IN THE HIGH COURT OF LESOTHO

(Commercial Division)

CIV/APN/225/2007

In the matter between:-

THE LIQUIDATOR LESOTHO BANK		**PLAINTIFF**
and		
LESOTHO DEFENCE FORCE	**1ST**	**DEFENDANT**
MINISTRY OF DEFENCE	**2ND**	**DEFENDANT**
THE ATTORNEY GENERAL	**3RD**	**DEFENDANT**

Date of hearing : 13th September 2010
Date of Judgment : 23rdSeptember, 2010

CORAM : MR ACTING JUSTICE J.D. LYONS

Counsel:

Mr. Malebanye for the liquidator

Mr. Sekati for the Attorney General

JUDGMENT

It has just come to my attention that there are conflicting decisions from this court concerning the legitimacy or the liquidator herein.

I am familiar with the special plea that has been raised concerning the legal status of the liquidator. Up to this point I had preceded on the understanding that

this special plea had been well settled by decisions from this court. It has now been brought to my attention that a recent decision has again thrown this legal status into question. In view of these conflicting decisions, it is incumbent on me to satisfy myself on the question of whether or not the liquidator herein is acting legally. I do so as to satisfy my duty in this matter (and any other matters involving the liquidator herein) and it is not intended that my determination be interpreted to reflect upon the above-mentioned decisions.

A liquidator is an officer of the court. As that is the case, then the liquidator is expected to act lawfully. If this is not the case, then the liquidator must be called upon to show cause as to why that liquidator should not be dismissed and another liquidator put in his place. Simply put, the Court cannot continue to allow a liquidator who has been found to be acting unlawfully, to continue acting as an officer of the court. The liquidator of the Lesotho Bank (in liquidation) (the plaintiff herein) is described as 'KPMG/Harley & Morris Joint Venture'.

KPMG is a firm of accountants. Harley & Morris is a firm of lawyers.

It is common knowledge that both professional firms have joined in a joint venture. The terms of that joint venture have been reduced to writing in the form of deed or memorandum of agreement of joint venture.

In view of my concerns I called on counsel for the liquidator to provide me with a copy of that deed of joint venture. It was obviously necessary for me to read that document (it being a the primary evidence) before determining whether I should call on the liquidator to show cause why it should not be dismissed.

At my request, counsel for the liquidator provided me with a copy of the agreement/deed (I will call it 'the agreement'). It is registered in the Registry of Deeds under number 26570. The date of registration is 1st February 2002. It is

a public document in the sense that it is available for examination by any member of the public.

Having read the agreement I am in no doubt that the joint venture between KPMG and Harley & Morris is a partnership. Although a joint venture is not, of itself, necessarily a partnership, in many instances that is precisely what a joint venture is. A joint venture, though, is essentially a contract. By looking at the terms of that contract, it can be determined whether or not the joint venture is a partnership as recognised by law. As I have said, this joint venture is a partnership entered into with "a view of profit". (Clause 1.2).

There is nothing in the law where an accountant and a lawyer (or their professional firms) are forbidden from entering into a partnership. They may form a joint venture or partnership in a racehorse and share the winnings. Or it may be a real estate venture and they may share the profits of sale.

I was able, though, to find provisions in The Accountants Act of 1977 and The Legal Practitioners Act of 1983 where accountants and lawyers are forbidden by law from entering into arrangements where they share their professional costs with unqualified persons. I think this is the nub of the arguments behind the special pleas referred to above.

Section 18 (e) of The Accountants Act reads: --

> ***No member shall --***
>
> ***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 practising 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.***

My understanding of both these sections is that the Parliament legislated to prohibit an accountant (or firm) and a lawyer (or firm) from either directly or indirectly sharing their respective professional fees with the each other.

Thus the question that arises here is; - "Can it be said that, by virtue of the joint-venture agreement, are KPMG (the accountants) and Harley & Morris (the lawyers) are participating in, making over, sharing or dividing the profits of their professional work or any portion of their professional fees?"

To answer this (and before I make any decision as to whether or not to call upon the liquidator to show cause), I must direct my mind to the primary evidence - that being the terms of the joint venture agreement or the contract between KPMG and Harley & Morris.

It is a short agreement, being only six pages. Clause 8 states that the net profit of the management accounts of the joint venture are to be divided equally between KPMG and Harley & Morris.

Clause 7 is entitled "**Expenses**".

It reads as follows: --

> ***7.1 Before arriving at the profit for division between the parties, the joint venture will meet any expenses, which have been mutually agreed.***
>
> ***7.2. These expenses will include:***
>
> ***Charges for time spent on joint-venture work at mutually***

> ***agreed charge out rates. KPMG time sheets to be authorised by SCH and H&M time sheets to be authorised by PEP. (****SCH is Mr. Harley and PEP is Mr. Parker. They are partners in Harley and Morris and KPMG respectively).*
>
> ***Direct expenses re: joint venture.***
>
> ***Interest on loans at agreed rates.***

On reading this, my understanding of how the joint venture works is that any professional work KPMG or Harley & Morris do in their respective professional capacities for the joint venture is time-costed and charged at agreed rates. These professional costs are jointly treated as part of costs earned by the joint venture but, by virtue of clause 7, are separately deemed to be an expense of the joint venture.

In terms of the liquidation my understanding of how the agreement is to be carried out is: --

If Harley & Morris undertake legal work in the course of the activities of the joint venture as the liquidator (for example; if they appear in court), then the professional costs are included as part of the costs earned by the joint venture as liquidator.

Similarly, if KPMG undertake accountancy in the course of the activities of the joint venture as the liquidator (for example; a review of the Bank's debtors ledger), then those professional costs are included as part of the costs earned by the joint venture as liquidator.

The respective bills of professional costs, though, always remain separately as an expense to the joint venture. The joint venture bills the client (The Lesotho Bank 'in liquidation') with its bill of costs, which is made up of the total of the professional costs KPMG and Harley & Morris. On payment, the respective

professional costs, being expenses of the joint venture, are paid in full to each firm in the full amount earned. The professional costs are thus treated as separate.

Whilst the joint venture agreement says the joint venture is operated 'with a view of profit', it may not necessarily make a profit on each and every venture. The joint venture partners may individually make a profit from their respective professional costs earned separately as part of the business of the joint venture, but on a particular deal, the joint venture itself may not make any profit.

If, for example, the joint venture undertook a venture like a real estate development, the legal and accounting professional work done by the respective partners would be 'billed' to the joint venture and paid as an expense out of the earnings of the real estate venture. Any money remaining after payment of all the expenses would be profit earned strictly from the sales of the real estate. This profit would be divided between the joint venture partners. That is not a sharing of professional costs or profit from professional work. It is the sharing of a profit earned by means of a separate business venture.

Returning to the venture of liquidator (and generally for that matter) provided the regime established by clause 7 is maintained (and I have no evidence otherwise), it seems as if the provisions of the above-mentioned Acts are not being breached. I must add that this ruling is not to be misconstrued as a comment on any of the other decisions the court has made on this issue. In my case I only had to deal with the issue on the basis of whether or not there existed a prima facie case to call on the liquidator. That is a much lower burden of proof that the balance of probabilities required in the other cases.

Accordingly I see no reason to call upon the liquidator to show cause why the liquidator should not be dismissed.

My duty having been discharged, I will now proceed with this case.

J.D. LYONS
ACTING JUDGE