

IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)

HELD AT MASERU

Case no: CCA/0068/2021

In the matter between:

MOEKETSI JOBO	1ST APPLICANT
‘MAMOIPONE BOSEKA	2ND APPLICANT
MOTHONYANA MABULA	3RD APPLICANT
LEBOHANG RANKUATSANA	4TH APPLICANT
KHOTSO MOLIKOE	5TH APPLICANT
‘MALINEO LEUTA	6TH APPLICANT
LEBOHANG MASOABI	7TH APPLICANT
HALIEO MOPELI	8TH APPLICANT
‘MAMAKOANYANE LECHAKO	9TH APPLICANT
HLALELE SHALE	10TH APPLICANT
THOMELO NKOFO	11TH APPLICANT
NTOKOLENG MOERANE	12TH APPLICANT
‘MATSELE TSELE	13TH APPLICANT
LIBAKANA BARETE	14TH APPLICANT
‘MAITHABELENG RAMANTSANE	15TH APPLICANT
LITEBOHO RAMONYALUOE	16TH APPLICANT

SELLO MAJAJANE	17TH APPLICANT
MOLAHLEHI TSEOLE	18TH APPLICANT
‘MASHALE RAMAKHULA	19TH APPLICANT
APESI NAPO	20TH APPLICANT
LIKETSO MALATALIANA	21ST APPLICANT
‘MASELLOANE RAKHONGOANA	22ND APPLICANT
MALEE KHAMPEPE	23RD APPLICANT
‘MAMONYANE LILEMO	24TH APPLICANT
SEKAKE MAKOANYANE	25TH APPLICANT
NTLHONAMO ROSA MOHEJANE	26TH APPLICANT

AND

LETSHEGO HOLDINGS (PTY) LTD	1ST RESPONDENT
LESANA FINANCIAL SERVICES (PTY) LTD	2ND RESPONDENT
PLATINUM CREDIT LESOTHO (PTY) LTD	3RD RESPONDENT
NETLOANS (PTY) LTD	4TH RESPONDENT
ALIMELA THUTO FINANCIAL LTD	5TH RESPONDENT
ACCOUNTANT GENERAL	6TH RESPONDENT
NATIONAL TREASURY	7TH RESPONDENT
COMMISSIONER (CENTRAL BANK OF LESOTHO)	8TH RESPONDENT
ATTORNEY GENERAL	9TH RESPONDENT

Neutral Citation: Jobo & 25 Others v Letshego Holdings (Pty) Ltd & Others
[2022] LSHC 96 COM. (09 JUNE 2022)

CORAM: MOKHESI J
DATE OF HEARING: 13th April 2022
DATE OF JUDGMENT: 9th June 2022

SUMMARY

CIVIL PRACTICE: *Interpreting court orders- Approach to interpreting documents applicable- The applicants having complained about micro-lenders before the Central Bank, and having obtained an interim interdict against the lenders from deducting from their salaries, monthly repayments, pending the outcome of the investigation- the Central Bank having concluded the investigations and the applicants being dissatisfied with the outcome, whether the court should extend the operation of the rule nisi pending the outcome of their appeal before the Tribunal which is yet to be appointed by the Minister of Finance- a case for the continued operation of the rule not having been made out, the rule accordingly discharged with costs.*

ANNOTATIONS

CASE LAW

Airoadexpress v LRTB, Durban 1986 (2) SA 663 (AD)

De Fraetas v Cape Licensing Court 1992 CPD 350

Elan Boulevard (Pty) Ltd v Fnyn Investments (Pty) Ltd and others [2018] ZASCA 165; 2019 (3) SA 441 (SCA) (29 November 2018)

Finishing Touch 163 (Pty) Ltd v BHP Biliton Energy South Africa Ltd and Others
2013(2) SA 20 HLB *International (South Africa) v MWRK Accountants and*
Consultants [2022] ZASCA 52 (12 April 2022) (SCA)
Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] ZASCA 13;
[2012] 2 ALL SA 262 (SCA).

LEGISLATION

Financial Institutions Act 2012

Financial Institutions (Credit Only and Deposit Taking Micro-Finance Institutions)
Regulations of 2014

JUDGMENT

[1] **Introduction**

I had issued an *ex tempore* order discharging the rule on the 13 April 2022 and promised that written reasons will follow. The following are the written reasons for the decision. The applicants had approached this court (Mahase J) on an urgent basis seeking the following reliefs:

1. *Dispensing with the normal rules relating to modes of service court process on account of urgency thereof*
2. *That a Rule nisi be and is hereby issued returnable on the date and time to be determined by the Honourable Court calling upon the Respondents to show cause (if any) why the following orders shall not be granted:*
 - a) *That the 6th respondent or anyone else acting under her authority be and is hereby restrained and interdicted forthwith from processing deductions from Applicants' salaries in favour of the 1st up to the 5th Respondents, pending final determination of the issues lodged before the 8th Respondent regarding the loan agreements between the Applicants herein and the 1st up to the 5th Respondents.*
 - b) *That immediately following the outcome of the final determination of the issues on non-compliance lodge before the 08th Respondent, the 6th Respondent be ordered to comply with Regulation 47(2) of the Treasury Regulations 2014 (as amended by Treasury Amendment Regulations 2017).*
3. *That prayers 1 and 2(a) operate with immediate effect as an Interim Court Order.*
4. *That the 1st to 5th Respondents be ordered to pay Applicants' costs hereof on attorney and client scale in the event of opposition.*

5. That the Applicants be granted further and/or alternative relief as this Honourable Court may deem fit,

[2] **The Parties and background facts.**

The applicants are civil servants employed in different Government Ministries. They had all applied for and were advanced loans by the 1st to 5th respondent companies, which are micro-lenders, on different occasions. They all have written loan agreements. As the report of the Commissioner (8th respondent) reveals (which will be dealt with at a later stage) some applicants have revolving loans. In order to ensure that the deductions are made, the respondents secured the applicants' consent to deduct monthly instalments towards repayment of the loans advance through the medium of the system called Central Deductions Administration System (CDAS). As some of the applicants had taken on huge debts through the respondents, they were burdened to an unbearable level. Being in a situation where they could barely breath, metaphorically, due to debt burden, they approached their current counsel who approached the 8th respondent (the Central Bank) for intervention as they felt the micro-lending companies were deducting amounts not due to them. The Central Bank was approached in terms of Financial Institutions Act, 2012 (hereinafter 'the Act').

[3] Given that in the Act the 8th respondent has not been given the power for issuing temporary interdicts, the applicants' counsel approached this court (Mahase J) on the 13 December 2021 seeking the reliefs alluded to above, and issued a *rule nisi* returnable on the 19 January 2022, after hearing arguments from counsel representing all the parties in the matter. This rule

has been extended since then until 13 April 2022 while awaiting the report of investigations by the 8th respondent into the allegations of impropriety by the 1st to 5th respondents. That report was ultimately released. I revert to the report in due course. The order of Mahase J was couched in the following terms (in relevant parts).

1. The Application for interdict is granted as prayed as per Prayer 2(a) in the Notice of Motion reads as follows:

“2(a) That the 6th Respondent or anyone or anyone else acting under her authority is hereby restrained and interdicted forthwith from processing deductions from Applicants’ salaries in favour of the 1st up to the 5th Respondent, pending final determination of the issues lodged before the 8th Respondent, regarding the loan agreements between the Applicants herein and the 1st up to the 5th Respondent.”

2. The Rule nisi is hereby issued returnable on the 19th January 2022.

3. Costs shall be in the course (sic)

4. The matter is referred to the Commercial Court for allocation.

[5] On the 13 April 2022 when the matter served before me on extended *rule nisi*, propriety of its further extension was argued. The debate was brought about by the fact that despite the report of the 8th respondent being released, the applicants were still unsatisfied about its findings and recommendations and had lodged an appeal in terms of Section 77 (1) of the Act. The main problem with this appeal is that the Minister of Finance has not and has never appointed an appeal Tribunal since the promulgation of the Act in 2012. It is unknown when he will appoint it for the applicants’ appeal to be determined.

[6] **Issues for determination**

(i) Whether the *Rule Nisi* should be extended.

[7] (i) **Should the Rule Nisi be extended?**

As already stated, when the applicants approached this Court seeking an interim interdict, they did so because the 8th respondent lacks of power to issue it pending the determination of the issues she/he was called upon to investigate pertaining to the 1st and 5th respondents. The question whether or not Mahase J was correct to issue the interim interdict as prayed by the applicants, is of no moment. In this matter I am merely concerned with the question whether the *rule nisi* should be extended further pending the determination of their appeal to the Tribunal.

[8] Although not stated as justification for the order, when Mahase J issued the interim interdict in the manner she did, she was exercising this Court's inherent power to prevent "hardship" and "injustice" to the applicants. That power was adverted to in **Airoadexpress v LRTB, Durban 1986 (2) SA 663 (AD)** where the court was dealing with a situation where the Provincial Division had directed the Local Road Transportation Board to issue road transportation permits to the appellant, pending an appeal by the appellant to the National Transport Commission against a decision of the board which had refused such permits. The Court had discharged the rule on the basis that it did not have the power to grant substantive rights which the appellant was claiming pending appeal. The Appellate Division having found that the local board had misconstrued its powers, that a review or appeal to the Supreme Court or to the National Transportation Commission would

occasion loss and hardship to the appellant given that the appeal could be heard later (delay). Kotzê, J. A, (at p. 676 B – C) stated the principle as follows:

*....I cannot accept that, if it can be shown in a case of this kind that the appellant must inevitably succeed in the appeal, interim relief pending the determination thereof can lawfully be withheld solely by reason of an order which cannot conceivably be sustained. I am of the view further that in principle the same approach should prevail where a strong prima facie case is established that the permits applied for were wrongly refused. In my view the principle applied in the **De Fraetas** type of case should be extended to a case like the present. The decision in that case is based on the exercise of a “general power” or, put differently, an inherent jurisdiction to grant pendete lite relief to avoid injustice and hardship. An inherent power of this kind is a salutary power which should be jealously preserved and even extended where exceptional circumstances are present and where, but for the exercise of such power, a litigant would be remediless, as is the case here.*

[9] In **De Fraetas v Cape Lincensing Court 1992 CPD 350 at 350-1**, the decision on which the above case was decided, Gardiner J said:

In the present case the licensee was successful upon an application for review in obtaining the setting aside of the proceedings of the licensing court, and an order was made on the licensing court to call a further meeting to consider his application. Against that judgement the licensing court has appealed, and this appeal cannot be heard until three months will have expired. It would be obviously unjust to the licensee if, pending the appeal, he were required to cease carrying on business. My attention had not been directed to any specific authority by which I can grant the

extension, but I think that the court has a general power when the hearing of an appeal is pending to do what may be necessary to secure that neither party shall be prejudiced.

These principles are applicable with equal measure in the present case.

[10] This matter principally concerns an interpretation of Mahase J's order mentioned above in the quest to determine whether it was only meant to be operative until the decision of the 8th respondent has been rendered or whether it was meant to extend beyond that occurrence and to be operative pending the determination of the issues by the Tribunal on appeal.

[11] An order of court is interpreted based on the same principles applicable to interpretation documents, by taking into account the language used, context and purpose of the order. (**Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] ZASCA 13; [2012] 2 ALL SA 262 (SCA). In Finishing Touch 163 (Pty) Ltd v BHP Biliton Energy South Africa Ltd and Others 2013 (2) SA 204 (SCA)** at para.13, the court said:

*...The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. See **Firestone South Africa (Pty) Ltd v Genticuro AG 1977 (4) SA 298 (A)**. (sic)*

[12] In **Elan Boulevard (Pty) Ltd v Fny Investments (Pty) Ltd and others [2018] ZASCA 165; 2019 (3) SA 441 (SCA) (29 November 2018)** at para.

16, the court emphasised the same approach to interpreting court orders by stating that:

“An order is merely the executive part of the judgment and to interpret it, it is necessary to read the Order in the context of the judgment as a whole...”

(See also: HLB International (South Africa) v MWRK Accountants and Consultants [2022] ZASCA 52 (12 April 2022) at para. 24).

[13] As stated earlier in the judgment, the twenty-five applicants had individually, at varying times, applied for and were granted loans by the 1st to 5th respondents who are micro-lenders. They had sought intervention of the 8th respondent in view of what they perceived as breaches of the Financial Institutions (Credit Only and Deposit Taking Micro-Finance Institutions) Regulations of 2014 (hereinafter ‘Regulations’) as amended. Various complaints relate to:

- (i) Contravention of Regulation 14 (1) (c) read with Regulation 11(5) which empowers the 8th respondent to deem a credit agreement reckless where loan was granted without assessing the borrower’s repayment affordability.
- (ii) Contravention of Regulation 17 (1) (F), by violating the *in duplum* rule;
- (iii) Contravention of Regulation 19 which provides that micro-lenders express separately and not as a combination, the fees charged for advancing the loan;

- (iv) Contravention of Regulation 22 (1) which provides that the lender renders a detailed monthly statement of the borrower's account.
- (v) Contravention of Regulation 65 (1) read with regulation (2) (A) (II) and (IV), by charging interest that "is way above the loan." This regulation provides that the Commissioner (8th respondent) may declare certain business practices to be undesirable on certain considerations stated under the regulation.

[14] It is in the context of the above complaints that this court was approached for the interim interdict pending the outcome of the investigations into the allegations against the lenders. Reading from the reasons provided by Mahase J when granting the interim interdict, the purpose was to prevent hardship on the applicants pending the determination of their grievances/investigations by the 8th respondent. The question therefore is what is the meaning of the words "*that the 6th respondent or anyone else acting under her authority is hereby restrained and interdicted forthwith from processing deductions from Applicants salaries in favour of the 1st up to the 5th Respondent, pending final determination of the issues lodged before the 8th Respondent, regarding the loan agreements between the Applicants herein and the 1st up to the 5th Respondent*" as appear in the order of Mahase J. It is the applicants' argument that the words intimate that an interim interdict was meant to remain operations until all available avenues will have been exhausted, that is, until their issues are determined by the Tribunal on appeal. The 1st to 5th respondents, on the other hand argued that the interim interdict was meant to be in operation until the 8th respondent will have investigated the issues and issued his/her report.

[15] I am inclined to the position of the respondents that the Mahase J's order was meant to be operational until the determination of the issues by the Commissioner (8th respondent) and was not meant to extend to the period pending the determination of appeal in event the applicants were dissatisfied with the outcome of the investigations. This comes clearly from the plain meaning of the words used in the order. The reason for this conclusion is that the Tribunal is not part of the 8th respondent. It is appointed by the Minister of Finance in terms of section 76 (2) of the Act. It is constituted by a Judge of this court and two other members who are appointed for their expertise in the financial sector, experience and qualification in financial accounting.

[16] In terms of section 77 (1) of the Act, a person who is aggrieved by the decision of the Commissioner may appeal to the Tribunal:

“Provided that:

(a) the Tribunal in determining its decision may examine whether the Commissioner acted unlawfully or whether the Commissioner acted in an arbitrary or capricious manner in light of the facts and relevant Acts and regulations;

(b)

(c) with respect to an appeal of any other decision:

(i) the filing of an appeal shall not result in a suspension of the decision, provided that the Tribunal in exceptional circumstances may suspend such decision where its

immediate application would cause undue hardship or irreparable harm;...”

[17] In terms of section 76 (1) (c) (i) of the Act, the noting of an appeal against the decision of the 8th respondent does not have the effect of suspending his/her decision. The decision whether to suspend the decision falls on the Tribunal where exceptional circumstances are shown to exist, in order to prevent hardship or irreparable harm. This clearly shows that the decision of the 8th respondent is determinative of the issues unless exceptional circumstances call for its suspension pending the determination of appeal. In my considered view the interim relief of the kind this court is seized with was to be operational until the 8th respondent will have investigated the grievances and made his/her decision (recommendation and conclusions). For the fact that in the present matter the Tribunal does not exist, this court is bound to exercise its inherent jurisdiction whether the interim interdict should continue to operate. I am of the view that for the interim interdict to go beyond the decision of the 8th respondent, the applicants must have shown that they should inevitably succeed on appeal and for the court to exercise its inherent jurisdiction upon a *prima facie* case being made out that the Commissioner acted arbitrarily or capriciously or unlawfully in light of the facts and the applicable laws, in order to avoid injustice and hardship(see: **Airoadexpress v LRTB, Durban (supra) at p.676A-D**). In the present matter the applicant’s counsel contended herself with making submissions without a substantive application a *prima facie* case that the 8th respondent acted arbitrarily, capriciously and unlawfully in view of the facts and applicable laws.

[18] When Counsel appeared before court, Adv. Suhr, for the 1st to 5th respondents, suggested to Adv. Khesuoe, for the applicants, that she should file a substantive application justifying why the interim interdict should be kept in operation in the light of the 8th respondent's decision, a suggestion which was rebuffed by the applicants' counsel, as she was of the view that such a route was unnecessary. The applicants' counsel was mistaken as to the approach to be adopted and this called for discharge of the rule by this court. My decision to discharge the rule was not made mechanically only in view of the absence of the application substantiating its continued operation pending appeal, but it was made mindful of what was said in **De Fraetas v Cape Licensing Court (supra)**

“to do what may be necessary to secure that neither party shall be prejudiced.”

[19] It should be stated that in his/her report of the investigations, the 8th respondent made findings, conclusions and recommendations which touch on the issues the applicants had raised:

On the issues raised, that is:

(i) Breach of in *duplum* rule.

The 8th respondent's investigations revealed that twelve (12) clients of the 1st respondent whose interest charged appeared to be higher than the principal amount, the clients took longer loan term with low premium resulting in higher interest amount, and these borrowers; in some situations the borrowers took revolving loans repayable over a long period, thus attracting higher interest amount.

- (ii) Fees and charges in terms of Rule 19. The 8th respondent made the following findings as regarding expression of fees charged separately and not as a combination:
- (a) 4th respondent had combined the collection fee and administration and the 8th respondent as a result, issued an administrative directive to separate administration and collection fees.
- (b) 1st respondent termed service fee a monthly fee, and in the same vein, was directed to term it as prescribed in the Regulation.
- (iii) Monthly statement (Reg. 22(1))
Directives were issued to 4th respondent to issue monthly statements to clients. The same directive was issued to the 1st respondent.
- (iv) Unfair assessment/undesirable practice.
8th issued an administrative directive to the 3rd respondent to correct the borrowers' assessment and bring them into the prescribed threshold. But even in this regard, the 8th respondent found that assessment was made using payslip which include payment of arrears and that borrowers did not fully disclose pre-existing financial obligations. The borrowers took on many loans from different lenders "before the repayments premium could reflect on payslips, CDAS and Credit Bureau."

(v) Interest charges:

The 8th respondent stated that micro-lending sector is a free market in which interest charges are determined by the market and not prescribed by the law.

These are the findings of the 8th respondent's investigations and the corrective measures she took to address the shortcomings. She then drew the following conclusions:

- (a) Borrowers failed to declare their expenses and additional obligations when applying for loans;
- (b) The over-indebtedness of borrowers was a result of incomplete disclosure of their expenses and pre-existing financial obligations, to a greater degree.

[20] It is in the light of these considerations that I felt a case for a continued operation of the interim interdict pending appeal was shaky. The applicants do not dispute their indebtedness to the respondents and the above findings prima facie do not call for a continued operation of the *rule nisi*. In the circumstances the 1st to 5th respondents should not be deprived of the repayment of the loans they advanced. A continued interim interdict would be prejudicial to them as businesses especially for the reason that it is unknown when the Minister of Finance will fulfil his statutory duty of appointing a Tribunal to deal with the applicants' appeal.

[21] In the result the following order is made:

(a) The rule is discharged with costs.

MOKHESI J

For the Applicants:

**Adv M.V Khesuoe instructed
by L.M Lephatsa Attorneys**

For the 1st, 2nd, 3rd, and 4th Respondents:

**Adv R.A Suhr instructed by
Webber Newdigate Attorneys**

For 6th, 7th and 9th Respondents:

**Adv. M. Moshoeshoe from
Attorney General's
Chambers**

For 8th Respondent:

**Mrs M. Tohlang Phafane
from Webber Newdigate**