

**IN THE HIGH COURT OF LESOTHO
(HELD AT MASERU)**

CIV/APN/184/2018

In the matter between:-

**LESOTHO NATIONAL WOOL AND MOHAIR
GROWERS ASSOCIATION**

APPLICANT

AND

**MINISTER OF AGRICULTURE & FOOD SECURITY
MINISTER OF SMALL BUSINESSES COOPERATIVES
AND MARKETING
ATTORNEY GENERAL**

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

JUDGMENT

CORAM : Honourable Justice Makara
HEARD : 8 AND 11 JUNE 2018
DELIVERED : 12 JUNE 2018

- 1 It appears *ex facie* the papers before court that an imprimatur of the present motion proceedings has been occasioned by two factors. The first is that first respondent, who is Minister of Small businesses, Cooperatives and Marketing had authored regulations intended for the regulation of the co-ordination and sale of wool and mohair in the Kingdom.

- 2 Secondly, the initiative seems to have been triggered by the judgment in **CCA/0105/2017** in which my sister Chaka-Makhooane J dismissed the application for a direction that the applicant in this matter should submit to the Maseru Dawning Trading (Pty) Ltd the wool and mohair that was in its possession at the material time. The basis of the intervention they sought from the Commercial Division of this Court was in synopsis terms, that there was a standing agreement between the parties that this be so.
- 3 It would further appear that in consequence of the aforesaid judgment, the first respondent found it befitting for him to promulgate the regulations, which would change the *status quo* by introducing new legislative regime, which in his view would benefit the country and its local farmers better. The court, in this regard, comfortably takes judicial notice of protestations and lamentations by the local farmers that the *status quo* gives them an unfair fiscus treatment regarding the amount and the manner in which the system is managed.
- 4 Thus, the first respondent found it imperative to circumvent the impasse by taking the initiative to address same through a promulgation of the regulations, which constitute a foundation of the present litigation. The intention of the minister transpires clearly from the antecedent explanatory note, the text of the regulations, its object and purport.
- 5 Notwithstanding a *prima facie* good intention of the first respondent what emerges to be of a material significance for the purpose of this case is whether the minister has clearly and consistently articulated his intention. In resolving the question the court must be guided by the manner in which the more operationally pertinent provisions have been couched. These apply to regulation 2 read with regulation 6 and elucidated more under schedules 1 and 3.
- 6 Regulation 2 (1) (f) provides:

“A person shall not engage in a business of wool and mohair exporting, unless the person has obtained a licence to do so from the Minister responsible for small business development cooperatives and marketing (in these regulations referred to as “the Minister”) in accordance with these regulations.

(2) A person who wishes to engage in a business set out in sub-regulation (1) shall apply to the Minister.

Regulation 6 presents itself as a complementary provision to regulation 2 (1) (f) by detailing that:

Where an applicant under regulation 1 (1) is a body corporate, the application shall be in the form set out in schedule 3.

- 7 So far what has emerged is the word “person” which includes artificial persons. It is common cause that the word “person” as employed under the above successively quoted provisions includes a natural person and personalised entities such as a company, partnership and an association. In this respect it is common cause that the artificialized persons contemplated herein are for the sake of attaining a personality status, registrable under different regimen of laws.
- 8 It should specifically be realised that the schedules referred to are specifically intended to operationalize regulations 2 and 6 in order to meet the object of the legislation.

Arguments Between the Parties

- 9 In motivating the application Mr Letsika, featuring for the applicant, premised his case upon a contention that the regulations were primarily authored for the exclusion of the applicant from co-ordinating the entrepreneurship of the applicant in the wool and mohair industry. In this endeavour, he invited the court to the relevant contentious words employed in regulations 2 and 6 when

interfaced with the two operative schedules. At that juncture, he invited the attention of the court to what he described as technical exclusion of the applicant from playing any part in the industry. To clarify the picture he argued that whilst the term “person” encapsulates even a legalised person, the attributes assigned to a person who could apply to participate in the system are designedly exclusive of the applicant.

- 10 To illustrate the point he explained that the applicant is not by any stretch of the construction of legal persons one of such. Instead he maintained that the applicant is simply an association registrable under the Societies Act of 1966. According to him entities registrable under the Act is an association of individuals, who have voluntarily associated themselves in pursuit of a common goal. He cited churches, the Law Society, football teams, Lesotho boys’ scouts etc to be some of the organisations contemplated under the Act.
- 11 What is of cardinal significance here is that those organisations are not considered to be engaged in any form of entrepreneurship in which profits are to be generated and consequently subject to taxation. It was, however, conceded that the applicant earns fees in its co-coordinative service to the wool and mohair farmers. In the same vein it was admitted that it is from these fees that it is able to service its debt to BKB Ltd.
- 12 The applicant further invited the attention of the court to a realisation that the credentials imposed for one to qualify for making an application to be considered for being licenced to participate in the wool and mohair transactions automatically excludes it. Understandably, according to the applicant, this is attributable to the fact that the assigned qualifications are applicable to a business oriented organisation. This was highlighted with reference to schedule 3, which requires a potential applicant to disclose:

1. Nature of the Corporate body and its tax number

2. Business Location/Address:Telegraphic Address and Telephone Number

3. Full names or style of the Company or Firm

4. Number of Directors and Officers-in-charge:.....

5. Full Names, Addresses, Nationality of Directors and Identification number and Officers in Charge:.....
.....
.....
.....

6. Nationality of Majority Share-holders in the company or Firm:.....

7. Mention the Item and Nature of Licence being applied for and reasons for wishing to acquire this Licence.....

8. (a) Has a Licence Under this Item been applied for before?.....
(b) If so, was it granted?.....

9. (a) Does the Company or Firm maintain a bank account in Lesotho?:.....
(b) If so, with which bank?.....

10. (a) Is the Company or Firm registered in Lesotho in terms of the Company's Act No. 18 of 2011 and/or Partnership Proclamation 78 of 1957?.....
(b) If so, Mention Registration Number thereof:.....

I, the undersigned on behalf of the afore-mentioned Company/Firm (Delete whichever is inapplicable) do hereby affirm that the information contained in this application is true and correct to the best of my knowledge and belief.

Full Name (Please print or type):.....

Position in the Company/Firm:.....

Signature.....

Date

Note: Kindly take notice that for every item of licence being applied for, a separate application form must be used. Please make sure that the application form is completely and properly filled in.

13 Again the court was invited to take notice that schedule 1 stipulates another series of qualifications, which are applicable to an entrepreneurial personality and not to an association of the nature of the applicant, such requirements being:

- a. Individual citizen
- b. Individual non-citizen
- c. Local company
- d. Foreign company.

14 In the above posture the applicant submitted that the status/qualifications for one to be considered for being awarded a licence excludes it. To demonstrate this it argued that the composition of its personality does not require the existence of its directorship, shareholders and officers in charge. It reasoned that this is itself explainable because it is a mere association comprising of voluntary members, which co-ordinates the affairs of the individual farmers and /or their local associations subject to their payment of fees. Emphasis was laid upon what they described as their co-coordinative role that *inter alia* explore prospects for them to sell their product at the higher price and other correspondence benefits for them.

- 15 The impression they gave was that their position is analogous to that of agent *vis-a-viz* its principals. To evidence this, they projected a picture that even the moneys paid to the farmers are written in the names of the individual farmers and not in the names of the applicant.
- 16 A key position maintained by the respondents is that regulations 2 and 6 when read in connection with the two schedules clearly accommodate the applicant as qualifying personality. Their construction of the term “person” is that it embraces an association of the standing of the applicant.
- 17 They developed their argument with a submission that much as a schedule is part of the legislation they indicate the consistency up to the schedules wherein the eligibility remains countenanced. In fortifying this portion the respondents contended that this is clearly attested under section 3 of the interpretation Act of 1977 (as amended). The section provides: “person” includes any company or association or body of persons corporate or uncorporate.

DECISION OF THE COURT

- 18 It is a foundational understanding of the court that in seeking to interpret the intention of the legislature, it is indispensable that all the provisions should be read together. The intention here would be to have a comprehensive and systematic appreciation towards its holistic perception. In this regard, it is found that the two schedules stand as an integral component of the legislation.
- 19 It is of great significance for the court to recognise the fact that the intention of the legislature becomes more pronounced in the subsequent provisions than the earlier ones. Thus, for the purpose of the law under consideration, the schedules are more elucidative of the intention of the legislature than under regulations 2 and 6.

- 20 In resolving the question as to whether the personality of the applicant has been taken on board in this legislation, it must first be considered whether the applicant is a natural or a legal person. A preliminary determining factor would be the regimen of the legislation applicable to it for its existence.
- 21 It is trite law that an incorporated entity should be registered under the Companies Act of 2011. On the other hand a partnership should be registered under the Partnership Proclamation of 1957.
- 22 Associations appear to fall under two (2) categories. The first would be those who though they are termed as such, they have however, incorporated and therefore registered in accordance with the relevant legislation. Secondly there are those which simply remain of a common law nature and therefore registrable under the Societies Act of 1966 or Friendly Societies of 1871.
- 23 In the instant case there is no evidence, whatsoever, that the applicant has ever graduated from being an ordinary common law association to any legally personalised status. Thus the credentials required under regulations 2 and 6 considered side by side with the schedules have, perhaps, inadvertently not embraced the applicant. The law seems to have conceptualised enterprising organisations who pursue financial gains, and the applicant is not one of those. Another testimony of this fact is that the conceived entities are those which are founded upon a pursuit of financial gains for their membership.
- 24 In the context of a *laisse-faire* economic environment in which we exist it, would appear desirable that in the interest of fair competition and better benefits for farmers it would be wise for the first respondent to consider the inclusion of associations among those who would be considered to be given licences.
- 25 One dimensional question which could introduce confusion concerns a meaning of nationality under schedule 3. The notion applies to the incorporated entities and it is not synonymous to citizenship, which applies to natural persons. A good example would pertain to a ship or aeroplane which flies a flag

of a particular nation without any implication that it is a national of that country. On the contrary a natural person is a citizen of a country.

26 In determining justice in this case the court is enjoined by law to consider whether or otherwise, the applicant has on the balance of probabilities made a case that it is entitled to the relief sought. Correspondingly, the court should consider whether the respondents would suffer any prejudice if the *status quo* is maintained.

27 In the premises prayers 1 and 2 of the notice of motion are granted as prayed. The file will go for allocation.

E.F.M. Makara

JUDGE

For Applicant : Mr. Letsika of Mei & Mei Attorneys

For Respondent : Adv. Sekati of the Attorney General Chambers