

# **IN THE HIGH COURT OF LESOTHO**

**HELD AT MASERU**

**CIV/APN/49/16**

In the matter between:

**COOPERATIVE LESOTHO LIMITED**

**APPLICANT**

**AND**

**COMMISSIONER FOR COOPERATIVE**

**1<sup>ST</sup> RESPONDENT**

**MINISTRY OF SMALL BUSINESS**

**DEVELOPMENT, COOPERTIVES &**

**MARKETING**

**2<sup>ND</sup> RESPONDENT**

**LEOHLA BOROTHO**

**3<sup>RD</sup> RESPONDENT**

**‘MAPALESA PASANE**

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

**TENANTS OF LESOTHO HANDSPUN MOHAIR**

**5<sup>TH</sup> RESPONDENT**

**ATTORNEY-GENERAL**

**6<sup>TH</sup> RESPONDENT**

**Neutral Citation:** Cooperative Lesotho Limited v Commissioner for Cooperatives Ministry of Small Business Development, Cooperatives & Marketing & 5 Others (CIV/APN/49/16) [2021] LSHC 54 (17 JUNE 2021)

## **JUDGMENT**

**CORAM:**

**MOKHESI J**

**DATE OF HEARING:**

**04 MAY 2021**

**DATE OF JUDGMENT:**

**17 JUNE 2021**

## **SUMMARY**

**CIVIL PRACTICE:** *Application for contempt of court- Applicable principles re-stated and applied- Application dismissed with costs.*

## **ANNOTATIONS**

### **Books:**

Herbstein & Van Winsen, **The Civil Practice of the High Courts of South Africa (2009) 5 ed. Vol. 1**

### **Legislation:**

Cooperatives Societies Act No.6 of 2000 (as Amended by Act of 2014)

### **Cases:**

Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623

Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA)

Makoala v Makoala [2009] LSCA 3 (09 April 2009)

Mars Incorporated v Candy World (Pty) Ltd [1990] ZASCA 149; 1991 (1) SA 567 (A)

South Cape Corp. v Engineering Management Services 1977 (3) 534 (A.D)

Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A)

Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA)

## **Introduction**

- [1] This is an application for contempt of court against the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents. This application is a sequel to CIV/APN/49/2016 which ended in the Court of Appeal as C of A (CIV) 43/2016. In the Court of appeal the following order was made:

*“[23] Consequently I make the following order:*

- 1. The appeal is upheld;*
- 2. The order of the court a quo is set aside and replaced with the following:*
  - (a) The 1<sup>st</sup> to 3<sup>rd</sup> respondents are hereby interdicted from unlawfully interfering with the administration, management, and day to day operations of the applicant.*
  - (b) The 1<sup>st</sup> to 3<sup>rd</sup> respondents are ordered to pay the costs of this appeal.*
  - (c) Counsel for the appellant is ordered to pay the costs occasioned by his omission to file the entire record of the Court a quo and to serve the 5<sup>th</sup> to 11<sup>th</sup> respondents with notice, grounds and record of appeal.”*

## [2] **Factual Background**

The applicant is a Cooperative Society registered in terms of the Cooperatives Societies Act No.6 of 2000 (the Act). It was established as a mother body of all Cooperatives in terms of S.7 of the Act. The 1<sup>st</sup> respondent is a Commissioner for Cooperatives Development whose appointment is by the Minister responsible for the 2<sup>nd</sup> respondent, in terms of S. 3 of the Act. The duties and functions of the 1<sup>st</sup> respondent are to;

register and protect co-operative societies in accordance with the provisions of the Act; advise the Minister on any matter relating to co-operative societies; encourage the establishment of co-operative societies and to help them increase their efficiency; and to perform all other duties which may be assigned to him/her by the Minister in terms of the Act.

[3] The 3<sup>rd</sup> respondent's particulars are unknown, but what is clear is that he has some connection with the 1<sup>st</sup> respondent. The 4<sup>th</sup> respondent was formally employed by the applicant. The 5<sup>th</sup> respondents are tenants of the Lesotho Wool Handspun Mohair (LHM), a cooperative society duly registered as such in terms of the Act. The LHM has immovable property in the form of office space. The LHM is also a member of the applicant. Mr Tlapanana, for the applicant, submitted that the 5<sup>th</sup> respondent is defunct while Adv. Lephuthing, for the respondents, took an opposing view. In my considered view the decision of this case does not turn on this issue as will be seen in due course.

[4] In CIV/APN/49/2016 the applicant had launched an application before Hlajoane J claiming for an interdict against the respondents from interfering and interrupting the administration, management and day to day operations of the applicant, and that the respondents be "directed to hand over the locks and keys to the premises and offices of the applicant". That application was dismissed with costs, hence the matter ended on appeal. The Court of Appeal reversed the Order of Hlajoane J. and made an order reproduced in para.1 above. It is common cause that 5<sup>th</sup> respondents were not party to that case neither was LHM as the landlord.

[5] The current application was borne out of the fact that the 1<sup>st</sup> respondent had written a letter to the 5<sup>th</sup> respondents informing them that rentals will be

collected by 3<sup>rd</sup> and 4<sup>th</sup> respondents. The said letter was couched as follows: (in relevant parts);

“

9<sup>th</sup> October 2017

*Tenants of Lesotho Hanspun Mohair  
Maseru*

*Dear Tenants,*

*Re: Collection Rent*

*You are informed that rent will be collected by Mr Leohla Borotho and Mrs. 'Mapalesa Pasane as indicated earlier. Until you are officially informed otherwise, this stays the same.*

*Yours truly,*

*SIGNED*

*'Maphamoli Lekoetje (Mrs.)  
Commissioner for Cooperatives Development.'*”

- [6] It is common ground that this letter was written after the decision of the Court of Appeal in C of A (CIV) 43/2016. Now, given this factual scenario, the issue to be determined is whether the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents are guilty of contempt of court by virtue of the above letter. Does the issuing of this letter by the 1<sup>st</sup> respondent constitute interference in the administration and day to day operations of the applicant? This is the question which must be answered in this judgment.
- [7] This application is opposed. In his answering affidavit the 3<sup>rd</sup> respondent raised the so-called points in *limine* that, (a) the LHM has not been joined in these proceedings, the fight being over rentals accruing to it in respect of its property; (b) 'Non case for contempt'; (c) Dispute of fact; (d) Lack of *locus standi* of the applicant to claim rentals.

[8] The practice of raising non-joinder and foreseeability of material dispute of fact as points in *limine* has been deprecated in this jurisdiction but it does not seem to come to an end (**Makoala v Makoala [2009] LSCA 3 (09 April 2009)** at paras. 6 and 10 (1)). The so-called “non case for contempt” is not a point to be raised in *limine* because by the sound of things it is a defence to the merits that the applicant’s case does not prove contempt. I think it is apposite to reproduce the remarks which were made by the court in **Mokoala** (ibid) at para.4, regarding this practice:

*“[4]... The persistent practice of taking inappropriate points in limine has bedevilled the procedure in the High Court for some time and it is a usage that shown no sight of coming to an end. When a point in limine is raise, the issue for determination is whether the applicant’s affidavits make out a prima facie case. Consequently, the applicant’s affidavits alone have to be considered and the averments contained therein should be considered as true for purpose of deciding upon the validity of the preliminary point (citation omitted). Unfortunately, the practice of converting defences on the merits into preliminary points has become so prevalent in motion proceedings that the process may be regarded as being akin to the Pavlovian response.”*

[9] Regarding non-joinder of the LHM, although in the ordinary scheme of things, the said entity being an interested party as the rentals being fought over are generated by its property, I ought to have stood down the matte to have the entity joined, but I opted against that course because this case can be decided without affecting the rights of this entity, as will become clear in the ensuing discussion.

[10] **Lack of locus standi to claim Rentals**

It is trite that a party who sues has to allege in his founding affidavit that he has *locus standi* and to prove it (**Mars Incorporated v Candy World (Pty) Ltd [1990] ZASCA 149; 1991 (1) SA 567 (A)** at 575 H – I). And thus, the onus is cast on him “in its true and original sense” and reposes in him/her throughout the proceedings (**South Cape Corp. v Engineering Management Services 1977 (3) 534 (A.D)** at 548B. According to **Herbstein & Van Winsen the Civil Practice of the High Courts of South Africa (2009) 5 ed. Vol. 1 at 143**, there are two aspects to the *locus standi*, viz; the capacity of the litigant to sue, and (2) the interest which that party has in the relief claimed or the right he/she has to claim the said relief in the sense of having a direct and substantial interest in the subject matter of litigation (**Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A)**).

[11] In the present matter the applicant is suing the respondents over their collection of rentals which belong to the LHM, an entity which in terms of the law has legal personality which is separate from that of the applicant as will be seen in the ensuing discussion. LHM has not been joined in these proceedings. This point is dispositive of this application; however, I do not wish to confine myself to it, but instead, I will proceed to deal with the merits to show how weak the applicant’s case is.

[12] **The Law**

The nature of civil contempt of court orders and its constituent parts was stated in the famous decision in **Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA)**. It is apposite to reproduce what was said by the court in summarising how contempt of court should be approached (at p. 344 para. [42]):

*[42] To sum up:*

- (a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.*
- (b) The respondents in such proceedings is not an ‘accused person’, but is entitled to analogous protections as are appropriate to motion proceedings.*
- (c) In particular, the applicant must prove the requisites of contempt (the order, service of notice; non-compliance; and wilfulness and mala fides) beyond reasonable doubt.*
- (d) But, once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides: should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.*
- (e) A declarator and other appropriate remedies remain available to a civil litigant on proof on a balance of probabilities.”*

[13] Importantly, the same court at para. 9 said:

*“[9] The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed ‘deliberately and mala fide.’ A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids infraction. Even a refusal to comply*



*that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).”*

[14] It is germane for the decision of this case that the relationship between the applicant as cooperative societies’ mother body and its constituent members (primary cooperative societies) and the legal status of such cooperative societies, be properly appreciated. This is important because, in my considered view, the determination of the issue whether the 1<sup>st</sup> respondent is in contempt of court turns on understanding this relationship and its legal ramifications.

[15] The applicant is what is known as the Apex organization in terms of the parlance of S. 7 of the Act. In terms of s.7(2) of the Act (as amended by Cooperative Societies Amendment Act of 2014, the Apex organisation should be made up of at least 50% plus one of primary cooperatives. In terms of S. 8 of the Act, the duties and functions of the Apex Organization are to;

*“a) provide information, education, training and advisory services on cooperative principles and on the Management of Cooperative enterprises;*

*b) assist study groups and societies registered under this Act in determining the feasibility of their projects;*

*c) facilitate the registration of new societies;*

*d) provide, organise and supervise central services such as joint supply of imputes, raw materials or implements, access to technical services and loans, joint marketing of produce and joint use of any services or*

*installations necessary to help others and members of affiliated societies and study groups in achieving their objects;*

*e) advise the Commissioner on matters related to cooperative development policy and legislation;*

*f) represent the cooperative movement of Lesotho at the national or international level;*

*g) coordinate activities of various primary cooperative societies and government agencies for the promotion of cooperative development.*

*(2) The Apex organisation shall make its own rules.”*

[16] Crucially, in terms of S.19 of the Act, all cooperative societies registered under the Act are given legal personality. S. 19 provides that:

*“19. A society registered in terms of this Act –*

*(a) shall be a body Corporate;*

*(b) shall have power to enter into contracts;*

*(c) may acquire, hold or dispose of movable or immovable property;*

*(d) may sue or be sued in its corporate name; and*

*(e) may perform the duties imposed on it and exercise powers conferred on it by or under this Act.”*

[17] When the above provisions are read together it becomes patently clear that the legal personality of the applicant as the mother body is separate from that of the LHM. The latter entity as a cooperative society has all the powers to acquire or to hold movable and immovable property. The applicant cannot seriously be heard to be laying a claim to rentals accruing to the LHM as each of the two entities have a right to hold property in their own right.

[18] An argument was advanced by Mr Tlapana, for the applicant, that the LHM is defunct, and therefore, its assets fall to be administered as part of the pool of assets belonging to the applicant as the Apex cooperative society. This argument is without substance, as it pales when seen in the light of the fact that LHM has a corporate legal personality distinct from that of the applicant. The fact of the cooperative society being defunct is not a call to be made by any person other than the Commissioner (1<sup>st</sup> respondent). Only the 1<sup>st</sup> respondent has power to order the winding-up of cooperatives. She/he is empowered to wind up any defunct cooperative, and this power is exercised in terms of S.79 of the Act:

*“79(2) The Commissioner may make a winding-up order in respect of a society which has ceased or the membership of which is reduced to less than the minimum membership prescribed in this Act.*

*(3) No society shall be wound up save by an order of the Commissioner.  
.....” (emphasis added)*

[19] To support the argument on dormancy of the LHM, Mr Tlapana relied on the letter which was authored by the 1<sup>st</sup> respondent on the 21 march 2014, in terms of which she was informing the chairperson of the applicant that the 3<sup>rd</sup> respondent will be managing the assets of the LHM *“as an apex of Cooperatives of spinners which is currently dormant. Mr Borocho is well experienced in Cooperative field operations and I request that he be utilised to improve service delivery at Cooperative Lesotho.”* However, on 08 March 2018 when the Commissioner deposed to an affidavit opposing the current contempt application, she made it clear at para. 2 of her answering affidavit that:

*“...Mr Borotho and members of his Committee have recently met with Hon. Phori of 2<sup>nd</sup> Respondent to address the question of its [Lesotho Handspun Mohair] dormant status. That issue has successfully been addressed and in view of the information availed to my office Lesotho Handspun Mohair Cooperative is now proceeding to its scheduled Annual General Meeting.”*

The applicant has not denied this averment. Although, Mr Tlapana would want this court to believe applicant's version that the LHM is defunct, the fact that it still has assets and has not been wound up does not support the applicant's story. What makes matters worse for the applicant is that the LHM whose property is being fought over is not cited as a party in these proceedings. Upon the conspectus of what has been said above a dispute of fact regarding whether the LHM is still alive, is to be decided in favour of the respondents. Their version cannot be rejected as being improbable, palpably untruth or far-fetched (**Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 at 634 J – 635 C**). In fact, as already said, it is only the 1<sup>st</sup> respondent who is given the statutory power to decide on the dormancy of cooperative society by ordering its winding-up. If the cooperative society has not been wound-up there is a presumption that it exists.

[20] Reverting to the issue to be decided, i.e., whether the 1<sup>st</sup> respondent was contemptuous of the Court order issued by the Court of Appeal in C of A (CIV) 43/2016. This order was issued in relation to the running of the affairs of the applicant. The running of the applicant has nothing to do with the affairs of the LHM. That order could not have been issued to include the latter entity as it has a legal personality separate from that of the applicant. Therefore, when the 1<sup>st</sup> respondent wrote the impugned

directives/instructions regarding payment of rental she did not act in contempt of the said court order.

[21] In the result the following order is made:

a) The application is dismissed with costs

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**MOKHESI J**

**For Applicant:**

**ADV. M. TLAPANA Instructed by  
K. D. Mabudu & Co. Attorneys**

**For 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents:**

**ADV. C. J. LEPHUTHING Instructed  
by Messrs T. Maieane & Co. Attorneys**

**For the 2<sup>nd</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents:**

**No appearance**