup> Rule 50(1).

<sup>4</sup> Rule 50(7), read with rule 34 governing discovery.

<sup>5</sup> Rule 50(4).



that election comes with consequences as will soon become apparent.

[24] It is trite that in review proceedings the production of the record of proceedings and the accompanying reasons sought to be reviewed and set aside, is for the benefit of an applicant seeking review. The applicant can elect to waive the right to obtain the record and to proceed to the hearing without first obtaining the record.<sup>6</sup>

[25] But if the absence of the record has a bearing on whether there is sufficient basis made out to justify judicial review, the applicant, having made the election to waive it, must bear the risk of non-persuasion. The facts of the present case lay bare that reality.

### **Legislative context**

[26] In the light of the averments made by the respondents, the Government would have been required to disclose the framework under which restrictions on the imports affecting the appellants are made. It would then have become apparent that the applicable legal framework is Import Restrictions Regulations, 1988<sup>7</sup>, as amended by the Import Restrictions (Amendment) Regulations,

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<sup>6</sup> *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 at 662F-663D and *Motaung v Makubela and Another, NNO, Motaung v Mothiba* 1975 (1) SA 618 (O) at 625C-626A; *The Director on Corruption and 3 others v Tseliso Dlamini* ( C of A (CIV) 21/2009), para 16-17 (Delivered on 23 October 2009).

<sup>7</sup> L. N. No. 192 of 1988.

2009<sup>8</sup> (IRR 1988), made in terms of the Export and Import Control Act, 1984 as amended by Order No. 17 of 1988 and Act No, 5 of 1996.

[27] Regulation 3 of IRR 1988 states that a person shall not import into Lesotho certain goods specified in Schedule 2, unless he or she is issued with a permit by the Director of Trade or by a person designated by him or her.

[28] The goods listed in Schedule 2 ‘which require an import permit to be issued before they are imported into Lesotho’<sup>9</sup> include:

*Item 7: Livestock and livestock products: Issuing Authority: Department of Livestock, Ministry of Agriculture and Food Security’.*

*Item 9: Red Meat: Issuing Authority: Department of Marketing, Ministry of Trade and Industry, Cooperatives and marketing.*

[29] If regard is had to the legislative scheme set out above, the appellants had the following avenues open to them to ventilate their grievance with the restriction that affects their business as regards the import of livestock and red meat into Lesotho. They could challenge Act 16 of 1988 as being unconstitutional on the basis of the Constitution, or they could challenge IRR 1988 for being *ultra vires* Act 16 of 1988 or on any other reviewable ground such as unreasonableness or irrationality as they sought to do in the present proceedings.

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<sup>8</sup> Legal Notice No. 175 of 2009.

<sup>9</sup> Schedule 2.

[30] Whatever course they followed, it behoved them to establish *locus standi* in the sense that they are aggrieved persons adversely affected by a specific administrative act or decision, or a legislative provision. It does not assist their cause to make speculative allegations about some unspecified ‘embargo’ or ‘policy’ in circumstances where the law requires them to follow a very specific procedure in order to obtain a decision and, if refused, to then seek redress in court by reference to a specific decision or non-decision of an administrative actor.

### **Fact finding process in motion proceedings**

[31] Since these are motion proceedings we must accept the version of the respondents unless they are shown to be farfetched.<sup>10</sup> As should be apparent from my summary of the evidence, the applicants failed to show that they are aggrieved persons affected by a specific decision taken in terms of the applicable law. They had the *onus* to show that they applied for and were denied a permit. They did not.

[32] Their allegations that they are being unlawfully refused permission to import red meat or livestock has been denied. Their assertions that Meraka is unlawfully being given preferential treatment is denied and is unsubstantiated. It is clear from the

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<sup>10</sup> *Plascon-Evans Paints Ltd v Van Riebeeck Paints Ltd* 1984 (3) SA 623 (A). See also *The Director on Corruption and 3 others v Tseliso Dlamini* ( C of A (CIV) 21/2009), para 17 (Delivered on 23 October 2009).

respondents' version that they are not even in competition with Meraka.

[33] The appellants had therefore demonstrably failed to make out the case for review and their application was properly dismissed by the High Court.

### **Costs**

[34] It is clear from the appellants' affidavit that this matter has a chequered history. The appellants seem to have engaged with the Government at some length to address the issue of imports. They ought of course to be aware of the governing legal framework considering they are acting on legal advice but quite clearly, they were not.

[35] Government's duty is to assist its people and not to frustrate them and to play hide-and-seek with them. It should give full information about applicable laws and procedures which they must follow to exercise their rights. Had that happened, the present litigation might have been avoided.

[36] The sad thing is that in the present litigation the Government itself failed in the answering affidavit to direct the court's attention to the applicable legislation. The applicable legislative framework had quite literally to be extracted from the Government and Meraka on appeal by this court.

[37] It was conceded by Government's and Meraka's counsel on appeal that the relevant legal framework was not even referred to in the court *a quo*. Had that been done this appeal could well not have been pursued.

[38] This is a proper case therefore for denying the successful parties their costs.

### **Order**

[39] I would therefore order as follows:

1. The appeal is dismissed.
2. There shall be no order of costs both *a quo* and in the appeal and each party shall bear its own costs.

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**P.T DAMASEB**  
**ACTING JUSTICE OF APPEAL**

I agree:

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**M MAHASE**  
**ACTING CHIEF JUSTICE**

I agree:

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**M CHINHENGO**  
**ACTING JUSTICE OF APPEAL**

**For the Appellant:**

Adv. Molati

(Assisted by Adv. Chabana)

**For the 1<sup>st</sup> to 4<sup>th</sup> Respondents:**

Adv. T Lebakeng

**For the 5<sup>th</sup> Respondent:**

Adv. ET Fiee