

**IN THE HIGH COURT OF LESOTHO**

**HELD AT MASERU**

**CIV/APN/60/2020**

In the matter between

**SIMON KUENA PHAFANE  
LESOTHO CHAMBER OF COMMERCE  
AND INUDSTRY**

**1<sup>st</sup> APPLICANT**

**2<sup>nd</sup> APPLICANT**

**AND**

**NATIONAL DAIRY BOARD  
CHIEF EXECUTIVE OFFICER NATIONAL  
DAIRY BOARD  
PRINCIPAL SECRETARY MINISTRY OF  
AGRICULTURE AND FOLLD SECURITY  
MINISTER OF AGRICULTURE AND  
FOOD SECURITY  
ATTORNEY GENERAL**

**1<sup>st</sup> RESPONDENT**

**2<sup>nd</sup> RESPONDENT**

**3<sup>rd</sup> RESPONDENT**

**4<sup>th</sup> RESPONDENT**

**5<sup>th</sup> RESPONDENT**

**Neutral Citation:** Simon Kuena Phafane and Another v National Dairy Board and 4 Others (CIV/APN/60/2020) LSHC 25 (25<sup>th</sup> March 2021)

## **JUDGMENT**

**CORAM:** MOKHESI J

**DATE OF HEARING:** 18<sup>th</sup> MARCH 2021

**DATE OF JUDGMENT:** 25<sup>TH</sup> MARCH 2021

## **SUMMARY**

**ADMISTRATIVE LAW:** *Applicants challenging the 4<sup>th</sup> respondent's termination of the 1<sup>st</sup> applicant's membership of the 1<sup>st</sup> respondent- Jurisdictional facts necessary for the exercise of such power non-existent- Application granted with costs.*

## **ANNOTATIONS**

### **STATUTES:**

Agricultural Marketing Act, 1991

Interpretation Act 1977

Agricultural Marketing (Establishment of a National Dairy Board) Regulations 1991

### **CASES:**

Meyer v South African Medical and Dental Council 1982 (4) SA 451 (T)

South African Defence and Aid Fund and Another v Minister of Justice 1967 (1) SA

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- [1] This is an application in terms of which the applicant is seeking to review the decision of the 4<sup>th</sup> respondent terminating his appointment as a Board member of the 1<sup>st</sup> respondent. The facts of this matter are pretty much straightforward and largely common cause. The Agricultural Marketing (Establishment of a National Dairy Board) Regulations 1991 (Regulations) were promulgated by the Minister of Agriculture (4<sup>th</sup> Respondent) pursuant to powers vested in him by Section 3A of the Agricultural Marketing Act, 1991. The purpose of these Regulations was to provide the legal framework for the establishment of the National Dairy Board (1<sup>st</sup> Respondent) and matters incidental thereto.
- [2] Crucially, the Regulations provide for the establishment of the Board, its composition, the tenure of office of its members and procedure for their removal from office. It is apposite to reproduce the provisions of these Regulations which are of relevance to this case. They provide that:

*“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.*

*Construction of Board*

4. (1) *The Board shall consists of the following nine office bearers.*

*Chairman – Principal Secretary of Agriculture,  
Secretary – Executive Director of the Board appointed by  
the Minister*

*Members – two producer representative 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) *Six members of the Board shall form a quorum*
- (3) *The Board may from time co-opt persons with the specific knowledge, expertise or skill to assist the Board and such persons may attend the meetings of the Board but may not vote.*

*Tenure of Office*

- 5. ***(1) The Members of the Board shall hold office for a period of three years.***  
***(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)*

[5] Acting in terms of Section 4 (1) of the Regulations, the Lesotho Chamber of Commerce and Industry (2<sup>nd</sup> applicant) on the 10<sup>th</sup> January 2018, nominated the 1<sup>st</sup> applicant as its representative in the 1<sup>st</sup> respondent. This nomination was done by a letter annexed to the applicant’s founding affidavit marked “Annexure “A”, and this is further confirmed by the Secretary General of the 2<sup>nd</sup> applicant, Mr. Fako Hakane in his confirmatory affidavit. The 1<sup>st</sup> applicant has been a member of the 1<sup>st</sup> respondent since 2008 consequent to his re-nomination by the 2<sup>nd</sup> applicant. In his letter to the 2<sup>nd</sup> applicant, the Principal Secretary for the Ministry of Agriculture as the chairperson of the 1<sup>st</sup> respondent requested nomination by the 2<sup>nd</sup> applicant of its representative in the Board as the 1<sup>st</sup> applicant’s tenure had come to an end by effluxion of time.

This letter was authored on the 08<sup>th</sup> January 2018. Promptly, the 2<sup>nd</sup> applicant re-nominated the 1<sup>st</sup> applicant to the Board.

- [4] On the 26<sup>th</sup> February 2020 the 4<sup>th</sup> respondent (Minister) authored a letter to the 1<sup>st</sup> applicant, couched as follows (in relevant parts):

“RE: TERMINATION OF YOUR TENURE BY OPERATION OF THE LAW.

*Reference is made to the meeting of the 13<sup>th</sup> January 2020 where you were present, and your letter dated 24<sup>th</sup> January 2020, in relation to the above-captioned subject matter. As you are aware, Section 5 of the Agriculture Marketing Regulations, 1991 provides that members of the Board shall hold office for a term of three (3) years. Our records indicate that you have been in the Board for more than three (3) years. You are therefore informed that your tenure has terminated by operation of law as per the aforementioned provision.*

*By this communication, you are required to return any property of the Board that is in your possession. You are also reminded that you are prohibited from disclosing any Board’s information (that you acquired during your tenure) without the prior written consent of the Board.”*

- [5] Consequent to this letter, the 1<sup>st</sup> respondent, on the 10<sup>th</sup> March 2020, made a request to the 2<sup>nd</sup> applicant to nominate its representative to the Board. It is not clear to me why the Minister would write the above letter, and why Board would ask the 2<sup>nd</sup> applicant to nominate its representative when it was in possession of the 1<sup>st</sup> applicant’s nomination dated 10<sup>th</sup> January 2018 alluded to in the preceding paragraphs. Is it a question of poor record keeping gone haywire or is it merely a question of an honest mistake on their part or is there skullduggery at play here? This factual scenario raises more questions than answers. Equally symptomatic of these concerns in the Minister’s reasons for suggesting that the 1<sup>st</sup> applicant’s term had expired *ex lege*. Being the

department responsible for this Board can the Ministry and the Minister seriously argue that they were not aware of the 1<sup>st</sup> applicant's January 2018 nomination? If the answer is in the affirmative, why this dead silence all along, that the Board is not fully constituted.

[6] Faced with this scenario the applicants approached this court on an urgent basis on the 28<sup>th</sup> May 2020 for a review of the 4<sup>th</sup> respondent's decision to terminate the 1<sup>st</sup> applicant's membership of the 1<sup>st</sup> respondent. I determined then that the matter was not urgent given the delay between termination of membership and the lodging of this matter. The matter had obviously to proceed in the ordinary manner. This application is opposed, and in opposition the respondents' case is that the 1<sup>st</sup> applicant's membership was correctly terminated by the Minister because he had been a member of the 1<sup>st</sup> respondent for a very long time.

[7] The applicant's arguments are easy to understand, and they turn on the non-compliance with the jurisdictional facts for terminating membership of the Board members. That the 1<sup>st</sup> applicant was nominated by the 2<sup>nd</sup> applicant is without doubt. In terms of S.4 (1), it is the 2<sup>nd</sup> applicant which is vested with power and discretion to nominate its representative in the Board, and once so nominated she/he becomes a Board member. The 4<sup>th</sup> respondent (Minister) does not have any stake in the nomination of this individual, whoever is nominated by the 2<sup>nd</sup> applicant, as a matter of the law becomes the Board member. The Minister does not have power to reject the nomination. Both Adv. Molati for the 1<sup>st</sup> and 2<sup>nd</sup> respondents and Adv. Lebakeng for the 3<sup>rd</sup> to 5<sup>th</sup> respondents argued that the fact that the 1<sup>st</sup> applicant had been a nominee of the 2<sup>nd</sup> applicant continuously since 2008 raise serious questions about

corporate governance, thereby entitling the Minister to scupper his re-appointment. This argument lacks merit as it flies in the face of S.4 (1) of the Regulations, which empowers the 2<sup>nd</sup> applicant to nominate whomsoever it desires for however long it deems appropriate, as the Regulations do not place any cap on the number of times a person should be re-nominated by the 2<sup>nd</sup> respondent. I turn to consider whether the jurisdictional facts for determination of the 1<sup>st</sup> applicant's membership were satisfied in this matter.

- [8] A jurisdictional fact refers simply to the condition precedent for the exercise of a statutory power. These conditions precedent may either be substantive or procedural. Thus, in the case of **Meyer v South African Medical and Dental Council 1982 (4) SA 451 (T)** at 454 A – D, 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 be exercised. In such a case, the objective existence of the jurisdictional fact preclude to the exercise of that power in a particular case is justiciable 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 (citations omitted). On the other hand, it may fall into the category comprised by instances where the statute itself has entrusted the repository of the power 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, the 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 justiciable in a court of law. The court can interfere and declare the exercise of the power invalid on the ground of a non-observance of the 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 an Aid Fund and Another v Minister of Justice 1967 (1) SA 31 (c)34F – H)*



[9] In terms of S.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.

[10] Undoubtedly, in the present matter, none of these two jurisdictional facts existed to justify termination of the 1<sup>st</sup> applicant's membership of the Board. It follows that the Minister's determination of the 1<sup>st</sup> applicant's membership is unlawful.

[11] Adv. Lebakeng, for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents, had argued that the Minister, not the 2<sup>nd</sup> applicant has power to appoint the Board members. In support of their argument they cited S. 34 of the Interpretation Act 1977 which stipulates that:

*“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 the power –*

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

The argument went on that, in view of this section, the fact that Minister has power to appoint, he also has power to terminate membership. S.34 of the

Interpretation Act is not applicable in this case, for simple reason: there is no uncertainty as to appointment and termination procedure such as would require its invocation, because s. 5(2) of the Regulations provides for reasons and procedure for terminating membership. At the risk of being repetitious, the Minister's power of termination is conditioned by this section. The Minister may only terminate membership on recommendation of the Board following the findings of misconduct or incompetence against a member. Outside these legislatively delineated parameters, the Minister cannot purport to exercise his power of termination, any such exercise of power is *ultra vires* the Regulations, and *void ab initio*.

[12] In the result:

(a) The application succeeds with costs.

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**MOKHESI J**

**For the Applicants:**

**MR. Q. LETSIKA**  
**From Mei & Mei Attorneys**

**For the 1<sup>st</sup> and 2<sup>nd</sup> Respondents:**

**ADV. L. MOLATI**  
**Instructed by Mukhawana Attorneys**

**For the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents: ADV. T. LEBAKENG**