IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) 24/2010

In the matter between:

THE LIQUIDATOR (LESOTHO BANK)
(in liquidation) **APPELLANT**

and

KHOMO SOLOMON MOLAPO **RESPONDENT**

CORAM : RAMODIBEDI, P
MELUNSKY, JA
SCOTT, JA

HEARD : 6 APRIL 2011
DELIVERED : 20 APRIL 2011

SUMMARY

Liquidator consisting of a partnership or joint venture between an accountants firm and a firm of attorneys – whether illegal in terms of Accountants Act, 9 of 1977 and Legal Practitioners Act, 11 of 1983. Partnership or joint venture not per se illegal.

What is illegal in terms of section 18 (e) of the Accountant Act is:

i) For an accountant to permit an attorney to participate in the profits of an accountant's professional work (as an accountant); or

ii) For an accountant to participate in the profits of the professional legal work of an attorney.

In terms of section 31(5) of the Legal Practitioners Act, it is not permissible for an attorney to share with any person other than a practicing attorney any portion of his professional fees as an attorney.

Special plea raised by respondent alleging that joint venture or partnership between accountant and attorney illegal – special plea decided without evidence – no proof that sections of aforesaid Acts contravened.

Court a quo incorrectly assuming that any such partnership or joint venture illegal.

Appeal accordingly upheld.

JUDGMENT

MELUNSKY, JA

[1] On 31 January 2001 the Lesotho Bank ("the Bank") was placed under voluntary winding-up by resolution of its sole shareholder, the Government of Lesotho, a procedure authorized by the Lesotho Bank (Liquidation) Act 2 of 2001, ("the Act"). In terms of the resolution, the KPMG/Harley & Morris was appointed as the liquidator.

[2] In the High Court the liquidator (the appellant in the appeal) sued the defendant (the present respondent) for payment of money lent and advanced and other relief. The declaration is not a model of clarity. It alleges that the *plaintiff* lent and advanced M65 688 to the defendant and that payment of the amount was secured by way of a Deed of Hypothecation registered in favour of the *plaintiff* in the office of the deeds registry. However the mortgage bond upon which the cause of action is based reflects that the money was lent and advanced to the defendant not by the plaintiff or the Bank but by Lesotho Building Finance Corporation ("the Corporation") which is the mortgagee under the said bond. However that may be, these deficiencies in the declaration do not arise in the appeal. In fact the respondent in his plea on the merits admits that the amount of money was lent and advanced to him but he alleges that he repaid the full amount to the Corporation

"before it was merged with Lesotho Bank".

[3] The respondent raised two special pleas and pleaded over on the merits. The first special plea was abandoned and nothing further needs to be said about it. The second special plea was upheld with costs by Nomngcongo J in the Court a quo. The effect of this decision was to put an end to the appellant's claims although no specific order was made in that regard. This is an appeal by the appellant against the decision of the High Court.

[4] The special plea with which this Court is now concerned is based upon alleged contraventions of the Accountants Act, 9 of 1977, the Legal Practitioners Act, 11 of 1983 and the Companies Act, 25 of 1967. The Court a quo held that the appellant was conducting an illegal partnership or joint venture between KPMG, a firm of

accountants, and Harley & Morris, a firm of attorneys. In this regard it relied on the following statutory provisions:

Section 18 (e) of the Accountants Act which reads:

> "No member [i.e. a registered accountant or licensed accountant] shall –
>
> (e) directly or indirectly allow or agree to allow any attorney or advocate to participate in the profits of the member's professional work or participate in the profits of the professional work of an attorney or advocate".

Section 31 (5) of the Legal Practitioners Act reads:

> "An attorney, notary public or conveyancer shall not make over, share or divide with any person other than a practicing attorney, notary public or conveyancer either by way of partnership, commission or allowance or in any other manner, any portion whatsoever of his professional fees."

Section 239 (1) (c) of the Companies Act provides that any person "under legal disability" is disqualified from being appointed a liquidator of a company that is being wound-up.

[5] The appellant replicated to the special plea by alleging

that KPMG and Harley & Morris concluded an agreement of joint venture; that the parties to the joint venture are not contravening any laws regulating the accounting or legal professions; that they are delivering a specialist corporate service and are not sharing professional fees. The replication emphasizes that the appellant was appointed as liquidator of the Bank in terms of the winding-up resolution which was signed by the Minister of Finance and Development Planning. It is, moreover, apparent from the resolution that the appellant's appointment was to be:

> "on such terms and conditions as shall be set out in the contract for liquidation service between the Ministry of Finance .....and the liquidators".

[6] Before dealing with the principal issue – whether the KPMG – Harley & Morris joint venture is conducting an illegal partnership – it is necessary to make some preliminary observations. The first is that the learned judge a quo made specific factual findings without hearing

oral evidence and without having the contract for liquidation service or the joint venture agreement before him. (The latter agreement has since been annexed to the respondent's heads of argument for the appeal and, since it has been registered in the deeds registry, it is a document that will be referred to in due course). The second is that the learned judge, without having knowledge of the terms of the joint venture agreement, used the expressions "partnership" and "joint venture" interchangeably. Of course the two forms of contract do not always share the same essential provisions, although, as Holmes AJA mentioned in Bester v van Niekerk 1960 (2) SA 779 (A) at 785A, a joint venture, even in respect of a single transaction is a partnership if the essentials mentioned by Pothier on Partnership are present. Having regard to the terms of the joint venture agreement, I am of the view, for reasons which will be given later, that the joint venture

between KPMG and Harley & Morris is indeed a partnership although nothing turns on this for the purposes of the appeal.

[7] Nomngcongo J's conclusion was based purely on his reading the pleadings and, in my view, on an incorrect appreciation of the terms of the statutes. He said the following:

> "The plaintiff argues that it is not contravening any laws regulating the auditing or legal profession and not sharing professional [fees]. Now it may well be that in the ordinary course they operate separately and independently but for the purpose of liquidating Lesotho bank, they operate as a partnership or a joint venture and a[s] such by definition they share profits. This is what is specifically prohibited and in so many words by both the Accountants Act and the Legal Practitioners Act. These acts place it beyond any doubt that both professions cannot participate or share profits or partner[s] with any persons or professions other than their own. Yet this is precisely what the entity KPMG/Harley & Morris purport to do. This in my view they cannot" (my underlining).

[8] Where the learned judge erred was in holding that an accountant and an attorney cannot, in terms of the relevant statutes, form a partnership or joint venture. The

acts in question do not prohibit this. Nor is it prohibited for accountants and attorneys to share profits. In terms of the Accountants Act what is prohibited is for an accountant:

> i) To permit an attorney to participate in the profits of his (the accountant's) professional work; or
>
> ii) To participate in the profits of the professional work of an attorney (my underlining).

What is clearly envisaged in (i) is the accountant's professional work qua accountant and not in any other capacity and in (ii) the professional work of an attorney qua attorney.

[9] In terms of the Legal Practitioners Act it is prohibited for an attorney to share any portion of his professional fees

with any person other than another practicing attorney (again, my emphasis). In this section, too, the reference to the attorney's professional fees must obviously be understood to refer to his professional fees as an attorney.

[10] Nor does the inept manner in which the special plea was drafted assist the respondent. The respondent's attorney, too seems to have been under the erroneous impression that it was unlawful per se for an accountant and an attorney to share profits arising out of a joint venture or partnership undertaking. The allegations in the special plea were that it was unlawful for an accounting firm to go into a "gainful venture" with a legal firm and that it was unlawful for a legal firm to enter into a "gainful venture" with an accounting firm.

[11] Furthermore the Court a quo erred in making a factual

finding purely on the basis of the pleadings. The alleged illegalities on which the respondent relied (however inadequately pleaded) had to be established by evidence. The respondent had the onus to prove the allegations raised in the special plea: for he did not content himself with a mere denial of the appellant's claim, he set up a special defence and for his defence to be upheld, he had to satisfy the court that he was entitled to succeed on it (see Pillay v Krishna & Another 1946 AD 946 at 952); and the fact that the appellant replicated that the two entities were not sharing their respective professional fees raised an obvious dispute of fact. The respondent's contention that the special plea is a matter of law and did not require viva voce evidence is untenable. Whether KPMG or Harley & Morris breached one or both of the statutes is very much a matter of fact. The same conclusion was reached in the High Court by Majara J in The Liquidator, Lesotho Bank

(In Liquidation) v Thabiso Tjamela (CIV)/T/132/2006, a decision which the Court a quo regrettably declined to follow.

[12] The appellant's reliance on section 239(1) (a) of the Companies Act was not argued by his counsel. It is therefore unnecessary to deal with this point.

[13] I have thus far covered the matters dealt with by the Court a quo and, for the reasons given, I am of the view that the learned judge was wrong in upholding the special plea. I have, however, already alluded to the fact that the joint venture agreement between KPMG and Harley & Morris is now before this Court and, especially as the respondent's counsel strenuously submitted that it established the illegality of the KPMG/Harley & Morris joint venture or partnership, it is appropriate that I should deal

with it. Counsel for the appellant did not object to this procedure.

[14] I do not intend setting out the contents of the entire agreement but I will refer to the more significant portions thereof. First, the question of a partnership. The essentials of a partnership are that each partner brings something into the partnership; that the business is carried on for the benefit of both partners; that the object is to make a profit; and that the agreement should be a lawful contract. These requirements are present in the joint venture agreement, subject to the question of legality which is, of course, the vital question for determination in this appeal. Counsel for the appellant conceded, quite correctly, that whether the transaction between KPMG and Harley & Morris was a joint venture or a partnership does not affect the outcome of the appeal.

[15] I now turn to consider whether the partnership is an illegal one having regard to the provisions of the joint venture agreement. The respondent relied on the following clauses:

1. The preamble which reads:

> "Whereas
>
> A KPMG practice in Lesotho providing consulting and financial services and Harley & Morris practice in Lesotho providing legal services.
>
> B KPMG and Harley & Morris consider their skills complement each other and are desirous of entering into mutually beneficial joint ventures."

2. Clause 1 of Annexure 'A' which, under the heading "Purpose of Joint Venture" provides:

> "Per clause 1 is to enter into joint ventures with a view of profit combining legal and financial expertise in the following areas: Corporate restructuring, liquidation and forensic reviews."

3. Clause 8, which under the heading "Sharing of Profits" reads as follows:

> "The net profit disclosed by the management accounts will

> be divided equally between KPMG and Harley & Morris. However, this sharing may be changed by mutual agreement."

[16] The liquidator's duties in this matter are contained in section 8 of the Act. These include taking possession of the assets of the Bank; collecting the debts of the Bank; paying creditors and depositors of the Bank; lodging an account of the assets of the Bank with the Master; and paying all costs consisted with the liquidation of the Bank. For carrying out the duties the liquidator's fees will either be fixed according to the tariffs contained in the sixth table of the seventh schedule to the Companies Act or, this being a member's voluntary winding up, determined by the sole member in terms of section 215 (1) of the said Act. In the latter case the question of payment of liquidator's fees might have been dealt with by agreement in the contract of liquidation service but this document is not before us.

[17] The liquidator's fees referred to in par [16] are not the net profit subject to division between KPMG and Harley & Morris in terms of Clause 8 of the joint venture agreement. Clause 7.1 provides:

> "Before arriving at the profit for division between the parties, the joint venture will meet any expenses that have been mutually agreed."

The expenses in terms of Clause 7.2 include charges for time spent on joint venture work by KPMG and Harley & Morris respectively at mutually agreed charge out rates according to time sheets. Consequently, and in terms of the agreement any partnership work carried out by either KPMG or Harley & Morris is time–costed and charged at agreed rates. Thus, as Lyons AJ pointed out in The Liquidator Lesotho Bank v Lesotho Defence Force and Others (CIV/APN/225/2007, in the Commercial Division of the High Court, delivered on 23 September 2010), the costs and profits of KPMG in respect of professional accountancy

work are an expense to the joint venture and are paid in full to KPMG. The same procedure applies in respect of the fees and profits of professional legal work carried out by Harley & Morris. These fees and profits are therefore excluded from the net profit earned by the partnership and are not subject to profit sharing in terms of Clause 8. Clause 7.2, moreover, is not limited to professional accounting and legal work and insofar as Lyons AJ might have expressed a contrary view it would not be in accordance with the agreement. The clause covers any joint venture work carried out by the respective partners, for instance, time spent by one of the partners in attending an auction sale of the Bank's assets.

[18] The joint venture agreement, on a proper interpretation of the document, does not assist the respondent. In order to obtain success on the special plea

the respondent would have had to establish that clause 7.2 was not applied by the parties in relation to the profits of KPMG's professional accounting fees or to the legal professional fees or profits of Harley & Morris. The respondent's election to approach the case as though it were an exception disposes of any further enquiry.

[19] Counsel for the appellant requested this Court to make specific findings on the question of the liquidator's locus standi in judicio. This matter does not arise on appeal and, in any event, Nomngcongo J's finding that locus standi was lacking was based on the incorrect premise that KPMG and Harley & Morris were conducting an illegal partnership. There is therefore no need for us to deal with this aspect.

[20] The order which is made is the following:

1. The appeal is upheld with costs including the

costs of two counsel;

2. The order of the court a quo is set aside and is replaced with the following:

"The special plea raised in paragraphs 1.2 and 1.3 of the defendant's plea is dismissed with costs."

_____

L.S. MELUNSKY
JUSTICE OF APPEAL

I agree:

_____

M.M. RAMODIBEDI
PRESIDENT OF THE COURT OF APPEAL

I agree:

_____

D.G. SCOTT
JUSTICE OF APPEAL

For the Appellant : Adv J.P. Daffue SC and
Adv S. Malebanye

For the Respondent: Mr. M. Ntlhoki