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**
NTSOKOLENG 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 161 Comm. (18TH AUGUST 2022)

CORAM: **MOKHESI J**

DATE OF HEARING: **08TH JUNE 2022**

DATE OF JUDGMENT: **18TH AUGUST 2022**

SUMMARY

CIVIL PRACTICE: *Application for contempt of court- applicable principles considered and applied- Unjust enrichment where deductions of the applicants' salaries were made despite the court order prohibiting same towards payment of their loans- The respondents were not enriched by effecting repayment of the loans they advanced to the applicants.*

ANNOTATIONS

STATUTES

Financial Institutions Act 2012

Treasury Regulations 2014 (as amended in 2017)

BOOKS

Eiselen and Pienaar **"Unjustified Enrichment: A Casebook" 2nd ed. (Butterworths)**

CASES

Fakie N. O v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA)

First National Bank of Southern Africa Ltd v Perry NO and Others 2001 (3) SA

Lerotholi Politechnic and Another v Lisene LAC 2009 – 2010) 397

Victorial Park Ratepayers Association v Greyvenouw CC and others (511/03) [2003] ZAECHC 19 11 April 2003)

JUDGMENT

[1] **Introduction**

This is an application for contempt of court and a recovery of monies which was deducted by the 1st to 5th respondents from the applicants' salaries during the currency of an order of court prohibiting the same. The reliefs are framed as follows:

1. *Dispensing with the normal rules relating to modes of service of court process on account of urgency.*

2. *Directing the 6th Respondent to appear before this Honourable Court on a date and time to be determined by the Court, to show cause (if any) why she should not be held in contempt of court in that the said Respondent has refused and/or neglected to comply with an order of this Honourable Court granted on the 13th December 2021.*

3. *Directing that, in the event of the 6th Respondent not appearing before this Honourable Court against service of an order upon her in such regard, that the 8th Respondent be and hereby directed and ordered through officers appointed in his/her discretion, to arrest the 6th Respondent and bring her before court to show cause as reflected above.*

4. *Directing the 1st up to the 6th Respondents to, jointly and severally, and with immediate effect, refund or cause refund to the Applicants, monies for the months of December 2021, January and February 2022 that were illegally deducted from Applicant's salaries after the service of court order prohibiting such deductions.*

5. *Directing that in the event that the 6th Respondent does not give effect to the Interim Court Order, the said Respondent be committed to prison until she has purged the Contempt.*

The applicant is opposed by both the Accountant General (as regards Contempt) and by 1st to 5th respondents as regards refunds.

[2] **Parties and background facts**

The applicants are civil servants who are employed in different Government Ministries. They had applied for and were advanced loans by the 1st to 5th Respondents Companies, who are licenced micro-lenders. The 6th Respondent is the Accountant General. The genesis of this matter and the main matter which has already been disposed of, are the complaints made by the applicants to the 8th Respondent (the Central Bank, as the regulator) on the 18 August 2021, alleging various transgressions of Micro-Finance Regulations by the 1st to 5th Respondents. The 8th Respondent was approached as the supervisor of financial and other licenced institutions, in terms section 49 of the Financial Institutions Act 2012. As the 8th Respondent could not issue the report of her investigations into the alleged transgressions on time, the applicant approached this court (the main application) on the 26 August 2021. The main relief which was sought in that matter was an interim interdict preventing the Accountant-General from processing deductions from the applicants' salaries in favour of the 1st to 5th respondents pending the determination of the complaint made to the Central Bank.

[3] After hearing arguments, Mahase J., granted an interim order in terms sought by the applicants with the *rule nisi* returnable on the 19 January 2022. On 19 January 2022 the *rule nisi* was extended to 1 March 2022 pending the completion of investigations by the Central Bank and provision of the report. The investigations were completed, and the said report was filed in this court on 01 March 2022. The matter was then adjourned to the 22 March 2022 in order to give the parties an opportunity to consider the report and to form an opinion on the future conduct of the matter. During the currency of the interim interdict, the Accountant General did not stop the deductions, with the result that deductions for the months in questions were made. The *rule nisi* was discharged by this court on the 13 April 2022, with written reasons being rendered on the 09 June 2022. It is these deductions that the applicants are seeking to recover in this matter in addition a relief that the Accountant- General be held in contempt of court.

[4] Before I go any further, it is important that the context in which money is deducted from the government employee salaries following their applications for micro-loans. The Accountant-General, in terms of Regulation 47 of Treasury Regulations 2014 (as amended in 2017) is authorised to make deductions from public officers' salaries in favour of third parties such as 1st to 5th respondents. But there is a condition attached for the exercise of such power. In terms of regulation 47 (2), the Accountant-General shall not process a deduction for third parties if the net amount that will become due to the employee after the deduction is less than 30% of the his or her gross salary.

[5] Due to the inefficiency of manual deduction system, the Government of Lesotho introduced a Central Deduction Administration System (CDAS). Through this system, the micro-lenders, can, before approving a loan application, check each individual's affordability. The system also controls deductions, in that, it ensures that the employee's take-home salary is not below 30% of their gross salary after the deduction. The third parties are given Government authorized deduction codes allowing them to initiate, alter and/or to stop the deductions. These access rights allow the respondents to stop the deductions themselves. The CDAS system is administered by a third party on behalf of the Department of Treasury, - CDAS Project Manager (DATANET/CBS). In effect this system does gatekeeping between the Government Payroll System and third parties (like the respondents).

[6] **Issues for determination**

(i) Whether the Accountant-General's failure to comply with the Court order was deliberate and *mala fide*.

(ii) Whether the applicants are entitled to the refunds.

[7] **Contempt of Court**

Contempt of Court is a criminal offence. It is an offence which violates the dignity, repute and authority of the court. It protects rights of everyone to fair trials, to maintain public confidence in the judicial arm of averment (**Victorial Park Ratepayers Association v Greyvenouw CC and others (511/03) [2003] ZAECHC 19 11 April 2003)** para. 15). The test for contempt is whether disobedience of the court order was committed

"deliberately and *mala fide*." This test was articulated in the now famous case of the **Fakie N. O v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA)** at para**.** 9, where the court said:

> *"A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith)."* (see also: **Lerotholi Politechnic and Another v Lisene LAC 2009 – 2010) 397 at 403 E – H (para. 12)).**

[8] At para. 41 (**Fackie case)** the Court held that:

> *"…[O]nce the applicant proves three requisites (order, service and non-compliance, unless the respondent provides evidence raising a reasonable doubt as to whether non-compliance was wilful and mala fide, the requisites of contempt will have been established. The … respondent no longer bears a legal burden to disprove wilfulness and mala fides on balance of probabilities, but need only lead evidence that establishes a reasonable doubt…"*

[9] Although the matter was initially about forcing the Accountant-General to comply with the Court order, since the main matter has been disposed of, it has now assumed the character of committal for non-compliance. This notwithstanding, the matter is still live and not moot. In **Victorial Park Ratepayers Association v Greyvenouw CC and others (above)** at para. 23:

> *"…[I]t us clear that contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the superior courts to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system …. Contempt of Court is not merely a means by which a frustrated successful litigant is able to force his or her opponent to obey a court order. Whenever a litigant fails to refuse to obey a court order, he or she thereby undermines the Constitution. That, in turn, means that the court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest…"*

[10] In an application for Contempt of Court once the applicant has proved order, service or notice and the respondent bears an evidential burden in relation to wilfulness and *mala fides*. Should the respondent fail to establish a reasonable doubt as to whether non-compliance was wilful or *mala fides*, contempt is taken to have been proved beyond a reasonable doubt (**Fakie case at para. 42).**

[11] It emerged from the founding affidavit of the applicants that when the court order was served on the Accountant-General she could not stop the deductions for the months of December and January as the payments for the said months had already been processed, and that she undertook to ensure that the deductions for the ensuing months were halted. Towards this end, she instructed DATANET which hosts and manages the CDAS, the payroll system and the Ministry of Public Service which manages the public officers' payroll, to stop the deductions. The Savingram to this effect was

issued on the 26 January 2022. The deductions did not stop as directed, and from her answering affidavit, she expected the 1st to 5th respondent to have stopped the deductions as they have been granted access rights into the CDAS to do so, because they were aware of the court order to that effect. Upon realising that the deductions did not stop as she ordered, she directed the payroll supervisor to stop them, and that was done for the month of March and the ensuing period until the *rule nisi* was discharged.

[12] Upon the conspectus of all these facts, can it be said that the Accountant-General was wilful and *mala fide* in not obeying the court order? Surely the answer should be in the negative. She could not stop the deductions for the two months of December and January because by the time she was served with the court order, payment of salaries for the two months had already been processed. In January she issued a directive to the Principal Secretary Ministry of Public Service, to stop the deductions but that did not happen until she directed the payroll Supervisor to do so. She always laboured under the belief that the 1st to 5th respondents, for their being privy to the court proceedings in which a court order in question was issued, would stop the deductions because they have been granted such rights. On the basis of all these facts, it is my considered view it has not been proved beyond a reasonable doubt that the 6th respondent was wilful and *mala fides* in not stopping the deductions for the months in question. I turn, now, to deal with the issue of refunds.

[13] (ii) **Refunds of the money deducted during the currency of the court order prohibiting same**.

It is common ground that deductions were made contrary to the order of this court. It is also common cause that the applicants were indebted to the 1st to 5th respondents for loans advanced. What remains to be determined is whether the applicants are entitled to recover the monies so deducted contrary to the dictates of the order of this court. The matter is not that straightforward as the applicants seem to think: the applicants' right of recovery does not lie in ownership of the money deducted, put differently, a vindicatory relief is not competent in the circumstances. The reason for this position is simple. Once the applicants' money got mixed with the 1st to 5th respondents', ownership thereof passed on to the respondents by operation of law (**First National Bank of Southern Africa Ltd v Perry NO and Others 2001 (3) SA 960 at 967 H – J).**

[14] Given that a vindicatory relief is not available to the applicants what remained for them was to allege and prove that the respondents were unjustly enriched, by invoking *condictio ob turpen vel iniustam causam*. This course of action is used to reclaim money or property which has been transferred in terms of an illegal contract. An agreement is illegal if it is prohibited expressly or by implication by law or where its conclusion (its subject matter or purpose) is *contra bonos mores* (Eiselen and Pienaar **"Unjustified Enrichment: A Casebook" 2nd ed. (Butterworths) at p.89).**

[15] An agreement which is contrary to the dictates of the Order of this Court falls within the realm of this course of action. It must be stated that the applicants did not expressly say that they are relying on this course of action. The court is merely being generous in its interpretation of the applicants' case. The applicants did not allege unjust enrichment.

[16] In terms of **FNB v Perry NO and others (above)** condictio *ob turpem causam* is applicable to the defendant who knew of the taint of the thing at time he acquires it and in situation where he learns of the taint after acquiring the thing. Importantly, however, at p.970 D – E the Court said:

> *"[25] This passage, to my mind, supplies the missing link. It is not only the person who receives with knowledge of illegality but also one who learns of it while he is still in possession. This does not mean that he is treated as liable for a delict as, among other things his liability is limited by his enrichment, that is if he is enriched at all…"* (emphasis provided)

[17] As Mr Suhr, for the 1st to 5th respondents, correctly argued, the validity of loan agreements in question were unaffected by the Court Order and therefore the applicants' obligations to repay them remained. What the Court Order did was to place a moratorium on deductions pending Central Bank's investigations. It was illegal to deduct monies contrary to the court order. Now that payment and acquisition of money by both the Accountant-General and the respondents (1st to 5th) respectively, was made contrary to the court order, does it mean that the respondents were unjustly enriched? The answer should be in the negative. It is trite that the onus of proving non-enrichment is on the respondents (1st to 5th) (**FNB v Perry NO and Others (above) at para. 31).** In my considered view, the respondents have shown that they were not enriched by their acquisition of the deductions because the money was used to repay the loans which the applicants have with the respondents. As the money was used to repay their respective

loans, the applicants cannot seriously argue that they have been impoverished.

[18] In the result;

(1) The application is dismissed with costs.

MOKHESI J

For the Applicants: **Adv. M. V. Khesuoe instructred by L. M. Lephatsa Attorneys**

For the 1st, 2nd, 3rd, 4th and 5th respondents: **Adv. R. A Suhr instructed by Webber Newdigate Attorneys**

For 6th Respondent: **Adv. M. Moshoeshoe from Attorney-General's Chambers**