IN THE HIGH COURT OF LESOTHO

CIV/APN/242/2011

In the matter between:

MAFETENG DAIRY FARMERS ASSOCIATION **APPLICANT**

And

DISTRICT ADMINISTRATOR - MAFETENG **1ST RESPONDENT**
MINISTRY OF LOCAL GOVERNMENT AND CHIEFTAINSHIP AFFAIRS **2NDRESPONDENT**
THE PRINCIPAL SECRETARY **3RDRESPONDENT**
ATTORNEY GENERAL **4TH RESPONDENT**

JUDGMENT

Coram : Honourable Acting Justice E.F.M. Makara
Dates of Hearing : 23 May, 2013
Date of Judgment : 23 May, 2013

Summary

The applicant seeking for an order nullifying the action of the 1st Respondent in seizing the control of the milk center in the interest of the public and apparently in good faith. The facility being erected within the site which the Deputy Principal Secretary had executed a letter indicating that it belongs to the Applicant. The application of the Latin Maxim superficies solo cedit and its limitation. 1st Respondent found to have acted *ultra vires* the powers assigned to his office under Section 39 of the Local Government Act 1997 by unilaterally seizing the center for the public. The Respondent's unstrategic approach and its adverse consequences. The prayers granted without an order on costs.

STATUTES
Government Proceedings and Contracts Act of 1965
Local Government Act 1997

Agricultural Produce Marketing Act No.24 of 1991

MAKARA A.J

[1] This judgment is sequel to the Notice of Motion proceedings initiated by the Applicant, (Mafeteng Dairy Farmers Association). It approached the Court as such seeking for its intervention by in the main issuing of an order that:-

1. The decision of the 1st Respondent shall not be declared unlawful and of no force and effect and as such null and void.
2. The 1st Respondent be interdicted and/or restrained from interfering with the affairs of the Applicant pending finalization hereon.

[2] The application has been lodged against the District Administrator for Mafeteng on account of the allegation that he has in the exercise of the statutory powers vest upon his office, acted *ultra vires*.

[3] The Ministry of Local Government which features as the 2nd Respondent has been proceeded against on the understanding that it is, *inter alia*, responsible over allocation of titles to rights over land and under which the 1st Respondent is answerable. In the same vein, the 3rd Respondent has been cited in his capacity as Principal Secretary of this Ministry. The Attorney General who is the 4th Respondent has simply been featured by operation of the **Government Proceedings and Contracts Act of 1965**.

[4] In consequence of the application for intervention, the additional respondents were joined into the proceedings. These

are the Likhoele Dairy Farmers Association which had demonstrated its interest to use the milk collection facility in consideration and the rest of the Respondents who are the individual dairy farmers with a similar interest. Their common complaint is that the applicant is violating their right to access the Centre for the purpose of delivering their milk to it.

[5] The Respondents who are represented by their respective counsel opposed the application and duly filed their counter papers.

[6] The hearing was scheduled for today the 19th November, 2013 and the matter was accordingly argued by the counsel to a conclusion.

[7] Judgment was on the same date delivered and both counsel were detailed to record it in collaboration with the Judge's Clerk. The latter served as the hand of the Court. The detailed arrangement was that the Counsel should subsequently bring their records to the Judge's Clerk to ascertain the correctness and for the Court to effect simple corrections without in any manner changing the substance.

[8] In the perception of the Court the parties' views were in harmony regarding the background history in the establishment of the milk facility in question. This in a nutshell is that, it was erected through the initiative of the Government of Lesotho acting in collaboration with the Canadian Government sponsorship. The

latter had provided the financial and the logistical realization of the project. This could have happened around or sometime during 1990. The sponsorship was intended for providing the member of the Association with a safe storage of the milk in the district.

[9] It must be made clear that *ex facie* the papers before the Court there is no Constitution of the Association furnished by either party to it. This leaves uncertainty regarding the qualification for its membership, how its committee is composed and how the individuals who make it assume their respective status. The document would facilitate in reflecting the mechanisms of accountability of the committee to the general membership. A dispensation of justice in the case has admittedly been complicated. The Court is unfortunately, confronted with a typical factual scenario in which it is forced to make a legalistic based judgment. This would be premised upon prayers before it.

[10] It is further common cause that the litigation has been specifically triggered by the decision of the 1st Respondent to seize the control of the Centre from the Applicant. A foundation of the Applicant's lamentation is that the District Administrator (D.A) had in so doing, acted *ultra vires* **Sec. 39 of Local Government Act 1997.** This section represents the source of the powers of the office of the D.A and its parameters of responsibility. It provides thus:

> "The District Administrator shall be the person who shall represent the interests of the Central Government at district level and shall be responsible for coordinating the duties and functions of all public officers in that district."

[11] The Counsel for the respondents contended strongly that the decision of the D.A and his intervention in taking over the control of the facility and commanding of a direction in the matter, are *intra vires* the Section in that he had done so in the best interest of the public. They emphatically projected a picture that his measure was a constructive response to the protestations advanced before him by the 5th and 8th Respondents. They had lamented that the Centre was not being administered in accordance with its inception purpose and that the milk hygiene was being detrimentally compromised by the presence of the tenants at the Centre who are pursuing tailoring and catering business ventures. These were according to them incompatible with a proper management of a milk collection facility.

[12] On another terrain of the arguments, the applicant maintained that the site where the facility is located belongs to it. In the understanding of the Court, it is in simple terms claiming the ownership rights thereon. In this regard, the Applicant has reinforced its claim of ownership with reference to a copy of a letter authored by one L. Mofubetsoane who was at the material time a Deputy Principal Secretary (DPS) in the Ministry Agriculture & Food Security. The letter in essence is a revelation of the genesis of the establishment of the milk centres in the districts of Mafeteng, Teya-Teyaneng, Leribe, Butha-Buthe, Mohale's Hoek including those erected at Mokema, Matsieng and Mazenod. A dimension of significance in his historical narration is that he draws a clear distinction between the sites where the centres were constructed within the Government's site as opposed to those which were

owned by the individual associations. The latter were according to him, the **Mafeteng,** Mohale's Hoek, Mokema, Matsieng and the Mazenod.

[13]The document has the official characteristics and deserves to the presumed as such. This is in consonance with the maxim regarding the interpretation of Legal documents that they should in the absence of any indication to the contrary, be presumed authentic and correct. The *maxim* is couched in these Latin terms:

> *Omnia praesumuatue rite et solemniter esse, all things are presumed to have been done regularly and with due formality until the contrary is proved.* [1]

[14] The Court notwithstanding the maxim holds that it would operate where there was no qualification assigned to the erection of a fixed structure on the site. The indication is that the onus would remain with a party who challenges the claim that the fixed structure has become part of the land and that it belongs to the owner of the rights thereon.

[15] The Counsel for the Applicant relying upon the distinction made by the DPS in his distinction of the ownership of the sites, drew it to the attention of the Court that in law once a permanent structure is erected on a site it becomes part of the land. He supported this assertion with reference to the view enunciated by **Silberbeg Law of property**. Here the Learned author has stated that:

> The buildings and other structures become the property of the owner of the land on which they have been built or erected. This is in consonance with the common law *Latin Maxim: superficies solo cedit.*

[1] Broom, leg, Max. (3rd London Ed.) 157

[16] It must be appreciated that it suffices for the applicant to have proven his case on the balance of probabilities and not beyond any reasonable doubt as it is a case in criminal proceedings.

[17] There is a consensus of minds between the Court and the Counsel that the question of the *ultra or intra vires* of the action by the DA represents the primary determining factor. The decision hereof should be guided by the already referred to provision under Section 39.

[18] In the interpretation of this Court, the DA had in the circumstances acted in *good faith* and probably for a good cause, albeit *ultra vires* this section. Besides, he had committed a civil offence of spoliation in that he had resorted to self help. He had not followed the established lawful means of intervening in the impasse. The Court cannot countenance that.

[19] The Respondents have contested the Applicant's claim of ownership of the right to the site. The Court had earlier directed the Counsel to secure from the Land Administration Authority, a copy of a title to the site. The intention hereof was to expediently ascertain the question of ownership of the site. It unfortunately, transpires from their report that the file containing the information was missing. The absence of this vital documentary evidence is not necessarily fatal on account of the said letter executed by the

DPS. It is inconceivable to this Court that this official could have fabricated the history.

[20] The letter was authored by the Deputy Principal Secretary on June 22, 2007. It bears the Lesotho Code of Arms at the top, was addressed to the Chairman of the Mafeteng Dairy Farmers Association (MDFA) and apparently signed by its author. The subject related to a complaint that some members of the board were fraudulently appropriating the site and the milk tank of the MDFA for themselves. A pertinently relevant part of the correspondence is where it straightens up the record that the sites for the milk collection centers of Mohales' Hoek, Mafeteng, Mokema, Matsieng and Mazenod associations have been established within the sites of the respective associations.

[21] It is appreciably in the above background that the Adv. P.L Mohapi of the Attorney-General's chambers wrote a letter to the DA denouncing him for having entered into the internal affairs of the Applicant without any authority.

[22] The end result is that the Court is on the balance of probabilities, persuaded that the Applicant has hitherto, established a *prima facie* proof that the site within which the Center is built, belongs to it. The Government is in an advantaged position to have documentally or otherwise proven that the land belongs to it. Nevertheless, it has not rendered assistance to the Respondents by advancing such evidence.

[23] The neutrality which the Government has maintained in the disputations justifies a conjectural inclination that this amounts to its attestation that the land and the milk infrastructure in question are the proprieties of the Applicant. Otherwise, it would have participated vigorously in the litigation and exploited its high powered stature to protect its property rights and policies.

[24] It should regarding the basis of the Court decision on the issue of the ownership of the rights over the site, be cautioned that any other qualifying person or entity other than the Respondents, is at liberty to litigatively contest the ownership rights over the land under consideration.

[25] In the understanding of this Court, it has been lethally unstrategic for the 5th, 6th and 7th Respondents to have joined the original ones particularly the DA. It should have transpired to them that the DA had, notwithstanding his *bona fides* in the intervention, committed an act of spoliation and acted *ultra vires* the powers entrusted upon him under Section 39. This justified the Applicant to file the present application seeking for the orders which it has prayed for.

[26] The Bible teaches that a wise man does not built his house upon a foundation which is grounded on a sandy soil.[2] It is once again emphasized that the intervening Applicants should have timeously realized that the DA's case was foundationless as the Attorney General's Chambers had rightfully observed.

[2] Matthew 7:24-27

[27] It appears from the papers filed by the intervening Respondents that their desire is that the management of Applicant should operate the Center in accordance with its original purpose and to maintain the required hygienic standard. Additionally, there is a clear complain that its management has hijacked the facility which actually belongs to the daily farmers of the district and that it is managing it as if it was its private property.

[28] The Court is of the view that the additional Respondents would have properly approached their case if they had brought an independent action proceedings against the Applicant and its management. This would have provided them with an opportunity to have, perhaps, straightened up the record on the historical genesis of the Center, its purpose, owners, administration, management, Constitution, relationship with the Government etc. These would have laid down a foundation for the granting of the prayers which would be commensurate with the final relief which they were contemplating. They could for instance, have incidentally applied for a declaratory order that the management of the Applicant is operating the Center in violation of its Constitution; that it be interdicted from running it *pedente lite*; it be directed to call for the election of the committee or seek for a vindicatory order attaching to the application the necessary documentations.

[29] The Respondents would have through an independent litigation availed themselves a good opportunity to obtain documentary or testimonial evidence on the issue of the ownership

of the rights over the land and the historical purpose of the facility. It was unstrategic for them to have joined the DA in the litigation.

[30] The Court strongly feels that notwithstanding its findings, the Lesotho National Diary Board which is established in terms of **Act No.24 of 1991 (Agricultural Produce Marketing Act),** could acting in collaboration with relevant Ministries intervene urgently. Their involvement should be calculated at ascertaining that this Centre is managed and operated in accordance with its foundational purpose and in compliance with the hygienic standards.

[31] In the premises, the application is granted in terms prayers 2 and 3.

[32] No order as to costs.

E.F.M. MAKARA
JUDGE

For the Applicant	**:**	**Adv. Mohapi Instructed by M.T. Matsau & Co.**
For the Respondent	**:**	**Adv. Sekatle Instructed by K.D. Mabulu & Co.** **Adv. Sekati Instructed by the Attorney General's Chambers**