

IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) NO 24/2021

CIV/PPN/160/2020

HELD AT MASERU

In matter between:

NATIONAL DAIRY BOARD

FIRST APPELLANT

CHIEF EXECUTIVE OFFICER

NATIONAL DAIRY BOARD

SECOND APPELLANT

AND

SIMON KUENA PATHANE

FIRST RESPONDENT

LESOTHO CHAMBER OF COMMERCE

SECOND RESPONDENT

AGRICULTURE AND FOOD SECURITY

THIRD RESPONDENT

MINISTER OF AGRICULTURE AND FOOD SECURITY

FOURTH RESPONDENT

ATTORNEY GENERAL

FIFTH RESPONDENT

CORAM: MUSONDA AJA,
VAN DER WESTHUIZEN AJA,
MTSHIYA AJA.

HEARD: 11th OCTOBER 2021

DELIVERED: 12TH NOVEMBER 2021

Summary

Administrative Law- First respondent challenging the 4th Respondent's termination of his membership of the second appellant- Jurisdictional facts of the exercise of such power by the minister non-existent- Lower Court granting the application with costs- Illegality, procedural impropriety and wednesbury unreasonableness grounds considered- Appeal dismissed with costs.

JUDGMENT

P. MUSONDA AJA.

Introduction

[1] This matter comes before us as an appeal against the judgement of the High Court (Mokhesi J). The first and second respondents brought an application in the High Court seeking the following reliefs:

[2] Dispensing with the Rules relating to the modes of service and time limits provided in the Rules due to the urgency hereof and disposing of the matter at such time and place, and in such manner and in accordance with procedures as the Court could deem fit;

[3] That the **Rule Nisi** issue returnable on a date and time to be determined by the Court calling upon the Respondents to show cause, if any, why;

- 1.1. The first and second respondents shall not be interdicted and prevented from implementing the fourth respondent's

decision of terminating the applicant's appointment as a board member of the National Dairy board;

- 1.2. The fourth respondent shall not be interdicted and prevented from appointing a candidate to the first respondent's board in the stead of the first applicant and is hereby interdicted and prevented from appointing a candidate to the board of the first respondent who is not a representative of the second applicant.
2. The decision of the fourth respondent of terminating and for removing the first applicant from the board of the National Dairy Board is reviewed and set aside as irregular and unlawful.
3. An order declaring that the first applicant's appointment as a board member of the National Dairy Board has not terminated by operation of the law.
4. It be ordered that the first applicant is reinstated as a member of the board of the national Dairy board without loss of his benefits.
5. That prayers 1, 2.1 and 2.2 operate with immediate effect as an interim Court-order pending finalization hereof;
6. Costs of suit
7. Further and/or alternative relief.

Background

[4] The first respondent was first appointed as a member of the National Dairy Board in terms of the Agricultural marketing (Establishment of a National Dairy Board) Regulations 1991. He was

appointed in representative capacity of the Lesotho Chamber of Commerce and industry (LCCI). In terms of regulation 5(1) members of the board had to hold office for a period of three (3) years. In terms of regulations 5(2) the Minister could on recommendation of the board, terminate the appointment of a member for reasons of misconduct or incompetency.

[5] The first respondent was re-nominated by LCCI to represent them in the National Dairy Board for another term on 10th January 2018. However, the 2nd Appellant who was the Chief Executive Officer National Dairy Board requested the second respondent (LCCI) to nominate a new representative on the contention that the first respondent had served too many tenures on the board. That notwithstanding, the second applicant re-nominated the first Respondent. He was appointed a board member representing the second respondent from January 2018. His term was to come to an end in January 2021.

[6] On 26th February 2020 the fourth respondent wrote the first respondent a letter terminating his membership of the board, by operation of the law. The fourth respondent purportedly terminated it pursuant to regulations 5 of the Agricultural Marketing Regulations. The first respondent was instructed that he return all property of the board that was in his possession.

[7] Consequently, the fourth respondent requested the LCCI to nominate a candidate for board membership. It was the first

respondent's averment, that that was an incorrect interpretation of Regulation 5, as he had not completed the three (3) year term.

[8] There were no jurisdictional facts that existed, as in terms of Regulation 5(1), such termination had to be based on misconduct or incompetency. The termination was therefore *ultra vires* the Regulations, as the board had not made such a recommendation.

[9] The fourth respondent indicated that he would appoint a candidate outside LCCI, if the LCCI failed to submit a nominee as demanded by the fourth respondent. The first respondent prayed that the first appellant be interdicted from acting on instructions of the fourth respondent, as the instructions were unlawful, as the fourth respondent as Minister had and has no authority to appoint someone outside the LCCI, as suggested. The fourth respondent did violate principles of natural justice as he was not heard.

[10] In a nutshell the first respondent averred that the fourth respondent had acted illegally, procedurally inappropriate. The Secretary General of the LCCI aligned himself to the first respondent's averments.

[11] The answering affidavit was sworn by Abiel Mashale, Chief Executive Officer of the National Dairy Board and the Secretary of the Board, who is the second appellant in these proceedings. He averred that there was no actual harm or imminent, to entitle the first respondent to be granted an interdict. The respondent had failed to prove that he had no alternative remedy other than approach the

High Court. If the respondent was aggrieved by the appointment of someone else on the board he should have approached the Court to have such appointment set aside.

[12] It was averred that the nomination and appointment of the deponent was done in terms of Regulation 4(1) of the Agricultural Marketing Regulations 1991. It was his view that the first respondent was never appointed to the board at all. Such an appointment was a prerogative of the fourth respondent and he had never appointed the first respondent.

[13] In the answering affidavit it was further stated that there having been no appointment by the fourth respondent there can be no termination, that was the gravamen of the respondent's answering affidavit.

[14] The first respondent, so it was averred was given a hearing when he was asked why he was still a board member, yet his term expired in 2011. While the first respondent was nominated by the second respondent, he was never appointed by the fourth respondent. The answering affidavit of Malefetsane Nchaka, Principal Secretary for third respondent was a mere restatement of the Chief Executive Officer of the National Dairy Board, (second appellant).

[15] It was the first respondent's averment in his replying affidavit that under the Regulations the board shall consist of a representative from LCCI. Such a representative is not appointed by the fourth respondent.

[16] The learned judge, in the Court below had declined to grant the first respondent an interdict, as he was of the view that the matter was not urgent.

[17] The Court found it imperative to quote the Regulations, which provide for the establishment of the Board, its composition, the tenure of office of its members and procedure for their removal from office. These Regulations are couched in these terms:

“Establishment of Board

3.

(1) There shall be established a Board to be known as the National Dairy Board;

(2) The Board shall have perpetual succession and may sue or be sued in its own name.

4.

(1) The Board shall consist of the following nine office bearers.

Chairman – Principal Secretary of Agriculture

Secretary- Executive Director of the Board appointed by the Minister.

Members- two producer representatives and one consumer representative appointed by the Minister.

A representative of the Lesotho Chamber of Commerce.

A processor representative appointed by the Minister.

Ex-officio members- Principal Secretary for the Ministries of Trade and the Ministry of Health.

(2) The Minister may on the recommendation of the Board terminate the appointment of a member for reasons of misconduct or incompetency.

(3) Vacancies which may occur during a term shall be filled by the Minister for the remaining period of such term (emphasis provided)."

[18] It was the learned Judge's view that the first respondent's arguments were easy to understand. They turned on the non-compliance with the 'jurisdictional facts', for terminating membership of the Board members. The first respondent was nominated by the second respondent who is vested with power and discretion to nominate its representative on the Board, and once so nominated he/she becomes a Board member in terms of Regulation 4(1). The fourth respondent (Minister) did not have any stake in the nomination of the individual, whoever is nominated by the second respondent, as a matter of law becomes a Board member. The Minister does not have power to reject the nomination.

[19] The learned Judge dismissed Adv. Molati, for the first and second respondents and Adv. Lebakeng for the third to fifth respondents in the Court below corporate governance argument. The first respondent having been nominated by the second respondent continuously since 2008 raised questions about corporate

governance entitling the Minister to scupper his reappointment, so the two advocates argued. The learned Judge stressed the primacy of section 4(1) of the Regulations, which empowers the 2nd applicant to nominate whoever it desires, for however long it deems appropriate, as the Regulations do not place any cap on the number of terms a person should be re-nominated by the second respondent.

[20] The Court below defined jurisdictional facts to be the condition precedent for the exercise of a statutory power. These conditions precedent may either be substantive or procedural. In the case of **Meyer v South African Medical and Dental Council**¹. Preiss J said:

“Upon a proper construction of the legislation concerned, jurisdictional fact may fall into one or other two broad categories. It may consist of a fact or state of affairs which objectively speaking must have existed before the statutory power could validly exercise. In such a case, the objective existence of the jurisdictional fact preclude to the exercise of that power in a particular case is justifiable in a Court of law. If the Court finds that objectively the fact did not exist, it may then declare invalid the purported exercise of that power. On the other hand, it may fall in the category comprised by instances where the statute itself has entrusted the repository of the power

¹ (1982) (4) SA 451 (T) at 454 A-D

*the sole and exclusive function of determining whether in its opinion the prerequisite fact, or state of affairs, existed prior to the exercise of the power. In that event jurisdictional fact is, in truth not whether subjectively speaking, the repository of the power had decided that it did. In cases falling into this category the objective existence of the fact, or state of affairs, is not justifiable in a Court of law. The Court can interfere and declare the exercise of power invalid on the ground of non-observance of jurisdictional fact only where it is shown that the repository of the power, in deciding that the prerequisite fact or state of affairs existed, acted mala fide or from ulterior motive or failed to apply his mind to the matter....” (see also: **South African Defence and Aid Fund and Another v Minister of Justice (1967)(1) SA 31 (C) 34 F-H**).*

[21] In terms of section 5(1) and (2), of the Regulations, members of the Board shall hold office for three years, and their membership shall be terminated by the Minister when two conditions precedent exist objectively, viz;

- (a) Termination shall only be on recommendation by the Board; and
- (b) Such recommendation must be consequent upon a finding of misconduct or incompetency.

Undoubtedly, in the present matter, none of these two jurisdictional facts existed to justify termination of the first respondent's membership of the Board. It follows that the Minister's determination of the first respondent's membership is unlawful, so concluded the learned Judge.

[22] Adv. Lebakeng, for the third, fourth and fifth respondents, in the Court a quo had argued that the Minister, not the second respondent had power to appoint the Board Members. He referred the Court below to the provisions of section 34 of the Interpretation Act 1977, which is couched in these terms:

“where an Act confers or imposes a duty upon a person to make an appointment or to constitute or establish a board, tribunal, Commission, Committee, Council or similar body the person having power or duty shall also have power-

(a) To remove, suspend, dismiss, revoke the appointment of, and to re-appoint or re-instate, any person appointed in exercise of such power or duty”

[23] It was the view of the learned Judge that the Interpretation Act, did not apply in this case for the simple reason that, there was no uncertainty as to the appointment and termination procedure such as would warrant its invocation, because section 5(2) of the Regulations provides for reasons and procedure of terminating membership. The Minister cannot purport to exercise his power of

termination outside section 5(2), any such exercise of power is *ultra vires* the Regulations, and void *ab initio*. Consequently, the application in the Court a quo succeeded with costs.

[24] Aggrieved by this decision, the appellant filed two grounds of appeal. These were:

- i. The learned Judge in the Court a quo erred and thus committed a misdirection by finding, as he did that the first respondent (herein referred to as first respondent) has been nominated by the second respondent (herein referred to as second applicant) he is automatically appointed into the Board.
- ii. The learned Judge a quo erred by not accepting the version of the respondents that the first applicant's membership of the Board expired on the 29th October 2011, and since then he has been in the Board contrary to the regulations (Agricultural Regulations 1991) as he had never been nominated and appointed to the Board.

The Appellant's Case:

[25] It was argued for the first and second appellants that the first respondent had only a recommendation for appointment from the second respondent. His stay on the Board post 29th October 2011, was contrary to the Regulations, as he was not nominated or appointed. The fourth respondent having duly informed the first respondent that by operation of law the tenure of his appointment

had come to the final destination, did not act arbitrary. Arbitrariness, is caprice or the exercise of the will instead of reason or principle, without a consideration of the merits. Holmes JA's statement in **Johannesburg Liquor Licensing Board v Kuhn**², was cited in support of that argument.

The first respondent cannot have legitimate expectation contrary to the provisions of statute. **Minister of Local Government and Another v Moshoeshe**³ was cited in support of that proposition.

[26] Adv. Molati, sharply focused on a narration of the law governing judicial review i.e. Diplock LJ's statement on grounds constituting judicial review in **Civil Service Unions v Minister for the Civil Service**,⁴ namely illegality, irrationality and procedural impropriety. He further alluded to the three categories of unreasonableness in these terms:

- a) Where there has been an extreme defect in the decision-making process. The assessment here focuses upon the reasoning or justification for the decision. These could be decisions taken in bad faith, decisions based on considerations wrongly taken into account or ignored or given. Inappropriate weight and irrational decisions.

² 1963 (4) SA 666 (A) 67

³ (CIV) NO 15/09 (2009) LSA 29 (23rd October 2009) para 18

⁴ (1984) UKHL 9

- b) Decisions taken in violation of common law principles governing the exercise of official power.
- c) Oppressive decisions, which have an unnecessarily onerous impact on affected persons or where the means employed (albeit for lawful ends) are excessive or disproportionate in their result.

It was valiantly argued that the first respondent cannot claim a right to be on the National Dairy Board permanently. This would fly in the teeth of King IV⁵ “Corporate Governance” principles, which espouse the rotation of non-executive directors.

[27] In paragraph 30 Adv. Molati conceded that in terms of section 5(2) the Minister has power to terminate the appointment subject to some requirements. He however contradicts himself when he submits that pursuant to section 34 of the Interpretation Act 1977, the Minister had power to appoint and disappoint.

The Issues

[28] In this appeal there are only two issues

- i) Whether the Minister had power to veto the representative of the second respondent in this case the first respondent; and

⁵ King IV Report- Corporate Governance for South Africa.

- ii) Whether the tenure on the Board of the first respondent was validly terminated.

Consideration of the Appeal:

[29] An analysis of Regulation 4(1) is revealing, the clause relating to the first a respondent simply says:

“A representative of the Lesotho Chamber of Commerce.”

While that dealing with a processor’s representative, has a rider and reads:

“A processor representative appointed by the Minister.”

In my view even if this Court wore both the purposivitis and textualists shoes of interpretation, the Court would come to the same conclusion. The legislative purpose of having a representative of the Lesotho Chamber of Commerce representative on the Board and appointed by them is that it is an aggregation of captains of industry and commerce and has the expertise to choose the best suited representative on the Board. Pursuing the textualist approach, while the representative of a processor is appointed by the Minister, the representative of the Lesotho Chamber of Commerce is not appointed. We agree with he learned Judge’s reasoning in para. 7 of his judgement that the fourth respondent (Minister) does not have any stake in the nomination of this individual, whoever is nominated

by the second respondent, as a matter of the law becomes a Board member. The Minister does not have power to reject the nomination.

[30] If it was the legislative intent that the Minister should have a say on who represents the second respondent on the Board, the clause would have read in the exact terms as that dealing with a processor's representative.

[31] It is hypocritical to the Chairperson of the Board to deny the first respondent's membership on the Board, when he chaired a meeting on 8th February 2018, attended by the first respondent and on the 11th April 2018 and the Chief Executive of the National Dairy Board who is Secretary and second appellant in this case, took the minutes at those Board meetings. Additionally, as public officers they had acted in a manner that created an expectation that they had no objection to the first respondent being a member of the Board, though they had no power to do so. They cannot therefore resile from that position almost two years later, when they had remained silent. 'Estoppel by silence' doctrine is also applicable in this matter.

[32] The fourth respondent (Minister) was under the misguided belief that he had absolute power to appoint members of the Board, and to terminate their membership. The provisions of Regulation 4(1), 5(1) and 5(2) literally interpreted, which was done by the learned Judge, did not permit him to do so. As Scott Gordon says, in his book 'Controlling the State:

*“There is an intestine struggle open or secret in every polity between authority and liberty and none should be entire or absolute. Authority is required for the existence of liberty, so is limitation of authority is necessary for the existence of liberty. The existence of liberty is essential for constitutional democracy to exist”*⁶

What Gordon is saying is that you cannot enjoy liberty in a chaotic or authoritarian environment. The point he makes is put differently by Lord Scarman, when he says State lawlessness is a menace to civil liberties

[33] In the case of **Motlatsi Pelesa v Ngaka Mohlouoa**⁷, though we were discussing the issue of a Court of law lacking jurisdiction our views therein apply with equal force, if not more force to the facts in this matter, we said in paragraph 39 citing the Zambian Supreme Court decision in **JCN Holdings Limited v Development Bank of Zambia Limited**⁸, we said:

“It is clear from the Chikuta and New Plast industries cases that if a court has no jurisdiction to hear and determine a matter it cannot make any lawful order or grant any remedies sought by a party to the matter.”

⁶ Scott Gordon, Controlling the State, Harvard Press 2002.

⁷ C OF A (CIV) NO. 36/2020

⁸ 2013 3 ZR 299

In more compelling terms, the Kenyan Court of appeal in **Owners of the Motor Vessel 'Lilian S.' v Caltex Oil (Kenya) Limited**⁹ said:

“it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide that the issue right away on the material before it. Jurisdiction is everything, without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceeding..... a Court of law does not sit in respect of the opinion that it is without jurisdiction.... Where the Court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing....”

[34] This Court does not agree that it was the legislative intent that both appointment and disappointment depended on the whim of whomever is Minister of Agriculture.

[35] The fourth respondent (Minister) did not have jurisdiction to terminate the first respondent's membership of the Board, unless he was found to have misconducted himself or was incompetent. The fourth respondent's decision therefore came to nothing and is a nullity.

⁹ (1989) KCR 19

[36] The appeal is dismissed.

[37] Costs will follow the event to be taxed in default of agreement



P. MUSONDA
ACTING JUSTICE OF APPEAL

I agree.



J. VAN DER WESTHUIZEN
ACTING JUSTICE OF APPEAL

I agree.



N. MTSHIYA
ACTING JUSTICE OF APPEAL

FOR APPELLANT: ADV L MOLATI

FOR RESPONDENTS: ADV LEBAKENG