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IN THE HIGH COURT OF LESOTHO

In the Applications of:

MATHETSO FOLOKO	1st Applicant
SOLOMON LETHOBA	2nd Applicant
CHARLES MAHASA	3rd Applicant
THABO TLALINYANE	4th Applicant

vs

L.A.D.B. PENSION FUND	1st Respondent
LESOTHO AGRICULTURAL DEV. BANK	2nd Respondent
METROPOLITAN LIFE INSURANCE CO.	3rd Respondent
PRINCIPAL OFFICER(LADBPFF) S.MOLELLE	4th Respondent

J U D G M E N T

Delivered by the Hon. Mr Justice M.L. Lehohla on
the 13th day of March, 1996

Well, I think a full judgment if there will be any need for that will come at much later stage perhaps on a date to be notified by the Registrar but for the moment, I have no difficulty at all in coming to a conclusion that will put paid to the case.

I may, to start with indicate the court's indebtedness to both counsel who stated to the court that the following are common cause, namely, that they agree that when first respondent, namely the fund, was set up, (the first respondent being an

independent persona) the second respondent and applicants were going to make contributions as follows :

- (a) applicants were to contribute 2% of their salaries;
- (b) second respondent was to contribute 22% in respect of each 2% contributed by an employee; and this was done;
- (c) all these monies were invested for insurance purposes with third respondent namely Metropolitan Life Insurance Company Limited;
- (d) on dissolution of first respondent, the first and fourth applicants were paid 2% of their contributions plus 5% interest. No payment was made of 22% of employer's contribution, that is second respondent.

In respect of the first and the fourth applicants the claim is directed against second respondent for 22%. As for Lethoba, the second applicant, he was offered 2% employees contribution which he turned down. However, there was the question of set-off arising from a loan advanced to him by the second respondent.

In respect of second applicant the claim is also for 22% which was never offered nor paid by the second respondent. There is, the court was informed a counter-application and the papers so indicate in that regard against second applicant by the Bank and its administration or administrative authority.

In regard to the third applicant Charles Mahasa the only issue there concerns set-off. He was offered the 2% and the 22% employees and employers contributions respectively which however were both withheld on grounds of debt owed to the Bank

by him. There is a counter-motion in this regard too. It was agreed between counsel that the question to be determined would be with regard to membership with first respondent of first, second and fourth applicants; and whether they are entitled to payment of 22% contribution made by the second respondent; the Bank.

Mr Sekake in turn rose to confirm this outline. I have indicated that I will rush to the conclusion and if it would be necessary in the end I will fill in the gaps.

The gaps I am referring to start from the sentence beginning with "In 1994....." and end with one ending in the phrase "i.e. that of liquidity".

In 1994 when the fund was dissolved, the 2nd Respondent and 4th Respondent made claims from the 3rd Respondent on behalf of the Applicants.

For the Applicants numbers 1,2 and 4 the 3rd Respondent issued cheques in the amounts of R13,595-08; R23,308-29 and R28,813-43 for each one of them respectively. These cheques were unilaterally returned to the 3rd Respondent by the 4th Respondent. Subsequently cheques in the amounts of R1,783-92, R2,176-96 and R3,076-78 for each one of them respectively were issued. These latter cheques represented the Applicant's 2% contributions, 5% interest and bonus. They were calculated from the commencement of the fund to the date of termination of their

employment. The Applicants remained members of the fund until its dissolution as it is common cause that on termination of their employment they were not given all the benefits due to them in terms of the rules of the fund.

Rule 7.6.2 provides as follows:

"A member's membership ceases only - when he\she ceases to be an employee, unless he\she remains entitled to a benefit payable in terms of these rules" or 7.6.3." on dissolution of the Fund."

As a member therefore each of the Applicants is entitled to the full benefits of the fund, their contribution and the employer's contribution, together with 5% compound interest and bonus.

The 2nd Applicant's cheque in the amount of R2,176-96 was further withheld on the basis that it was setting-off a loan that the 2nd Applicant had with the 2nd Respondent. Likewise the 3rd Applicant's cheque in the amount of R13,658-77 representing his full benefits, was withheld by the 2nd Respondent on the allegation that it was setting-off a debt arising from the fact that the 3rd Applicant is implicated in a pending criminal case wherein an amount of M154,000-00 was stolen from the 2nd Respondent. The 3rd Applicant is presently on bail.

The relevant rules here are rules 5.6; 5.6.1.1. and 5.6.3, these rules read thus :-

Deduction from benefits:-

Notwithstanding anything to the contrary contained in these rules, the fund may deduct the following amounts from benefits which are payable according to the rules and pay such amounts to the person to whom or body to which it is due:

5.6.1, "debts to the Fund or the employer in respect of a loan granted to the member by the fund or the employer to enable the member to;

5.6.1.1 "redeem a loan granted to the member by a person other than the fund or the employer against security of immovable property belonging to the member or his spouse on which a dwelling has been or will be erected, occupied or to be occupied by the member or dependents of the member"

This rule certainly excludes a loan such as was granted to the 2nd Applicant, as that was purely to redeem a purported loan by the fund as against by a person other than the fund or the employer as required by the above rule. In any event in this case the Respondents have failed to show that there was any debt due to them by the 2nd Applicant. In the case of *Thabo Michael Motseki v Lesotho Agricultural Development Bank*, CIV\APN\72\95 p.17,18 (unreported), the Court found that it was not proper for the 2nd Respondent to withhold information about the Applicant's own bank loan account

"I found the behaviour of the 2nd Respondent not only mind-boggling but unheard of. This was an abuse of

whatever power a bank can have".

It was found in that case that no periodic statements of account which are the right of every customer, were issued and forwarded to 2nd Applicant. In this case, similarly, the 2nd Respondent has failed to annex even a single statement for its claim against the 2nd Applicant. Worse still when the Applicant left the 2nd Respondent's employ debts due to the 2nd Respondent were deducted from his benefits, as evidenced by SLM3. It is not clear how this debt was left out if it was there.

Going to the case of the 3rd Applicant, with regard to him the relevant rule applicable is rule 5.6. and 5.6.3. this rule reads thus:

"Notwithstanding anything to the contrary contained in these rules the fund may deduct the following amounts from the benefits which are payable according to the rules and pay such amounts to the person to whom or body to which it is due:-

- 5.6.3. compensation in respect of damage caused to the employer by reason of theft, dishonesty, fraud or misconduct by the member, and in respect of which the member has in writing admitted liability to the employer, or judgment has been obtained against the member in a Court".

In this case, all what are levelled against the 3rd Applicant are mere allegations. The 3rd Applicant has neither admitted liability to the 2nd Respondent nor is there any judgment obtained against the 3rd Applicant by any Court. As a result the 2nd Respondent is not entitled to withhold the 3rd Applicant's benefits.

The second leg of the 2nd Respondent's argument is that they set-off the debts of the 2nd and 3rd Applicants against their own debts. To determine whether the principle of set-off is applicable herein it is essential to look at the Respondents individually and analyse the principle of set-off.

The 1st Respondent is a corporate body with its legal persona independent of the 2nd Respondent. Therefore the 1st and 2nd Respondents are two different legal persons. Can the principle of set-off now therefore apply for a debt owed the 2nd Respondent by the Applicant, against money owed the Applicants by the 1st Respondent?

In the case of *Lesotho Agricultural Development Bank v Leabua Thaabe CIV\APN\127\95*, the Court found that :

"the debt of another cannot be set off without the creditor's consent".

The Applicants are creditors of the 1st Respondent, whilst the 2nd Respondent is the creditor of the Applicants.

Innes C.J. in the case of *Treasurer General v Van Vuren 1905 T.S.*

at 590 discussed in Alison Kahn: Contract and Mercantile Law Through Cases 1971 page 279 says :-

"set-off, like payment, should be pleaded and proved, so that the Court may give effect to it; but its operation dates back to the moment when the two persons concerned, were reciprocally liable to one another. At that moment in intendment of Law they are regarded as having paid each other's claim with his own, so far as it would go....."

J.T.R. Gibson: Mercantile and Company Law; 5th Edition 1983 at p.122 discussed the essentials of set-off as being :-

- (i) The reciprocal debts must be mutually owed.
- (ii) They must be due.
- (iii) They must be liquidated or be identical in nature.

The 2nd Respondent only satisfies one of these requirements i.e. that of liquidity.

Regarding rules which will be applicable in determining this matter of importance would be reference to rules of the Lesotho Agricultural Development Bank Pension Fund and the particular rules would be Rule 5.6, Rule 5.6.3. and Rule 7.6.

Rule 5.6 relates to deductions from benefits. It reads as follows :

"Notwithstanding anything to the contrary contained in

these rules the fund may deduct the following amounts from benefits which are payable according to the rules and pay such amounts to the person to whom or body to which it is due.

5.6.1 - debts to the Fund or the employer in respect of a loan granted to the member by the fund or the employer to enable the member to -

5.6.1.1. redeem a loan granted to the member by a person other than the fund or the employer against security of immovable property belonging to the member or his spouse on which a dwelling has been or will be erected, occupied or to be occupied by the member or dependents of the member"

5.6.3. Relates to compensation or rather states as to deductions from benefit that : notwithstanding anything to the contrary contained in these rules the fund may deduct the following amounts from benefits which are payable according to the rules and pay such amounts to the person to whom or body to which it is due to it : compensation in respect of damage caused to the employer by reason of theft, dishonesty, fraud or misconduct by the member, and in respect of which the member has in writing admitted liability to the employer, or judgment has been obtained against the member in a court.

Rule 7 at 7.6 relates to cessation of a member's membership and says : a membership ceases only when he ceases to be an employee, unless he remains entitled to a benefit payable in terms of these rules.

I have just referred to these rules because I think they form the core of what is to be decided in this matter.

Having said that I have no hesitation then in finding for the applicants as follows :

In respect of applicant No.1 Foloko the claim now being made is for Eleven Thousand Eight Hundred and Eleven maloti and sixty cents(M11,811-60). I think this applicant is entitled to that amount.

In respect of the 2nd applicant, that is Lethoba, the claim being made now as was originally the case is Twenty-Three Thousand Three hundred and Eight maloti and Twenty-nine cents (M23,308,29). I think this amount by order of this judgment is owed and payable.

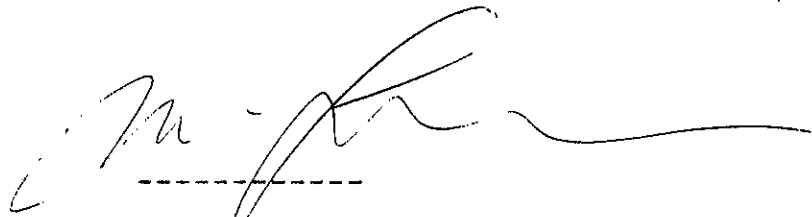
In respect of 3rd applicant Mahasa, the applicant is awarded by judgment of this Court Thirteen Thousand Six hundred and Fifty Eight maloti and Seventy-Eight cents (M13,658-78) as was originally claimed by him in these proceedings.

In respect of the fourth applicant Tlalinyane the amount awarded by Court is in the amount of Twenty Five Thousand Seven hundred and Thirty-six maloti, and fifty-seven cents (M25,736-57) plus costs on an ordinary scale between party and party in respect of each of the findings made above.

It is important to take note that the amounts awarded represent the periods between the inception of the fund and the time either of dismissal or resignation as the case may be

relating to individual applicants.

The claims at no stage when presented before Court related to the period between the inception of the fund to the date of the dissolution. The Court therefore cannot award anybody something that they did not claim. So this claim is confined to the period between the inception of the fund and either the dismissal or termination of the contract by dismissal of the employees or by their resignation either of which event results in the termination of the contract.



J U D G E

13th March, 1996

For Applicants : Mrs Thabane

For Respondents : Mr. Sekake