IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C of A (CIV) NO. 12/2017**

LAC/APN/06/2010

In the matter between:

FORMER LESOTHO BANK EMPLOYEES **1ST APPELLANT**

MOKOTJO MPHAKA **2ND APPELLANT**

And

LIQUIDATOR LESOTHO BANK **1ST RESPONDENT**

LESOTHO BANK (In liquidation) **2ND RESPONDENT**

LABOUR COMMISSIONER **3RD RESPONDENT**

ATTORNEY GENERAL **4TH RESPONDENT**

CORAM: **MUSONDA, AJA**

PEETE, AJA

MTSHIYA AJA

HEARD : 26 NOVEMBER 2018

DELIVERED : 7 DECEMBER 2018

SUMMARY

Effect of a court order on a liquidated company. There is no need to issue a court order which cannot be enforced.

JUDGMENT

MTSHIYA, AJA

[1] This is an appeal against the judgment of the Labour Appeal Court wherein on 1 March 2017 it dismissed a review application by the appellants. In dismissing the review application, the court a quo reasoned as follows:

> *"In this case since the 1st and 2nd Respondents no longer exist, and Applicants have not claimed against anyone else and no more funds are available for distribution, the relief sought would clearly be an exercise in futility. On this basis alone we are constrained to dismiss the application."*

[2] The appellants, dissatisfied with the court *a quo*'s decision appealed and their grounds of appeal are as follows:

> *"1. The learned judge erred and/or misdirected himself in holding as he did that the court had to refuse the granting of the prayers sought on the basis that its judgment would be unenforceable. This is moreso when neither party had*

raised the issue of unenforceability of the judgment nor the parties invited to address the court on that subject.

2. *The court erred and/or misdirected itself in not considering the prayers in the notice of motion.*

3. *The appellants reserve the right to file such further and/or better grounds of appeal as permitted by the Rules of this Honourable Court."*

[3] It appears this appeal is only by the 2nd appellant. There is no support from the other employees. Despite the absence of that evidence of support from the rest of the cited appellants, Advocate Pheko argued that the issue had never arisen in the court *a quo*. It is, however, necessary that the decision to appeal must clearly attach to particular appellants, I therefore agree with Advocate Hoffman, for the respondents, that there is no evidence that the appeal is by all appellants. I shall therefore proceed on the basis that the appeal is by the 2nd appellant alone.

[4] The background to this case is that at all material times the appellants were employees of the 1st respondent (the Lesotho Bank). The Bank officially closed down on 31 July, 1999 and the appellants were retrenched. Later on, and under Standard Bank, a new Bank, called Lesotho Bank 1999 Ltd was established. The new Bank offered employment to all the retrenched employees of the closed Lesotho Bank. The said new Lesotho Bank subsequently went into voluntary liquidation.

Upon termination of employment, on 31 July 1999, the 1st respondent elected to pay the appellants on the basis of the highest option from the three available statutory options, namely severance pay, gratuity and six (6) month's salary.

[5] Notwithstanding the fact that the 1st respondent was only granted an exemption by the Labour Commissioner on 13 January 2005, it stated that it had, however, paid in accordance with the exemption.

[6] The exemption letter granted to the 1st respondent, when it was already under liquidation, read as follows:-

> ***"RE: APPLICATION FOR EXEMPTION FROM SECTION 79 (1) OF THE LABOUR CODE ORDER 1992***
>
> *Reference is made to your letter dated 30th November 2004 in which you requested to be exempted from complying with the provisions of Section 79 (1) of the Labour Code Order, 1992.*
>
> *After perusal of the schedule reflecting benefits due to the former employees of Lesotho Bank (In Liquidation), the Labour Commissioner has found that the scheme offers more advantageous benefits than severance pay.*
>
> *Lesotho Bank (In Liquidation) is therefore exempted from the effects of Section 79 (1) of the Labour Code Order 1992 subject to the condition that should in any event severance pay prove to be more advantageous than benefits under the scheme the provisions of Section 79 (1) shall be invoked and the exemption shall not apply"*

The above exemption was sent to A. S. McAlpine, a representative of the appointed liquidator of the 2nd respondent.

The appellants were not satisfied with the payments they had received from the 2nd respondent. They made unsuccessful representations to the Directorate of Dispute Prevention and Resolution.

[7] Upon being granted leave by the High Court to proceed against a company under liquidation, appellants then approached the Labour Court for relief. Appellants prayed for orders:-

a) Directing the respondents to pay all applicants that had completed more than one year continuous service with the 2nd respondent, their severance payments;

b) Directing the respondents to pay gratuity to all those applicants who had finished their ten (10) years service with the 2nd respondent and/or those that were entitled to their *pro rata* gratuity payment;

c) Directing the respondents to pay to all those applicants who were never paid their six month's salary such entitlements as were paid to others;

d) Declaring that the decision of the Labour Commissioner dated 13th January, 2005 in terms of which the respondents were exempted from paying severance pay *null and void* and of no force and effect;

e) Costs of suit;

f) Further and/or alternative relief.

[8] On 24 November 2006 the Labour Court ruled that it lacked jurisdiction to challenge the decision of the Labour Commissioner.

[9] The appellants then took the matter to the Labour Appeal Court, which, on 1 March 2017, dismissed their application and hence this appeal.

In the matter dismissed by the Labour Appeal Court, the appellants had sought the following relief:-

> *"1. The review and setting aside of a decision of the Labour Commissioner exempting the Lesotho Bank (In Liquidation) from paying severance to the applicants.*
>
> *2. An order directing first and second respondents to pay severance pay to those of the applicants who are entitled to such payment in terms of the law.*
>
> *3. Costs of suit.*
>
> *4. Further and for alternative relief."*

[10] As can be seen from the grounds of appeal reproduced under paragraph 2 of this judgment, the appellants submit that the court *a quo* went into error in refusing the orders they had prayed for on the ground that the 2nd respondent had been liquidated, and therefore any order granted by the court would be unenforceable.

[11] In addressing the position of the appellants, the court *a quo*, briefly recorded the appellants' arguments in support of their case as follows:-

> *"Applicants contend that the exemption the Labour Commissioner purported to grant the Bank is unlawful, invalid, irregular and legally untenable because:*
>
> *a) Firstly, it was only granted on 13 January 2005 pursuant to an application to 3rd respondent by letter dated 30 November 2004, a long time after the employment relationship between the parties came to an end in July 1999. The Labour Commissioner "could only exempt an employer and not an erstwhile employer from paying severance pay;*
>
> *b) Secondly, the employees' entitlement of severance pay had already accrued at the time when the purported exemption was made. [They] therefore had existing proprietary rights in the nature of severance pay at time when the … purported exemption was made. [They] were therefore entitled to be heard before the said exemption could be made in as much as [it] prejudicially affected their … proprietary rights. The exemption rendered them worse of, because it meant that they would no longer be entitled to severance pay in addition to the other payments that were due to them;*
>
> *c) Thirdly, the purported exemption was not made by the Labour Commissioner but by one B. Bitso purporting to make it on behalf of the Labour Commissioner. Bitso was not legally competent to grant any exemption."*

In turn, the court also briefly recorded the 2nd respondent's case in the following terms:-

> *"The liquidator filed detailed records showing that unlike what they allege, Applicants upon retrenchment, prior to liquidation, were paid terminal packages comprising:-*
>
> *a) Severance pay (amounting to 6 months' salary);*
> *b) Accumulated leave;*

c) *One (1) month's notice;*
d) *Gratuity (for those qualified in terms of the Bank's Conditions of Service for Permanent Staff).*

In addition, during the liquidation, they were paid:-

a) Their state pensions; and

b) Funds distributed in accordance with the non-contributory Lesotho Bank Pension Fund.

The Liquidator contended that severance pay referred to in paragraph 11 point (a) above far exceeded the statutory severance pay Applicants were entitled to under section 79 (1) of the Labour Code.

The Applicants did not reply to Mr. McAlpine supplementary affidavit amplifying the Bank's defence and furnishing the above mentioned termination payment records. Instead their Counsel in his heads of argument argued the payment schedules appended thereto (as Annexure B-F, pages 110 to 216 of the bundle) were inadmissible hearsay evidence."

[12] Having considered the above positions of both parties, the court *a quo*, to its credit, I must say, came to the following conclusion:

"Without even going into the merits of the case, the biggest difficulty which faces us is that even if this court was persuaded to review and set aside the decision of 3rd Respondent and direct 1st and 2nd Respondents to pay severance pay to the qualifying Applicants as prayed, the court would be making orders which cannot legally and practically be enforced, it is a well-established and elementary principle that courts should refrain from making orders which cannot be enforced.

In this case since the 1st and 2nd Respondents no longer exist, and Applicants have not claimed against anyone else and no more funds are available for distribution, the relief sought would clearly be an exercise in futility. On this basis alone we are constrained to dismiss the application."

The court a quo was dealing with an application where evidence was in the form of affidavits. Clearly in the absence of averments

made in the unanswered supplementary affidavit of McAlpine, the above reasoning of the court a quo cannot be faulted.

[13] In their heads of argument, the appellants submitted as follows:-

> *"The first ground of Appeal is that, the learned Judge erred and/or misdirected himself in holding as he did that the court had to refuse the granting of the prayers sought on the basis that its judgment would be unenforceable. This is more so when neither party had raised the issue of unenforceability of the judgment nor the parties invited to address the court on that subject. It is common cause on the papers that this issue of the unenforceability of the judgment was neither pleaded nor argued in the court a quo."*

[14] The above submission does not reflect the truth because in paragraph 3.2 of his supplementary affidavit, which was duly served on the appellants, A. S. McAlpine, on behalf of the 1st and 2nd respondents, states as follows:-

> *"No further assets are held by the liquidator in casu and the banking account operated by it has been closed. The final liquidation and distribution account has been lodged with the Master and there are no further funds to be distributed by the liquidator."*

The above point was again raised in arguments before the Labour Court in the following terms:-

> *"Mr McAlpine makes clear in his supplementary affidavit that no assets remain (in other words all have been distributed or dealt with), a final liquidation and distribution account has been lodged with the Master and that there are no further funds to be distributed."*

[15] It cannot therefore be correct for the appellants to argue that the issue of unenforceability was never raised in both pleadings and submissions. In the absence of contrary evidence proving that liquidation of 2nd respondent is still in progress, I am disabled from faulting the court *a quo*'s decision. I therefore agree that the 2nd respondent has indeed been liquidated. That is the only evidence before me. The liquidation therefore renders the 'appeal moot' as submitted by the 1st and 2nd respondents.

The appellants up to this hearing, were always aware of the stated position of the 1st and 2nd respondents but for reasons best known to themselves, they did not deem it necessary to refute the contents of A. S. McAlpine's supplementary affidavit. That was fatal to their case.

[16] Indeed Section 152 of the Companies Act No. 18 of 2011 provides as follows:-

> *"1. The liquidation of a company is completed when the liquidator files with the Registrar a final report and final accounts of the liquidation and a statement that:-*
>
> *a) Known assets have been disclaimed, realized or distributed without realization;*
> *b) Proceeds of realization have been distributed and*
> *c) The company is dissolved.*

2. *Upon receipt of a final report and statement from a liquidator, the Registrar shall endorse the register and in the record of the company to show that it has been dissolved in liquidation,*

3. *Upon sending or delivering to the Registrar a final report, the final accounts and the statement of completion of liquidation, the liquidator ceases to hold office, but this section does not limit the court or the Master's supervision of the liquidation or enforcement of the liquidator's duties."*

Indeed, as I have already pointed out, in the absence of evidence to the contrary, the 2nd respondent has in terms of the law been dissolved/liquidated. Accordingly any order issued against the 2nd respondent would, as the court a quo correctly noted, be unenforceable. To that end I fully agree that no purpose would be served by considering whether or not to grant the prayers of the appellants.

[17] The above position of the law finds support in a number of cases decided in Southern Africa. ***Integail Aid South Africa vs Magidiwana & Others 2015 (2) SA 568 (SCA)*** it was said:-

> *"Courts should not and ought not to decide issues of academic interest only. The much is trite. In* ***Radio Pretoria v Chairman, Independent Communications Authority of South Africa and Another 2005 (1) SA 47 (SCA)*** *this court expressed its concern about the proliferation of appeals that had no prospect of being heard on the merits, as the order sought would have no practical*

effect. It referred to ***Rand Water Board v Rotek Industries (Pty) Ltd 2003 (4) SA 58 (SCA)*** *para 26 where the following was said:*

> *'The present case is a good example of this Court's experience in the recent past, including unreported cases, that there is a growing misperception that there has been a relaxation of dilution of the fundamental principle … that courts will not make determinations that will have no practical effect.'"*

See also ***The Prime Minister and Others C of A (CIV) 5/2016***

In ***Mansell v Mansell 1953 (3) SA 716***, the court said:-

> *"If the plaintiff asks the court for an order which cannot be enforced, that is a very good reason for refusing to grant his prayer. This principle appears to be so obvious that it is unnecessary to cite authority for it or to give authority for it or to give examples of its operation."*

[18] I also want to record that the appellants correctly submitted that courts should only deal with those issues pleaded. That is correct and is exactly what happened *in casu*. The issue relied on, in calling for the court to interfere with the decision of the court *a quo* was pleaded and argued. Once that ground of appeal falls away, then there is no purpose to be served by going into the appellants' other prayers. The appeal should therefore fail.

[19] As to the issue of costs, I think it is only fair that this being largely a labour matter, each party should bear its own costs.

[20] I therefore order as follows:-

1. The appeal be and is hereby dismissed.

2. Each party shall bear its own costs.

N. T. MTSHIYA
ACTING JUSTICE OF APPEAL

I agree:

P. MUSONDA
ACTING JUSTICE OF APPEAL

I agree:

S. PEETE
ACTING JUSTICE OF APPEAL

For Appellants : Adv. N. B. Pheko
For Respondents : Adv. G. I. Hoffman