IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CIV/APN/375/2019**

In the Matter Between:-

FORMER EMPLOYEES OF LESOTHO AGRICULTURAL DEVELOPMENT BANK **APPLICANT**

AND

THE GOVERNMENT OF THE KINGDOM OF LESOTHO **1ST RESPONDENT**

THE MINISTER OF FINANCE **2ND REPONDENT**

THE ATTORNEY GENERAL **3RD RESPONDENT**

JUDGMENT

CORAM **: MOKHESI J**

DATE OF HEARING **: 11TH AUGUST 2020**

DATE OF JUDGMENT **: 15TH OCTOBER 2020**

Summary:

ADMINISTRATIVE LAW: *The applicant had launched a review application against the Government's decision not to pay terminal*

benefits due to them on the basis of the Government's guarantee to pay, which was made in the wake, of the now defunct Lesotho Agricultural Development Bank's collapse- The applicants basing their case on the doctrine of substantive legitimate expectations- The requirements of this doctrine considered and applied- Held, that the applicants had substantive legitimate expectation that their terminal benefits would be paid by Government, and the Government's decision not to honour its guarantee to pay them entitled the applicants to seek redress before the courts- Held, further, that the Government's decision not to pay is reviewed and set aside.

ANNOTATIONS:

STATUTES:

Agricultural Development Bank Act 1976

Government Proceedings and Contracts Act, 1965.

REFERENCE:

Concise Oxford English Dictionary 10th ed, Revised by Judy Pearsal

CASES:

Delfante v Delta Electrical Industries Ltd 1992 (2) SA 221

Wightman t/a JW Construction v Headfour (PTY) Ltd and Another [2008] 2 A11 SA 512 (SCA

Foloko and Others v LADB Pension Fund and Others CIV/APN/142, 143, 144, 145/95 (unreported) pp 1

Natal Joint Municipal Pension Fund v Endumemi Municipality [2012] (4) A11 SA 593 (SCA); 2012 (4) SA 593 (SCA)

Mulcahy v Ministry of Defence [1996] QB 732 (H2)

Froylan v Transport Board and Others Court of Appeal of Belize, A.D 2012 CIV Appeal NO. 32 of 2011

M v Home Office [1994] 1 A.C 377

Taylor LJ. P, R v Lincensing Authority, ex parte Smith Kline & French Laboratories Ltd (Generics) (UK) Ltd [1989] 2 WLR 378; [1989] 2 ALL ER 11

Oudekraal Estates (PTY) Ltd v City of Cape Town 2004 (6) SA 222 (SCA)

Moorosi Matela and Others v The Government of the Kingdom of Lesotho and Others CIV/APN/197/2019 (unreported dated 14th November 2019)

Comair Limited v Minister of Public Enterprises and Others (13034/2013) [2015] ZAGPPHC 361; 2016 (1) SA 1(GP)

Francis Paponette and Others v The Attorney General of Trinidad and Tobago [2010] UKPC 32

Ward v Sulzer 1973(3) SA 701(A)

MOKHESI J

[1] INTRODUCTION

Before everything else, I must express my gratitude to both counsel for assisting this court with well-researched submissions. The applicants are former employees of the now defunct Lesotho Agricultural Development Bank. They are two hundred and sixteen in total. Given the debilitatingly inordinate delay in resolving this matter some former employees are now deceased and are accordingly represented by their relatives. The applicants have instituted these proceedings seeking relief in the following terms:

> *"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 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."

[2] The Lesotho Agricultural Development Bank ("LADB" hereinafter) was a Statutory Corporation established by the Government of Lesotho ("GOL" hereinafter) in terms of the Lesotho ***Agricultural Development Bank Act 1976*** (hereinafter 'the Act'). The sole purpose of establishing the bank was the facilitation and orderly development of agriculture in Lesotho, and to provide for matters incidental thereto or connected therewith. The bank was wholly owned by the GOL. The bank had limited liability and perpetual succession. In terms of section 31(1) of the Act the provisions of the Companies Act were not applicable to the bank except in situations where the Minister by notice in the Gazette

declares that any provision of the statute (inclusive of the Companies Act) that is consistent with the Act applies to the bank subject to modifications which may be specified in the Gazette. Furthermore, in terms of section 32(1) the bank was wholly exempt from paying income tax.

[3] In 1987 the LADB Pension Fund was established and administered by the insurer, Metropolitan Life Cape Town, in terms of which the LADB contributed 22% of the employees' monthly salaries. Although the respondents would seem to deny that the employer ever paid 22% as alleged, my considered view is that this denial by the respondents is untenable and ought to be rejected merely on the papers (***Wightman t/a JW Construction v Headfour (PTY) Ltd and Another [2008] 2 A11 SA 512 (SCA)***. The reason for this conclusion is this; It is a historical fact that in the year 1995, some employees of the bank hauled it before this court wherein the LADB Pension Fund was also the respondent. LADB admitted this fact that GOL is seemingly denying before this court. Lehohla J (as he then was) in ***Foloko and Others v LADB Pension Fund and Others CIV/APN/142, 143, 144, 145/95 (unreported) pp 1 – 2)*** recording the admitted facts on which the decision was based said the following:

> *"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*

[LADB Pension Fund], namely the fund, was set up, (the first respondent being an independent persona) the second respondent [Lesotho Agricultural Development Bank] and applicants were going to make contributions as follows:

(a) applicants were to contribute 2% of their salaries;

(b) ***second respondent [LADB] 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."(emphasis added)

[4] Quite plainly, before this court, LADB admitted that it contributed 22% of the employees' monthly salaries, and therefore, an assertion to the contrary can only be disingenuous. The fund was dissolved in January 1994 given the financial pressure it was exerting on the bank. Following its dissolution, the employees were given their 2% contribution while the employer's 22% remains outstanding to date. The LADB Pension Fund was later resuscitated and restructured in February 1994 with only

employees contributing 5% of their monthly salaries while the employer did not contribute anything due to financial hardships it was experiencing. This continued until the bank completely collapsed in 1999.

[5] LADB's Collapse and GOL's Response*:*

As already alluded to earlier, the bank was experiencing financial difficulties which made it impossible for it to be a going concern. Given the bank's financial distress situation, the GOL explored several options aimed at saving it, however, those efforts came to naught. These intentions of saving the bank were expressed by the then Minister of Finance in a written statement released on the 30th June 1998 in which he expressed the GOL's views that the bank was now insolvent and that there was no prospect of returning it to profitability. He informed the public that, the GOL has decided to close the bank "in the event that it cannot be privatized within a reasonable period of time." Under paragraph 6 of the same statement the Minister said (hereinafter **'the First Statement'):**

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

[6] When the GOL failed to secure a purchaser for the LADB, the only sure destination was its closure. Following the decision to

close the bank, the GOL through the Minister of Finance, Dr. L. Ketso released what was termed "Public Statement by the Honourable Minister of Finance in relation to the Lesotho Agricultural Development Bank" (hereinafter **'the Second Statement'**). In this statement, which is quite brief and to the point, the Minister said:

> *"In recent months, the Government has endeavoured to find a purchase 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 M2,000.00 and less plus interest, and these cheques will be encashable at any branch of Lesotho Bank.*
> 4. *All deposits in excess of M2,000.00 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." (emphasis added).

[7] To date the applicants have not been paid their terminal benefits. They even sought intervention from various quarters, namely, the Ombudsman, the Attorney General and the National Assembly. As regards the Attorney General his legal opinion regarding the plight of the applicant was unequivocal that the GOL was bound to pay the applicant their gratuities, severance packages, and pension benefits. The Accountant General even went to the extent of computing and quantifying each applicants' severance pay, gratuity and pension benefits (inclusive of the 22% employer's contribution to the 1994 LADB Pension Fund). All attempts at resolving the *impasse* were unsuccessful.

[8] On the 07th December 2016 the Principal Secretary - Ministry of Finance, had sought and was granted authorization by the Minister of Finance (2nd respondent) for payment of termination packages to the applicants. The request for authorization was couched as follows (in relevant parts):

"RE: PAYMENT OF TERMINAL PACKAGES OF THE DEFUNCT LESOTHO AGRICULTURAL DEVELOPMENT BANK.

The above matter bears reference. The office of the Attorney General as the Government Legal Advisor has written a legal opinion which is Documented 1 (sic) in the file herein attached.

After Lesotho Agricultural Bank was liquidated all that had to be done except payment of outgoing employees' terminal benefits of pension in the of form of the employer's monthly contributions towards pension.

The contribution is said to have been 22% of an employee's monthly salary.

Attorney general stated that the bank was an agent of the Government of Lesotho, the government of Lesotho acted as a banker and for these reasons government must pay the former Employees of the Lesotho Agricultural Bank.

Your Approval is sought.

Approved ***Signed***

Date 07/12/16" (emphasis added)

Consequent to this approval, in the same 2016/17 financial year, the Minister of Finance -towards meeting the GOL obligations in respect of the applicants- proposed a supplementary budget and the rationale for requesting supplementary allocation of funds was the "unplanned expenditure" necessitated by the 50th Anniversary

celebrations, food subsidy and crucially *"Lesotho Agricultural Development Bank staff terminal benefits"* among others. This was following the decision by the GOL which was communicated to the Government Secretary reference GS/DEC/6 dated 29th November 2016, authorizing the payment of the applicants' terminal benefits and their pensions as per Accountant General's computations.

[9] The Financial Controller – Ministry of Finance was accordingly instructed to pay the monies referred to, but that did not happen. When this did not happen, the applicants' frustration nudged them to seek intervention of Parliamentary Portfolio Committee on Economic Cluster on 11th September 2018. This Committee conducted its own investigations and made the following findings and conclusions:

- *"That the Ombudsman made an informal determination on this matter on the 06th August 2015, however the determination was half informed because that determination did not put (sic) into consideration the issue of liability on the side of the Government of Lesotho.*
- *That there is no money within the Central Bank's coffers available to disburse, for the payment of the pension and terminal benefits of the former employees of the Agric Bank.*

- *That the pension fund of the Defunct Lesotho Agricultural Development Bank (LADB)was dissolved in 1994 on the advice of the Agric Bank Board due to its costly and expensive nature. However, another fund was established in 1995 which continued until 1998 when the Agric Bank was closed down.*
- *That the pension fund for the defunct Lesotho Agricultural Development Bank was established in 1987 and employees contributed 2% while the employer contributed 22% of their monthly salary. Therefore, upon dissolution Metropolitan paid what was due to the former employees basing itself on the rules that governed dissolution of the Fund.*
- *That there is no liability on the Government of Lesotho towards the Defunct Lesotho Agricultural Development Bank, thus they were paid what was due to them by the Metropolitan Insurance Company in line with section 5.4.1 of the fund rules that govern dissolution of the fund.*
- *There is no pension and other terminal benefits to be paid by the Government of Lesotho to the Former Employees of the Defunct Lesotho Agricultural Development Bank (LADB) as there is no liability due. Since they have been duly paid*

their monies by the Metropolitan when the fund was dissolved as per the fund regulations in the amount of M6.7 million.

- *Conclusion:*

  In conclusion, the committee has noted that the employees were paid therefore, the committee presents this report with its findings and recommendation to be considered by the House basing itself on Standing Order No. 79 (3)"

[10] Although these facts may appear to burden the judgment, they are necessary to shed light on what precipitated this application. On the back of these findings and conclusions by the Parliamentary Portfolio Committee, the GOL dug in its heels and took an entrenched position not to pay applicants' terminal and pension benefits.

[11] PARTIES' RESPECTIVE CASES: APPLICANTS' CASE

It is the applicants' case that they had substantive legitimate expectation that the GOL would pay them their terminal and pension benefits, and this is how they put it in para. 10.1 of their founding affidavits:

"APPLICANTS' LEGITIMATE EXPECTATION

10.1. The Applicants read and understood the aforesaid promise, guarantee and assurance to mean that the GOL

undertook to pay the terminal benefits and pension benefits in the event of default by those primarily responsible (LADB, LADB Pensions Fund, the Liquidators of LADB, etc). As indicated, those primarily responsible had defaulted in making the payments for the terminal benefits and pensions benefits described herein."

[12] RESPONDENTS' CASE

The 2nd respondent (Minister of Finance) in his opposing papers raised two points in *limine*, viz,

a) LADB was liquidated in 1998, and this was effectively when the cause of action arose, and therefore, the applicants' claims have prescribed as they were not instituted within two years of the cause of action arising, per the ***Government Proceedings and Contracts Act, 1965***.

b) That the applicants could not institute the current proceedings seeking to review the GOL's decision not to pay their terminal benefits when the decision of the Portfolio Committer on which the GOL's decision not to pay was based is not being challenged in these proceedings. This is how he puts the point at para. 3.2 of his answering affidavit:

"The decision of parliament stands valid, and therefore, it is unprocedural while the decision stands valid, the applicants

can mount another challenge before this court seeking essentially the same thing they sought before Parliament…"

On the merits, it is the respondents' case that _as regards Pension Fund- that the GOL cannot be held liable for debts of the Pension Fund. Essentially, it is the respondent's case that the legal opinion by the Attorney General was erroneous, and therefore they are not bound by it: this is given that the LADB Pension Fund was a separate person from LADB and therefore, no basis exist in law to its liability to the employer (LADB); and further, the LADB was a legal persona separate from the GOL and therefore, its liabilities cannot be extended to the latter.

[13]POINTS IN LIMINE RAISED

I turn now to deal firstly with the points in *limine* raised.

(a) ***Applicability of the Government Proceedings and Contract (hereinafter "GPCA").***

It is the respondents' case that the applicants' claim has prescribed in terms of section 6 of GPCA as these applications was launched way beyond a two-year period prescribed by the said section. It is the respondents' argument that the cause of action arose when the Minister of Finance made an announcement on the 23rd June 1998, and further that even if it were to be assumed that Cabinet decision of the 09th November 2016 created another expectation, the claim has prescribed.

[14]On the other hand it is the applicants' contention that GPCA has no application in this case as its crux is to review the GOL's decision not to respect the promise or guarantee made to pay the terminal and pension benefits. Mr. Maqakachane, for the applicants, argued vociferously that the GPCA has no application in review proceedings as those proceedings are excluded from GPCA coverage. This point he made considering the historical context of the GPCA.

[15] The Government Proceedings and Contract Act NO. 4 of 1965 provides (in relevant parts)

> *"2. Any claim against Her Majesty in Her Government of Basutoland which would, if that claim had arisen against a subject, be the ground of action or other proceedings in the competent court, shall be cognizable by any such court, whether the claim arises out of any contract lawfully entered into on behalf of the crown or out of any wrong committed by any servant of the crown acting in his capacity and within the scope of his authority as such servant:*
>
> > *Provided that nothing in this section contained shall be construed as affecting the provisions of any law which limits the liability of the Crown or of the Government of any department thereof in respect of any act or omission of its servant, or which prescribes specified period within which a claim shall be made in respect of any such*

liability or imposes conditions on the institution of any action.

3…..

4…..

5…..

6. *Subject to the provisions of sections six, seven, eight, nine, ten, eleven, twelve and thirteen of the Prescription Act no action or other proceedings shall be capable of being brought against Her Majesty in Her Government of Basutoland by virtue of the provisions of section two of this Act after the expiration of the period of two years from the time when the cause of action or other proceedings first accrued.*

……"

[16]Much energy in the arguments from counsel centred on the interpretation of the words " *no action or other proceedings shall be capable of being brought against Her Majesty's Government of Basutoland by virtue of the provisions of section two of this Act after the expiration of the period of two years…"* as appear in s.6 of the GPCA. Mr Sekati, for the respondents, interprets the phrase *"action or other proceedings",* to cover review proceedings. Mr. Maqakachane, for the applicants, argued that these words were not

intended to cover applications for review of administrative decisions, as historically they were not available against the Crown. Review proceedings were Crown side proceedings.

[17] I now turn to interpret whether this phrase was intended to cover review proceedings as well. Interpretation is a unitary process. It seeks to attribute meaning to the words used in the statute or document in the light of the ordinary rules of grammar and syntax, and by having due regard to the context in which the words appear; the circumstances attendant on the statute's or document's coming into existence. The purpose for which the provision was directed also form part of the matrix of considerations to be included in the interpretation process (***Natal Joint Municipal Pension Fund v Endumemi Municipality [2012] (4) A11 SA 593 (SCA); 2012 (4) SA 593 (SCA)*** at para. 18)

[18]A brief historical context of GPCA will be undertaken. This exercise is important in order to highlight the reasons which precipitated promulgation of GPCA; it is also boon to answering the anterior question as to the gamut of this statute. It needs to be reiterated that we are dealing with review proceedings. When the Sovereign enacted GPCA, it was to provide break from the shackles of the age-old English twin principles which inhibited instituting proceedings against the Crown, *viz*, (a) that the King could not be sued in his own courts, and, (b) that the King could do no wrong.

The import of these two provisions, at in practice, was to immunize the Crown against being sued for tortuous acts of its servants or employees. In order to ameliorate the harshness of these inhibitors, practice developed whereby whenever Crown servant committed a tortuous act, acting within the scope of his duties, the Crown would pay damages on *ex gratia* basis. Whenever one wished to institute proceedings against the Crown to recover unliquidated damages for breach of contract, that had to be by way of petition of right.

[19] The house of Lords summarized the practical effects of these twin-principles as follows in ***Mulcahy v Ministry of Defence [1996] QB 732 (H2) at paras. 14 – 19***

> *"14. It is to be remembered that the primary claim by the plaintiff against the defendant is on the basis that the Ministry is liable vicariously for the negligence of Sergeant Warren. Nevertheless, it is necessary to consider the law relating to the liability of the Crown in tort because the relevant legislation and decided cases may throw light on the questions raised in this appeal and because the plaintiff's alternative claim is a direct claim against the Ministry.*
>
> *15. Until 1947 actions against the Crown were inhibited by two principles of ancient though doubtful origin. The first was that the King could not be impleaded in his own courts. The effect of the application of this principle was that until the 19th*

century proceedings against the Crown, so far as they were available at all, had to be brought by various complicated procedures including a petition of right. These procedures were simplified by the Petitions of Right Act 1860 and it was held in Thomas v The Queen (1874) LR 10 QB 31 that proceedings for damages for tort were inhibited or rather prevented by the application of the second ancient principle, the principle that the King could do no wrong. It may be that at one time the maxim 'the King can do no wrong' meant that the King was not privileged to commit illegal acts, but it came to be understood to be a rule barring actions in tort against the Crown. Thus in Canterbury v The Attorney General (1843) 12 LJ Ch. 281 an ex-speaker failed in his claim for compensation from the Crown for damage done to his furniture in the fire which destroyed the Houses of Parliament in 1834 caused, it was alleged, by the negligence of certain Crown Servants.

16. The consequences of the immunity of the Crown against proceedings in tort were mitigated by the practice whereby, for example, if a claim were brought for damages for negligent driving against a crown servant acting in the course of his employment, the Crown, in what were considered to be appropriate cases, would pay the damages on an ex-gratia basis. But the system attracted widespread criticism and both Lord Haldane and Lord Birkenhead made proposals for reform.

Furthermore, in Australia and New Zealand the matter was largely rectified by statute by the beginning of this century…..

19. The Crown Proceedings Act 1947

The immunity of the Crown against proceedings in tort was fundamentally charged by section 2 of the Crown Proceedings Act 1947."

[20]With the same purpose as that contained in Crown Proceedings Act 1947, in this jurisdiction still under British rule, the Crown liabilities Proclamation 77 of 1948 was promulgated to impose liability on the Crown for acts of its servants – vicarious liability- and to remove the restriction on suing the Crown for claims arising out of any contract lawfully entered into on behalf of the Crown. Importantly, under this Proclamation there was no prescriptive period beyond which claims against the Crown could not be instituted. This prescriptive clause was included in the ***Government Proceedings and Contracts Act No. 4 of 1965*** **(GPCA**) which repealed the Proclamation 77 of 1948

[21]These pieces of legislation did not (and do not) apply to judicial review because, these proceedings are what, in England, are referred to as the Crown side of the Queen's Bench Division proceedings. The Crown side proceedings are those proceedings by means of which the Queen's Bench Division exercises its supervisory powers by issuing writs of *mandamus*, prohibition or *certiorari*, *quo warranto* and *harbeas corpus* **(**see: ***Froylan v***

Transport Board and Others Court of Appeal of Belize, A.D 2012 CIV Appeal NO. 32 of 2011 at para. 41. Since these were prerogative remedies, they:

> *"[C]ould not be obtained against the Crown directly as was explained by Lord Denman C.J in Reg. v Powell (1841) 1 Q.B 352:*
>
> > *'…both because there would be an incongruity in the Queen commanding herself to do an act, and also because the disobedience to a writ of mandamus is to be enforced by attachment.'" (Lord Woolf in* ***M v Home Office [1994] 1 A.C 377 at para 24****).*

The British **Crown Proceedings Act 1947** being a prototype of our 1947 Proclamation and later the **GPCA,** clearly shows that **GPCA** does not apply to review proceedings (see further: ***Taylor LJ. P, R v Lincensing Authority, ex parte Smith Kline & French Laboratories Ltd (Generics) (UK) Ltd [1989] 2 WLR 378; [1989] 2 ALL ER 113****.* This brief historical context to the existence of GPCA, makes it abundantly clear that the said Act was directed imposing liability on the Crown vicariously for tortuous acts of its servants acting within the scope of their work, and for providing for Liability of the Crown for Contracts entered lawfully into by its servants acting within their scope of work. In my judgment, the phrase *"action or other proceedings"* refers only to the above stated scenarios, and not to applications for review,

which are quintessentially a "Crown side proceedings." For these reasons the preliminary point taken that this application has prescribed in terms of section 6 of GPCA falls to be dismissed as ill-conceived.

[22](b) PARALLEL PROCEEDINGS

The 2nd respondent contend that these proceedings should not be countenanced for being a "parallel challenge" to the decision of the National Assembly that the applicants are owed nothing by the GOL. For this proposition he invoked the decision in ***Oudekraal Estates (PTY) Ltd v City of Cape Town 2004 (6) SA 222 (SCA)***. In short, they argue that the decision of the National Assembly stands and should be challenged first as it exists in fact. The argument that the ***Oudekraal Estates*** is applicable in this application is misplaced for the following simple reasons: Simply stated, that case is authority for proposition that unlawful administrative acts are capable of producing legally valid consequences until those acts are set aside, and further that, a person is entitled to raise a collateral challenge to the validity of a coercive and unlawful administrative act. We are not dealing with that scenario in that case, but a review of the GOL decision to frustrate the substantive legitimate expectations of the applicants. The decision of Government not pay the applicants' terminal benefits predate that of the Portfolio Committee and could not have been based on it. What the Committee did was simply to confirm

the GOL's position not to fulfil the legitimate expectations. The applicants petitioned the National Assembly to intervene and to cause the GOL to pay their terminal and 'pension' benefits as promised. Being dissatisfied with the findings of the National Assembly, in my considered view, the applicants were entitled to frontally challenge the decision of the GOL not fulfil their promises as alleged. I therefore find that the point was not well taken and is accordingly dismissed.

[23]THE MERITS: SUBSTANTIVE LEGITIMATE EXPECTATIONS.

I turn now to consider whether the two statements by the Minister of Finance constitute a promise or undertaking to pay the applicants their terminal and pension benefits. The two statements being documents, are to be interpreted based on the approach in ***Natal Joint Municipal Pension Fund*** case (above).

[24]Before engaging in the interpretative process it is apposite to recapture the requirements of a claim based on substantive legitimate expectation. The doctrine of substantive legitimate expectation, as opposed to procedural legitimate expectation, was formally introduced in this jurisdiction by the decision of ***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 and followed. The following are the elements:

a) the statement by a decision-maker 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) how on a fair reading of the statement it could have been reasonably understood by the claimants.

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 has succeeded in doing that, the burden shifts to the respondent (maker of the statement or undertaking) to justify the frustration of the expectation by providing overriding

public interests which justify such frustration. These considerations are weighed against the requirements of fairness to the applicant (Proportionality test). These elements were summarized in ***R (ON THE APPLICATION OF PATEL) v General Medical Council [2013] 1 W.L.R 2801*** *at para. 58****;*** *This decision was followed in* ***Moorosi Matela (ibid)*** *at para. 17.*

[25]I now turn to deal with the interpretative process to determine whether the GOL made an undertaking to pay the applicants' terminal and pension benefits as alleged. When the Minister of Finance on the 30th June 1998 made the First statement on the financial situation of the LADB, it is clear that the GOL was fully aware that the bank was on the precipice of a complete collapse. The Minister expressed the Government's plans to safe the bank and expressed further, its awareness that the bank had outstanding obligations towards other banks, depositors and its employees. Clearly, macro-economic issues were always involved. This statement was made on the back of these considerations. Particularly as regards the employees, perhaps at the risk of being repetitious, at para. 6 thereof, the Minister said:

"The Government has decided that the process of Consultation with the staff of the Bank will begin immediately. This will be handled by establishment of a small sub-committee of the Board of the Bank that will consult with the

various staff representatives. In order to assist this consultative process, it is likely that the sub-committee will appoint a facilitator.

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

[26]After the GOL's efforts to secure the buyer for the bank the inevitable happened, the bank had to close shop. In the wake of that closure, the Minister of Finance issued the Second statement on 03 September 1998, in relation to the bank, wherein he said (as regards the employees):

"*1. …*

2. …

3. …

4. …

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." (emphasis added).

[27]The First Statement: whether it constitutes a promise to pay:

The applicants rely on this statement as forming one of the bases of the promise by the GOL to pay the amounts claimed. It will be observed that when the GOL issued this statement it was faced with a situation where liquidity of LAB was out of question – the bank was in a dire financial distress situation and was looking for some rescue avenue. The options which were considered by the GOL included transferring some rights and obligations of the LADB to Lesotho Bank or other financial institutions. The undertaking by GOL to ensure that "all employee salary, 'leave termination' and pension rights will be honoured" must be looked at in light of the purpose of the statement.

[28]The purpose of the statement was to outline the government plans or policy to safe the bank, and to assure that whatever measure is adopted at saving it, the government will ensure that the depositor's and employee interests are not prejudiced. I do not think that the government was undertaking itself to pay employee salary and their pensions. My reading of the Statement is that, as regards employees, the government merely undertakes to ensure that the entity which buys the LADB will honour the employee terminal and pension benefits. To my mind what the GOL was saying and doing, was merely to lay down a policy framework for saving LADB from collapse. The statement cannot

be said to be clear, unambiguous and devoid of relevant qualification. The GOL cannot be said to be promising to pay the amounts claimed by the applicants.

[29]The Second Statement:

In the immediate aftermath of the calamitous eventuality of collapse of the LADB the Minister of Finance issued a statement in terms of which it:

> *"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."*

It is on this second statement that I think the resolution of this matter turns. Mr. Sekati, for the respondents, argued with much force that this statement is ambiguous as it does not say with clarity what are "lawful entitlements" or "terminal packages" or "leave entitlements." He argued further that "pension premiums in lieu of notice" is a vague expression.

[30]On the authority of ***Natal Joint Municipal Pension Fund*** case, the context, purpose of the document and the plain meaning of words used in the document must be interrogated. It will be observed that the word used in both the first and second statements is *"guarantee."* In this second statement the GOL said

said that, "2. All depositors' funds are entirely guaranteed," and as a sign of its 'guarantee' the GOL undertook a positive action of:

a) Issuing cheques to all depositors of M2000.00 and less plus interest, and those cheques were to be cashed at any branch of Lesotho Bank.

b) All depositors in excess of M2000.00 were to be transferred electronically to Lesotho Bank.

[31]The same word, "guarantee", is used to say GOL *"guarantees LADB staff all lawful entitlements such as terminal packages, leave entitlements, pension premiums in lieu of notice and any other due notice payments."* The plain meaning of the word, according to **Concise Oxford English Dictionary 10th ed,** revised **by Judy Pearsal** at p.630 describes the word, thus:

> *"guarantee **n**. 1 a formal assurance that certain conditions will be fulfilled, especially that restitution will be made if a product is not of a specified quality. 2.something that gives certainty of outcome. 3. Variant spelling of guaranty. 4. Less common term for guarantor. **V**. **1** provide a guarantee: the company guarantees to refund your money> provide a guarantee for (a product)> provide financial security for; underwrite. **2** promise with certainty"*

It is the meaning of the word as a verb with which we are concerned in this matter. When used as a verb the word connotes

and creates direct liability (see also: ***Comair Limited v Minister of Public Enterprises and Others (13034/2013) [2015] ZAGPPHC 361; 2016 (1) SA 1(GP)*** at para. 17.2). The applicants are claiming that the GOL guaranteed to pay their pensions, but I think we need to go back to the statement to see what was being said. The GOL guaranteed LADB staff *"all lawful entitlements such as termination packages, leave entitlements,* ***pension premiums in lieu of notice*** *and any other due notice payments"* (emphasis added). This to me does not say anything, as the Minister does not explain what he means by *'pension premium in lieu of notice'*. In this regard, this statement is vague. The GOL did not undertake to pay applicants' pension monies, if it was its intention to do so it should have said so clearly. I am fortified in this view when regard is had to the context in which the statement was made: the statement was made in the wake of LADB collapse, and the bank being wholly-owned the GOL undertook to pay all the bank's liabilities. Pension monies were not LADB's liability, as those monies were administered in terms of a separate arrangement with Metropolitan Insurance. The Pension Fund was a separate legal *persona* from the bank, and therefore its liabilities to the applicants cannot be transposed on the bank and by extension on the GOL. In this regard, this statement was qualified by this legal reality.

[32] The above -on pension monies- notwithstanding, i am convinced that by *guaranteeing* the applicants' terminal benefits,

the GOL was making a clear, unambiguous statement devoid of qualification to pay the itemized benefits. It is common cause that to date, the GOL has not made good on the guarantee. I must, indicate that the collapse of the LADB must have had micro-economic and micro-political elements about it, but the GOL, offered the opportunity to proffer justification for frustrating the expectations, did not do so. The GOL's decision not to pay terminal benefits can only be explained on the basis of abuse of power. The following remarks are apposite:

> *"If the authority does not place material before the court to justify its frustration of the expectation, it runs the risk that the court will conclude that there is no sufficient public interest and that in consequence its conduct is so unfair as to amount to an abuse of power. The Board agrees with the observation of Laws LJ in Nadarajah v Secretary of State for the Home Department [2005] EWCA CIV 1363 at para. 68: "The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that only failure or refusal to comply is objectively justified as a proportionate measure in the circumstances." It is for the authority to prove that its failure or refusal to honour its promises was justified in the public interest. There is no burden on the applicant to prove that the failure or refusal was not justified." (**Francis Paponette**

and Others v The Attorney General of Trinidad and Tobago [2010] UKPC 32 at para. 38

[33] Costs:

The applicants have prayed for costs on the scale as between attorney and client owing to the fact that the GOL put them to unnecessary expenses. Awarding of costs falls within the discretion of the court. This principle applies with equal force to the award of punitive costs. Punitive costs are only awarded by reason of special circumstances attendant in a particular case (***Ward v Sulzer 1973(3) SA 701(A)***. Stubbornness bordering on vexatiousness and reprehensibility on the part of litigant merits an award of costs on the punitive scale (***Delfante v Delta Electrical Industries Ltd 1992 (2) SA 221).***

[34] A look at the history of this matter reveals that the decision to pay the applicants the amounts claimed was made at the level of Cabinet in the financial year 2016/2017 where supplementary budget was authorized to meet the expenditure, among others, related to payment of applicants' terminal benefits as calculated by the Auditor General. The Ministry of Finance's Financial Controller was even instructed to effect the said payments, but that never materialized. This forced the applicants to seek intervention from the Parliamentary Sub-committee. When the Sub-committee's findings did not favour the applicants the GOL opportunistically used these findings it as a shield against making good on the

guarantees it made to pay the applicants' terminal benefits. In my view the GOL's conduct was reprehensible, in the circumstances of this case. I therefore find that the award of costs on attorney and client scale will meet the justice of this case.

[35] In the result:

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 1st and 2nd 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.

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MOKHESI J

FOR THE APPLICANT: **ADV. T. S MAQAKACHANE**
INSTRUCTED BY CLARK POOPA
ATTORNEY AND NOTARY PUBLIC,
DA SILVA MANYOKOLE ATTORNEYS

FOR THE RESPONDENTS: **ADV. M. SEKATI FROM THE**
ATTORNEY GENERAL'S
CHAMBERS