

**IN THE HIGH COURT OF LESOTHO
(Commercial Division)**

In the matter between:

CENTRAL BANK OF LESOTHO

APPLICANT

AND

**PHOKENG FUNERAL PARLOUR
(PTY) LTD**

RESPONDENT

JUDGMENT

Coram : L.A. Molete J
Date of Hearing : 26th June 2013
Date of Judgment: 24th September 2013

SUMMARY

Companies –Winding up – Application for liquidation under 547 of Insurance Act 1976 – Respondent disputing it is an Insurance Company – Whether it is in the circumstances trading unlawfully – whether intervention of the Central Bank as Commissioner of Insurance justified – Granting trial liquidation order appropriate in the circumstances

ANNOTATIONS

CITED CASES

Lake v Reinsurance Cooperation Limited 1967(3) All SA225; 1967(3) SA 124(W) at 127-128

Sitmore Engineering Works (Pty) Ltd v Fidelity Guards (Pty) Ltd 1972(1) SA 478

The Golden China TV Game Centre v Wintendo Co Ltd 1997(1) SA 773

MKM Marketing Ltd and Others v The Commissioner of Insurance and Others C of A (CIV) 24 of 2011 (unreported)

STATUTES

Insurance Act No18 of 1976 Section 2

BOOKS

- [1] This matter is an Application by the **Central Bank of Lesotho** for an order of liquidation of **Phokeng Funeral Parlour (Pty) Ltd**. The application for liquidation is in terms of Section 47 of the Insurance Act, as amended.

[2] The Applicants notice of motion was served on the Respondent. It sought an order to place the estate of the Respondent in liquidation to enable the liquidator to deal with the assets of the company for the benefit of all members of the public who contributed to the Umbrella Funeral Scheme in the belief that the Scheme was lawful and regulated in terms of the provisions of the Insurance Act by the Commissioner of Insurance.

[3] The Application was brought on the basis that the continuance of the business of Phokeng Funeral Parlour was unlawful and prejudicial to the public interest. The Applicant, in its capacity as Commissioner of Insurance had carried out some investigations and discovered that

- (a) Respondent had bought and taken over the brokereeage business of ABC Insurance Brokers (Pty) Ltd.
- (b) The ABC insurance brokers had been registered and had a licence to be an insurance broker, but such licence had since expired.
- (c) Respondent had not bothered to renew the licence and therefore continued to carry on the business of a broker unlawfully and illegally.
- (d) That furthermore the umbrella funeral scheme that Respondent conducted was not legal in that none of the recognised insurance companies underwrites it as required by law.

[4] It was therefore the conclusion of the Applicant that the estate of the Respondent had to be placed in liquidation urgently in terms of Section 47 of the Insurance Act 18 of 1976, as amended to enable the liquidator

who would be appointed to maintain the value of the assets owned or managed by Respondent; The liquidator be given certain powers to carry on the business, raise money as security on assets of the estate and take full control thereof; to have powers to seek a court order *ex parte* as contemplated in Section 132 of the Companies Act 2011 to call upon certain persons to attend and be examined on oath on any matter relating to the business, accounts or affairs of the Respondent including to produce any books, records or documents required relating to the business accounts or affairs of the company.

- [5] Counsel for both the parties appeared on 31st May 2013 and the court granted dispensation only and proceeded to set a time-table for the filing of further affidavits and heads of argument. The matter was then allocated a date of hearing being 23rd June 2013 when it proceeded.
- [6] The task of the Court at the hearing was simpler than anticipated. This was so because in the answering affidavit the deponent who is a managing director of the Respondent made an outright statement and averment as follows;

“(a) Phokeng is neither an Insurance Broker nor an Insurance Company.

(b) Phokeng provides funeral benefits which are monetary and non-monetary. The non-monetary services include the provision of transport, mortuary and the money for funeral expenses. The services are provided in terms of the category in which the client falls. The cost (of) funeral

services that we provide range from M5000-00 to M15,000-00.”

[7] In the light of the above it was clear that if Respondent was found to be either a broker or an Insurance company, or both, then it would be reasonable to conclude that it would be operating an unlawful business. Indeed, the denial in the words of the director was in my view; meant to counter the very proposition that the Respondent was trading illegally. It follows that if this Court finds that it was, then the Central Bank would be entitled to an order of liquidation in terms of Section 47 of the Insurance Act, as amended. It would be directly in the public interest to stop the activities of a company that is trading illegally and not subject to any supervision as required by law. It is the Commissioner of Insurance who is obliged and mandated to protect the public.

[8] It is necessary at first instance to define “insurance company” and “insurance broker.” This may be done by first understanding what a contract of insurance is; and it has been defined as

“A contract between an insurer (or assurer) and an insured (or assured); whereby the insurer undertakes in return for the payment of a price or premium to render to the insured a sum of money; or its equivalent, on the happening of a specified uncertain event in which the insured has some interest”¹ . This may be said to be the generally accepted meaning a contract of insurance and has been applied consistently in many cases².

¹ Lake v Reinsurance Cooperation Limited 1967(3) All SA225; 1967(3) SA 124(W) at 127-128

² Sitmore Engineering Works (Pty) Ltd v Fidelity Guards (Pty) Ltd 1972(1) SA 478

- [9] The Act further defines “insurance business” and “insurance company” as “the assumption of the obligations of an Insurance Company in any class of insurance business and includes re-insurance business”. The “company” is “any person carrying on insurance business”³
- [10] In the same way it is to be noted that “insurer” means “an insurance company which is registered under section 10 of this Act for the purpose thereof; either as domestic or foreign insurer”⁴. “Broker” is a person who as an independent contractor solicits or negotiates insurance for a commission, on behalf of the insured other than himself.”
- [11] It is common cause and confirmed in the Respondents answering affidavit that;
- (a) Respondent has taken over the business of ABC, having bought its furniture, equipment, and goodwill. It also operated from the premises previously occupied by ABC brokers and took over most of its staff members, so that there was no interruption in the business of ABC brokers.
 - (b) ABC Insurance Broker (Pty) Limited was registered as a lawful insurer and its funeral scheme was initially endorsed and underwritten by Metropolitan Lesotho Limited. The licence of the company expired prior to the transfer and sale of the business to the Respondent and it was never renewed by Respondent.

³ Insurance Act NO18 of 1976 Section 2

⁴ Insurance Act Section 2

(c) Although Respondent denies it in the answering affidavit and avers that only the equipment and furniture items were bought as well as goodwill; the notice issued by ABC Insurance Brokers (Pty) Ltd to all members of its Umbrella Funeral Scheme which the Respondent was aware of gave notice that the scheme has been sold to Phokeng Funeral Parlour with effect from 1 June 2012 and further stated that “The services have not changed, so is the office. All that has changed is the management..... In other words, you will be assisted in the same way as before”.

[12] Unless this was an attempt to mislead the public, the Respondent should have been aware that the impression that the combination of these factors and notices would create is that the Respondent is authorised, licenced and registered to carry out the precise business formerly conducted by ABC Insurance Broker (Pty) Limited.

[13] The reasonable person would not only assume that the business is the same; but also that it was a legal and lawful entity possessing the same attributes as the previous insurance company. Most importantly that it would be a registered entity and have the required underwriting, and also be subject to the supervision of the Commissioner of Insurance.

[14] It is furthermore accepted practice and the legal procedure that payment of benefits should be made by the insurer who has underwritten the funeral scheme and not the broker. A broker is supposed to only collect the premiums from the policy holders and pay over to the insurance to receive his or its commission. It is the entity who underwrites the policy

who should make payment in the event of a claim. Consequently, the activities

of Respondent to both receive the premium and also make payment of claims is irregular and unlawful in the insurance business.

- [15] The Amendment in Act No.20 of 1983 further complicates the position of the Respondent herein. Section 2(b) it is provided that;

“Funeral business means the business whereby the insurer assumes in return for a premium or the promise of a premium, an obligation to provide on the death of any person benefits not exceeding a value in total of

M1,000-00 which consist principally of;

- (i) Provision for funeral expenses of that person
- (ii) The grant to any person of some other non-monetary benefit, whether or not the policy provides for the payment at the option of the insurer.....and whether or not it provides for the payment of a sum of money in addition to the provision of such funeral or the grant of such other non-monetary benefit.”

- [16] The above means that even as a funeral business the Respondent fails to meet the legal requirements in as much as it is common cause that Respondent is paying out monetary benefits in excess of M1000-00. The cost of funeral expenses that are provided by Respondent range from M5000-00 to M15 000-00.

[17] The Respondents counsel could only submit in this regard that as funeral costs have increased in Lesotho, and as a result of the inflation rate it could be assumed that the cost of burial which was M1000-00 has escalated to

M15 000-00. The case of **Golden China TV Game Centre v Wintendo Co Ltd**⁵ was quoted as authority in this regard.

[18] The contention was that there is evidence that the specified amount of M1000-00 was abrogated by disuse and that in any event the statute cannot be relied upon without computing exactly how much the M1000-00 would be equivalent to today. There is however no evidence to support the allegation that the statute has been abrogated by disuse, and neither has Respondent been able to show that the amount of M1000-00 taking into account the inflation and other factors would be equivalent to M15 000-00. This is pure speculation. The figure could be arrived at in almost precise terms.

[19] The Court is not expected to make laws to the extent of substitution its own figures where the legislature has not amended the laws. It is also not authorised to repeal and substitute clear legislation for what it may deem to be appropriate at any point in time. In case of **Director of Immigration and Others v Lekhoaba and Another**⁶, the Court of Appeal quoted with approval the words of His Lordship Mr Justice S. Peete when he said;

⁵ 1997(1) SA 773

⁶ LAC (2007-2008) P326 at 336

“Whilst inevitable absurd results or undue hardships must always be avoided when interpreting the law, no benevolent interpretation should be allowed to supercede otherwise clear constitutional or statutory provisions which the courts of law must enforce”.

[20] The approach that the court has taken in this matter has made it unnecessary to address in any further detail the points *in limine* brought by the Respondent. The urgency of the matter had already been decided in favour of Applicant when the Court granted dispensation and set a time-table for filing.

[21] As regards the point of Lis Pendens, the requirements are not met as this is an application for liquidation of Respondent and the Applicant has not previously applied for liquidation. Compliance with the Companies Act would also apply only where the liquidation proceedings were brought under the Companies Act, but not in this case because Applicant invoked the provisions of Section 47 of the Insurance Act, 18 of 1976; as amended.

[22] On the other hand the Applicant herein is authorised to apply to the Court;

“for the winding up of any Insurance Company (ie a company doing insurance business whether registered under the Act or not) *inter-alia* on the

grounds that it is insolvent or that the continuance of its operations is not in the public interest”⁷

[23] In the circumstances the court is persuaded that the Respondent is operating an illegal and unlawful business, and that the Applicant is correct in the assertion that members of the Public who belong to the scheme and who contribute monthly premiums will suffer prejudice as Respondent is not permitted by law to receive these monies.

[24] The appropriate order which the court gives is therefore that;

- (a) Phokeng Funeral Parlour (Pty) Limited is placed into liquidation in terms of Section 47 of the Insurance Act 18 of 1976, as amended.
- (b) Attorney Moroesi Tau-Thabane is appointed as the liquidator of the Respondent in terms of Section 127(2) of the Companies Act subject to the confirmation of the master.
- (c) It is directed that Attorney Tau-Thabane shall have the usual powers in terms of the Companies Act and Insolvency Proclamation as set out in Prayer 4 of the Notice of motion.
- (d) The costs of this Application and for the due performance of her mandate by the liquidator shall be costs of administration in the liquidation.

⁷ MKM Marketing Ltd and Others v The Commissioner of Insurance and Others C of A (CIV)24 of 2011 (unreported)

L.A. MOLETE

JUDGE

For the Applicant: Advocate P.J.J. Zietsman

For Respondents : Adv. M.M. Manyokole