

**IN THE APPEAL COURT OF LESOTHO**

**HELD AT MASERU**

**C OF A (CIV) NO.35 OF 2020**

**CIV/APN/375/2019**

In the matter between:

**FORMER EMPLOYEES OF THE LESOTHO  
AGRICUTURAL DEVELOPMENT BANK  
APPELLANTS**

AND

**THE GOVERNMENT OF KINGDOM  
OF LESOTHO**

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

**RESPONDENT**

**THE MINISTER OF FINANCE**

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

**RESPONDANT**

**THE ATTORNEY GENERAL**

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

**RESPONDANT**

**CORAM:**

DR K E MOSITO P

P T DAMASEB AJA

M H CHINHENGO AJA

**DATE HEARD:**

16 APRIL 2021

**DATE DELIVERED:** 14 MAY 2021

## **SUMMARY**

*Whether promises made by the Government of Lesotho to former employees of the defunct Lesotho Agricultural Development Bank (LADB) a juristic person with separate legal personality from the Government as shareholder constituted an enforceable substantive legitimate expectation at the instance of the former employees for the payment of their ‘terminal and pension benefits’ which were allegedly due from the LADB Pension Fund - which was also a separate juristic person.*

## **JUDGMENT**

### **PT DAMASEB AJA**

#### **Introduction**

[1] This appeal arises from an unfulfilled promise made by the Government of Lesotho that it will ensure the payment of the ‘terminal and pension benefits’ of the former employees (‘the former employees’) of the defunct Lesotho Agricultural Development Bank (‘LADB’ or ‘the Bank’) when the latter was wound-up.

[2] The LADB was established by an act of Parliament as a statutory body with separate legal personality with the Government of Lesotho as its sole shareholder. In terms of s

3(2) of the Lesotho Agricultural Development Bank Act 5 of 1976 ('LADB Act'):

*'The Bank shall be a body corporate with limited liability and perpetual succession and common seal and its corporate name capable of suing and being sued and of purchasing or otherwise acquiring holding or alienating moveable or immoveable property and of doing or performing all such acts as are necessary for or incidental to the performance of the duties imposed on it and the exercise of the powers conferred upon it by or under this Act.'*

[3] Section 16 of the LADB Act limits the liability of the shareholder 'to the amount of shares held' by it.

[4] The combined effect of ss 3(2) and 16 is that the LADB was created as a separate legal person from the Government of Lesotho as shareholder. It was thus in law not in the hallowed words of Lord Macnaghten 'the agent of the subscribers [or shareholders] or trustee of them'.<sup>1</sup>

[5] Section 12(3) of the LADB Act provides:

*'The Bank may grant pensions gratuities or retiring allowance to officers and employees of the Bank and require them to contribute to any pension or provident fund or superannuation scheme.'*

[6] It is common ground that in 1987 the LADB established a pension fund styled 'The Lesotho Agricultural Development Bank Pension Fund' ('the Pension Fund') to provide to it

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<sup>1</sup> *Salomon v A Salomon & Co Ltd* [1897] AC 22 at 51.

employees those f benefits specified in the Fund's Rules. Contributions to the Pension Fund were made by the employees and by the Bank as 'Employer'.

[7] The basic facts giving rise to the litigation in the court *quo* can be stated briefly. When the LADB was wound up in 1998 the Government of Lesotho made public statements through the then Minister of Finance giving assurances to the Bank's creditors and employees that whatever was due to them would be paid. The employees allegedly understood that to mean that the Government of Lesotho accepted whatever 'terminal and pension benefits' were due and owing to them arising from their membership of the Pension Fund. The former employees made certain demands on the Government in respect of those alleged benefits and the promises made. When they did not get paid they approached the Ombudsman and the Attorney-General for assistance. Both those functionaries took the view that the statements made by the minister were binding on the Government of Lesotho and that it should pay the former employees. The Accountant-General even went on to calculate the amounts allegedly due and the Ministry of Finance took preparatory steps to pay the former employees based on those calculations. The total debt calculated was an amount close to M300m. No payments were made though and the former employees took their grievance to the Lesotho Parliament which through its 'Portfolio Committee' made clear that the Government of Lesotho was not liable for whatever debts owed to the former employees by the LADB and or the

Pension Fund. The Government of Lesotho then informed the employees that it would not make good on their demands. That led to the litigation which gave rise to the present appeal.

### **The statements**

[8] When in 1998 the LADB fell on hard times financially and could not be rescued the minister responsible for finance at the time the Hon. Leketekete Ketso made two public statements. The first on 23 June 1998 and the second on 3 September 1998. On 23 June 1991 the Minister made this announcement:

*'The Government wishes to make it clear that despite the financial condition of the Bank the Government undertakes to ensure that all employee salary leave termination and pension rights will be honoured.'*

[9] The statement of 3 September 1998 reads:

*'In recent months the Government has endeavoured to find a purchaser for the LADB. However this has been unsuccessful and now Government finds itself faced with the option of closing the Bank as a last resort. Consequently the following shall apply:*

- 1. As of the date hereunder mentioned the LADB is no longer operating.*
- 2. All depositors' funds are entirely guaranteed.*

3. *Cheques will be issued to all depositors of M2000.00 and less plus interest and these cheques will be encashable at any branch of Lesotho Bank.*
4. *All deposits in excess of M2000.00 will be electronically transferred to Lesotho Bank and shall be available to depositors' thereat subject to proof of ownership.*
5. ***Government wishes to make it clear that it also guarantees LADB staff all lawful entitlements such as termination packages leave entitlements pension premiums in lieu of notice and any other due notice payments;***

*Government has now appointed an Administrator to oversee the LADB assist the Government with the closure plan and to administer the Bank's obligations after closure." (My emphasis)*

[10] It is these statements which the former employees allege entitled them to be made good by the Government of Lesotho but which were not and which is the basis for the relief they sought in the High Court over 20 years later.

### **The former employees' affidavit**

[11] On 6 November 2019 the former employees launched proceedings in the High Court seeking the following relief:

1. *Declaring that the applicants had a **legitimate expectation** that the Government of the Kingdom of Lesotho would pay all terminal benefits and pension benefits to the applicants*

*consistently with the promise guarantee and assurance made by the Government of the Kingdom of Lesotho to the Applicants.*

- 2. Reviewing and setting aside the decision of the Government of the Kingdom of Lesotho not to pay the Applicants the terminal benefits and pension benefits guaranteed as unfair and an abuse of power for violating the Applicants' legitimate expectation.*
- 3. Directing the 1st and 2nd Respondents to pay alternatively to facilitate the payment of Applicants' terminal benefits and pension benefits as described and indicated in Annexure A.*
- 4. Compound Interest at the rate 5% per annum from December 2016 to the date of final payment.*
- 5. ALTERNATIVELY to 4 above interest at the Central Bank of Lesotho's prime lending rate from December 2016 to the date of final payment.*
- 6. AS FURTHER ALTERNATIVE to 4 above interest at the Central Bank of Lesotho's prime lending rate from the issue of this summons to the date of final payment.*
- 7. Further and/or alternative relief this Honourable Court deems fit.*
- 8. Costs of this application against the Respondents on Attorney and Client Scale." (Emphasis supplied).*

### **The former employees' case on affidavit**

[12] The affidavit in support of the former employees' case was deposed to by Mr Benjamin Tankiso Salae a former employee of

the Bank. He confirms the basic common cause facts that I set out above. He also confirms that their approach to the Speaker of the National Assembly led to the legislature resolving on 29 March 2019 that the former employees had been paid their benefits by the Pension Fund and therefore the Government of Lesotho was not liable to them.

[13] According to the deponent the statements made by Minister Ketso on behalf of the Government of Lesotho constitute gave rise to 'legitimate expectation of a substantive nature' in favour of the former employees. He alleges that with those statements the Government of Lesotho guaranteed their unfulfilled 'salary leave termination and pension rights'. He states that the Government of Lesotho thus guaranteed the former employees all lawful entitlements in its capacity as a state organ and not as the shareholder of the LADB and that the former employees who had pursued their legal entitlements since the 'restructuring' of LADB Fund in 1994 understood the Government of Lesotho in making the second statement in 1998 to be assuring them of all their legal entitlements.

[14] According to the deponent the fact that the LADB was a separate legal entity from the pre-1994 LADB Fund did not detract from the 'validity extent and remit of the Government of Lesotho's guarantee'. He maintains further that the former employees' 'terminal and pension benefits' and which the Government of Lesotho was historically aware of formed part of their 'lawful entitlements'.



[15] Mr Salae states that the 1987 Fund was dissolved in January 1994 and benefits paid out. The Fund was then 'restructured' in February 1994 with the employees contributing 5% of their salaries. On his own version the reason that the first Fund was dissolved in 1994 was:

*'4.2 Due to some difficulty which the LADB Board of Directors described the Fund as too burdensome to the LADB' and 'the Fund was dissolved in January 1994 with the employees given their respective 2% contribution with compound interest while the 22% employer's (LADB's) contribution remained unpaid and owing to the employees of LADB. It was indicated that the 22% employer's contribution would be paid with compound interest at an unspecified future date.'*

*4.3. The LADB pension Fund was reconstructed in February 1994 and was subsequently ultimately terminated in 1999 after the demise of the LADB in 1998...Under the restructured LADB Pensions Fund only the employees contributed 5% of their monthly salaries while the LADB (employer) did not make any contribution to the Fund for reasons of financial distress indicated above.'*

[16] The former employees allege further that they pursued *'the payment of their terminal benefits and pension benefits with the liquidators of LADB and the Administrators of the LADB Pension Fund which efforts were fruitless ... until now'*.

[17] That they seek to recover from the Government of Lesotho the alleged unpaid benefits after the dissolution of the pre-1994

pension fund is clear from the following allegation in the founding affidavit:

*'6.4. It is important to inform this Honourable Court that the 22% employer's contribution to the 1994 LADB Pension Fund amount was calculated by the Auditor General based on 5% compound rate that was prescribed by the LADB Regulations.'*

[18] It is worthy of note that the former employees did not attach the Rules or 'LADB regulations' as they call them of either the first pension Fund that was dissolved in 1994 or the second Fund that was 'reconstructed' after the dissolution of the first and which was terminated when the LADB was wound up in 1998.

[19] According to the former employees under the 1978 Pension Fund they contributed 2% of their salaries and the Bank as 'Employer' contributed 22% in respect of each 2% contributed by an employee. The monies were then invested for insurance purposes with the 'Insurer' Metropolitan Life Insurance Company Limited. On dissolution of the LADB the former employees were paid 2% of their contributions plus 5% interest. No payment was made of the 22% of the Employer's contribution on 'pension and or lawful entitlements or terminal packages or leave entitlements'. The latter is what they seek to recover from the Government of Lesotho.

## **Opposition**

[20] The successor to Minister Ketso the Hon. Moeketsi Majoro who is cited *nomino officio* as second respondent in the proceedings deposed to the answering affidavit on behalf of the Government of Lesotho. According to the deponent the statements relied upon by the former employees were not intended to mean that Government bound itself to pay them 'terminal and pension benefits' of any kind. According to the Minister the payments referred to in the statements made by Minister Ketso were those that were provided for in the Rules of the Pension Fund and which were already fully satisfied on dissolution of the Fund.

[22] In addition to pleading over on the merits Minister Majoro raised two points of law: The first being prescription. On this view the statements on which the former employees rely were made in 1998 and that any claim based thereon had prescribed in terms of s 2 the Government Proceedings and Contracts Act 4 of 1965 which prescribes after the expiry of two years any claim against the Crown arising '*out of any contract ...or out of any wrong committed by any servant of the Crown or of the Government...*' Secondly Parliament had made a determination that the Government of Lesotho was not liable and thereby obligated the latter not to pay. Since that decision of Parliament stands until set aside the former employees were not entitled to seek review against the Government of Lesotho without first setting aside Parliament's decision-making.

[23] Minister Majoro also maintains that the Government of Lesotho cannot be held liable for debts of the Pension Fund. That is so because the LADB Pension Fund was a separate legal person from LADB and therefore no basis exists in law to impute liability to the Employer (LADB); and further the LADB was a legal *persona* separate from the GOVERNMENT OF LESOTHO and its liabilities cannot be extended to the Government of Lesotho.

[24] With Minister Majoro's answering affidavit the Government of Lesotho discovered the 'Rules of the Lesotho Agricultural Development Bank Pension Fund'. From that it is apparent that the Fund was administered by a 'Principal Officer'. It also emerges therefrom that the Fund was a 'separate corporate body' and that Metropolitan Life was the Insurer of the Fund.

[25] In terms of Rule 4.1:

*'Upon approval of the Fund by the Commissioner the Fund shall become a separate corporate body and legal persona distinct from its members shall be the lawful owner of its property and shall be capable in law of suing and of being sued in its own name.'*

[26] The Rules make provision for the office of and appointment of a 'Principal Officer' by the Employer and whose duties include:

*'4.3.2 to effect group policies with the Insurer for the purposes of insuring all the benefits described in these rules;*

*4.3.3 to arrange for the Employer to collect the contributions payable by the Members and to pay these to the Insurer together with the contributions payable by the Employer...’.*

[27] Rule 6 of the Rules contains very detailed provisions for what was to happen upon the winding up of the Bank. Para 6.1.1 states:

*‘If the Employer is wound up whether voluntarily or not or if the Employer ceases to carry on business the Employer shall instruct the Principal Officer to dissolve the Fund by dividing the monies of the Fund after payment of all expenses incurred in terminating the Fund among the Members and persons in respect of pensions and prospectively entitled to pension in a manner recommended by the Valuator and approved by the Insurer.’*

[28] Rule 6.3 states:

*‘If the Fund is dissolved the principal officer shall continue to hold office for the purpose of settling all matters in connection with the dissolution. When these matters have been concluded the office of principal Officer shall automatically be dissolved.’*

## **The High Court**

[29] On 15 October 2020 Mokhesi J gave judgment in the matter partly finding in favour of the former employees and rejecting a part of their claim. The learned judge dismissed both *in limine* objections taken by the Government of Lesotho

and held that the former employees made out the case for substantive legitimate expectation arising from the undertakings made by Minister Ketso. The judge also held that the undertakings made by the Government of Lesotho did not extend to the former employees' 'pension benefits'. The judge made the following order:

- a) *The decision of the Government of Lesotho not to pay the applicants' terminal benefits is reviewed and set aside as an abuse of power for violating the applicants' legitimate expectations.*
- b) *The 1<sup>st</sup> and 2<sup>nd</sup> Respondents are directed to pay the applicants' terminal benefits -excluding the applicants' pension benefits- as tabulated in the Auditor General's computation filed of record.*
- c) *Compound interest on the amount payable at the rate of 5% per annum from December 2016 to the date of final payment.*
- d) *The applicants are awarded the costs of this application on attorney and client scale.*

[30] The former employees appeal against that part of the judgement and order declining to grant them the 'pension benefits'. The Government of Lesotho cross-appeals against the entirety of the court *a quo*'s judgement and order including the dismissal of the points of law.

[31] I will proceed to consider the appeal and cross-appeal.

## **Prescription**

[32] As Adv. Teele KC for the Government of Lesotho correctly submitted the former employees' case is that the Government

of Lesotho had at all times been ready to pay them on their demands and indeed took preparatory steps towards that end. It is common cause that those preparatory steps were frustrated when Parliament took the view that Government of Lesotho was not liable and should not pay. It must follow Adv Teele submitted that what the former employees wanted was to enforce payment of a debt which the Government of Lesotho had accepted liability for. As far as the Government of Lesotho was concerned therefore the debt was due and payable. On that approach as regards the Government the debt allegedly due could not escape the statutory prescription.

[33] During oral argument counsel for the former employees Adv. Maqakachane for the former employees effectively abandoned the relief for payment of the debt and submitted that if the court agreed with the former employees on the review relief the appropriate course is to make a *declarator* and review and set aside the refusal to pay. It would then be up to the former employees to institute an action for damages.

[34] On that approach according to counsel for the former employees the statutory prescription does not apply as the real dispute between the parties is the Government of Lesotho's refusal to pay and thus frustrating their legitimate expectation of a specific benefit which allegedly was induced by the guarantee to assume the liabilities of the Pension Fund.

[35] I will accept the correctness of that proposition founded as it is on the abandonment of the relief for the payment of a debt. It follows that the remaining cause of action is not hit by s 2 of Act 4 of 1965.

[36] The remaining relief therefore is for a declarator and review both of which are in the discretion of the court.

### **Parliament's decision unchallenged**

[37] Mokhesi J rejected the suggestion by the Government of Lesotho that the Portfolio Committee's decision ought to have been challenged but was not. In the view that I take on the outcome of the appeal on the issue of legitimate expectation I find it unnecessary to decide that issue. In any event it is unlikely to end the litigation as the former employees most likely will revert to court resulting in protracted litigation.

### **Discussion**

#### *Legitimate expectation*

[38] The doctrine of substantive legitimate expectation was recognised in this jurisdiction in *Moorosi Matela and Others v The Government of the Kingdom of Lesotho and Others CIV/APN/197/2019* (unreported dated 14th November 2019) wherein the English approach was adopted as follows:



- a) The statement by a decision-maker giving rise to a legitimate expectation must be *“clear unambiguous and devoid of relevant qualification.”*
- b) The party seeking to rely on the statement or representation *“must have placed all his cards on the table. This is important because it can define the context in which the statement or representation is made”*
- c) The test is how on a fair reading of the statement it was reasonably understood by those who place reliance on it.
- d) The statement must be pressing and focused. *“In this regard ... while in theory there may be no limit to the number of beneficiaries of a promise for the purpose of a substantive legitimate expectation in reality it is likely to be small if the expectation is to be upheld because first it is difficult to imagine a case in which government will be held legally bound by a representation or undertaking made generally or to a diverse class and secondly because the broader the class claiming benefit of the expectation the more likely it is that the supervening public interest will be held to justify the change of position of which complaint is made.”*
- e) The burden of proving the legitimacy of the expectation lies with the applicant in terms of the above elements.

And once he or she has succeeded in doing that the burden shifts to the maker of the statement or undertaking to justify the frustration of the expectation by providing overriding public interests which justify such frustration.

[39] The former employees challenge the High Court's exclusion of the pension benefits from the Government of Lesotho's guarantee which they allege and the High Court found to constitute an enforceable substantive legitimate expectation.

[40] The Government of Lesotho on the other hand impugns the court *a quo's* finding that it made a guarantee that would be enforceable against it by way of substantive legitimate expectation. Its case is that the High Court ought to have found as alleged by Minister Majoro that the statements made by his predecessor were not intended to bind the Government of Lesotho but related to payments provided for in the Rules of the Pension Fund.

[41] Both *a quo* and in the appeal the Government of Lesotho denies that the statements made by and on its behalf gave rise to an enforceable legitimate expectation in favour of the former employees. It is really only if that contention is rejected that we can consider if the High Court improperly excluded 'pension

benefits' from the right to compensation by the Government of Lesotho relied on by the former employees.

[42] I propose therefore to deal with the real question which confronts us in the appeal: Was the High Court correct in concluding that the 'undertakings' made by the Executive in the wake of the winding-up of the LADB in fact and law gave rise to an enforceable 'substantive legitimate expectation'?

### **The appeal**

#### *The former employees*

[43] On appeal the former employees support the High Court's conclusion that Minister Ketso's statements gave them enforceable claims against the Government of Lesotho. They argue however that the court *a quo* should have included pension benefits in that equation.

#### *The Government of Lesotho*

[44] The Government of Lesotho impugns the finding that the Minister's statements gave rise to 'substantive legitimate expectation'.

### **Disposal**

[45] The first obstacle facing the former employees is that they did not '*place all the cards on the table*'. I have shown how they chose not to disclose the Rules of the Pension Fund which

governed the benefits they are claiming. Secondly it is not altogether clear whether their claims relate to both the Pension Fund dissolved in 1994 and the Fund that was 'reconstructed' after the first was dissolved. Mr Salae' affidavit is evasive about that. Thirdly he elected to say nothing at all about the manner in which the two funds were dissolved and which benefits were paid and which ones not and why? I have shown from quoting passages from the Rules of the 1978 Pension Fund that the Principal Officer remains in office until all outstanding claims have been attended to. Nowhere is there mention whether the Principal Officer is still in office or not. How the Government of Lesotho could be said to have unambiguously and unequivocally committed public funds to meet unquantified obligations which could well still be met by the Principal Officer defies reason.

[46] *As Moorosi Matela tells us 'it is difficult to imagine a case in which government will be held legally bound by a representation or undertaking made generally or to a diverse class and secondly because the broader the class claiming benefit of the expectation the more likely it is that the supervening public interest will be held to justify the change of position of which complaint is made.'*

[47] Minister Ketso's statement relied upon is so terse and unspecific that one is left to guess whether it related to the

dissolution of the first Fund or unpaid benefits arising from the 'restructured' Fund.

[48] It is obvious though that the former employees' claim is largely based on the alleged unpaid benefits arising from the dissolution of the 1994 fund on the strength of the following most nebulous allegation:

*'4.2 Due to some difficulty which the LADB Board of Directors described the Fund as too burdensome to the LADB' and 'the Fund was dissolved in January 1994 with the employees given their respective 2% contribution with compound interest while the 22% employer's (LADB's) contribution remained unpaid and owing to the employees of LADB. **It was indicated that the 22% employer's contribution would be paid with compound interest at an unspecified future date.**' (My underlining for emphasis).*

[49] We are not told who 'indicated' and in what form and to whom. That is surprising. The deponent to the founding affidavit spent a great deal of time and energy to detail the promises made by the Government of Lesotho and the preparatory steps taken to pay them and yet deals with the very foundation of their claim in such a cavalier fashion. That highlighted one line is the springboard for the legitimate expectation on which the Government of Lesotho is being sued to pay about M300m for the debts of the Pension Fund.

[50] In my view the case had not been made out for 'substantive legitimate expectation' that the Government of Lesotho would pay the Bank's employees' benefits in the wake of its winding up.

[51] But perhaps more fundamentally how could it be rationally explained that the Government of Lesotho would accept liability assuming it exists for a debt owed by either the LADB or the Pension Fund - both of which are separate legal persons from it? Where does the power come from for such a commitment? The answer provided by the former employees is that the power vests in the Government of Lesotho as a 'state organ'.

[52] We subscribe to the edict that a public authority can only exercise such powers as are granted to it under law. One would have no difficulty finding in an appropriate case that undertakings made by a public official or organ acting in furtherance of a lawful power would entitle a person who relies thereon and arranges their affairs accordingly to a legitimate expectation that the public authority would honour the undertaking.

[53] The claim of legitimate expectation as formulated in the present case is in reality a contention that the Government of Lesotho is 'estopped' from reneging on undertakings made to the former employees. Now that argument is fundamentally in

conflict with the basic principle of constitutionalism which states that a public body cannot exercise power that it does not enjoy.

[54] As Baxter correctly points out:

*'Public authorities could never acquire lawful powers through the operation of estoppel because to allow this would undermine the principle of legality.'*

*To allow a public authority to hold out incorrectly that it is empowered to act in a certain manner would permit it to arrogate powers to itself which it does not possess. This would open the door to all kinds of abuse and where a public authority permitted to excuse someone from compliance with the law this would constitute recognition of a dispensing power. It would enable officials to render legislation 'nugatory' or a 'dead letter'. Allowing a public authority to waive legal requirements or prohibitions would also overlook an important principle of public policy that persons be they public or private cannot waive rights in which the public have an interest'.<sup>2</sup>*  
(Footnotes omitted).

[55] In support of this principle Baxter cites amongst others the very old case of *Collector of Customs v Cape Central Railways Lt*<sup>3</sup>. In that case the head of government of the Cape Colony contrary to law but *bona fide* gave the assurance that imported cement would not be subject to customs duty and the customs officials on the strength of that statement released the cement untaxed to the importers. Shock befell the importers when it

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<sup>2</sup> Baxter, L. 1984, Administrative Law at 401-2

<sup>3</sup> (1889) 6 SC 402.

was discovered that the cement was in fact dutiable and the revenue authorities sued them for recovery of the duty. The importers denied liability on the strength of the prime minister's representation and argued that the government was estopped from going back on his word. The argument was resoundingly rejected by the court.

[56] It is instructive that the case was decided in a pre-constitutional ethos era and assumes even greater significance under constitutionalism where all power must be sourced in either the constitution or legislation.

[57] However one might try to dress it up to commit the Fiscus to pay the benefits of the former employees such as they claim is the exercise of a power. Under Lesotho's democratic system of government the Executive can only assume financial liability for obligations which arise under law and which unless they are contingent liabilities<sup>4</sup> have been authorised by Parliament through appropriation.

[58] Counsel for the former employees argued on appeal that the undertaking made by the Government of Lesotho absolved the LADB Pension Fund from its liability towards the employees. In other words although the Pension Fund is in law the body liable to make good the benefits of the former employees the Government had since assumed that liability and it matters not

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<sup>4</sup> Such as claims in delict whose outcome is uncertain.



that the Fund is able to meet those obligations. Counsel was not able to point us to any power either under the Constitution or statute empowering the Government of Lesotho to do such a thing. It would in effect amount to excusing the Pension Fund from complying with its obligations under law.

[59] The LADB Act made the Bank an independent juristic person for whose debts the Government of Lesotho is not legally liable. The debt being claimed by the former employees is not even that of the Bank but of the Pension Fund. The public as taxpayers have an undoubted interest that the Government of Lesotho will comply with the law insofar as it shields the public purse from liabilities properly attributable to a separate juristic body.

[60] It is not enough to say as the employees do that a guarantee was made. They ought to have shown the legal basis UPON WHICH Minister Ketso made such a guarantee when the LADB Act made clear that the Government of Lesotho was not liable for the debts of the Bank. Assuming the Minister purported to assume the Pension Fund's or LADB's debts he would be acting contrary to the law of the land. He would have had to return to the legislature and amended the LADB Act to render the Government of Lesotho liable.

[61] To permit ministers and the government to assume power which they do not enjoy can lead to excesses of unimaginable

proportions. And what is the limit? Can government assume liability for the debts of every failed public enterprise?

[62] Government revenue is primarily tax revenue. In other words it is the taxpayer that ultimately pays for the money government spends.

[63] There is a sound public policy reason why estoppel does not operate against public authorities. Precisely to prevent the abuse of power. What if the next parastatal folds and the employees say since the Government of Lesotho did that that for LADB employees we have a 'legitimate expectation' to be treated similarly?

[65] I come to the conclusion therefore that the High Court misdirected itself in finding that the statements made by Minister Ketso in 1989 and the Government's subsequent ill-fated preparatory steps to pay debts allegedly owing to the former employees by the Pension Fund amounted to an enforceable legitimate expectation in favour of the employees.

[66] It follows that the former employees' cross-appeal must fail and that the appeal of the first to third respondents must succeed.

## **Costs**

[67] There can be no plausible argument that the former employees were frivolous in seeking redress in court in view of

the Government of Lesotho's promises in the past and the comfort given by the Ombudsman the Attorney-General and other government legal advisors that they had an enforceable claim. In those circumstances it would not be just and equitable to mulct them in costs either *a quo* or in the appeal.

### **The order**

[68] I would propose the following order:

- (a) The 1<sup>st</sup> to 3<sup>rd</sup> respondents' cross-appeal succeeds.
- (b) The appellants' appeal is dismissed.
- (c) The judgment and order of the High Court is set aside and is replaced by the following order:
  - “(i) The application is dismissed.*
  - (ii) There is no order as to costs.”*
- (d) Each party to bear its own costs in the appeal.



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**P.T. DAMASEB**  
**ACTING JUDGE OF APPEAL**

I agree:



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**K.E. MOSITO**  
**PRESIDENT OF THE COURT OF APPEAL**

I agree:



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**M.H. CHINHENO**  
**ACTING JUDGE OF APPEAL**

**FOR THE APPELLANTS:** *ADV. T. MAQAKACHANE*

**FOR THE 1<sup>ST</sup> TO 3<sup>RD</sup> RESPONDENTS:** *ADV. M.E. TEELE KC*