

IN THE LABOUR APPEAL COURT

LAC/REV/83/03

HELD AT MASERU

In the matter between: -

‘MALEBINA ROSA LEPAMO

APPLICANT

And

LESOTHO BANK

1ST RESPONDENT

THE COURT PRESIDENT (LABOUR COURT) 2ND RESPONDENT

THE ATTORNEY GENERAL

3RD RESPONDENT

CORAM: HONOURABLE MR ACTING K E MOSITO

ASSESSORS: MR J M TAU

MR R L MOTHEPU

HEARD ON: 6th November, 2006.

DELIVERED ON: 7th November, 2006.

SUMMARY

The substantive relief sought involved 1st Respondent - The Respondent had been placed on liquidation - Applicant proceeded against it without the necessary leave of the High Court as required by *section 180 (a) of the companies Act No.25 of 1967* such leave is mandatory - Application dismissed.

JUDGMENT

MOSITO AJ: -

1. This is an application for an order in the following terms:
 - (a) The Second Respondent herein shall not be directed to dispatch or cause to be dispatched to this Honourable Court, the record of proceedings in LC 112/95, within fourteen (14) days of the service of this order upon him.
 - (b) The decision of the Second Respondent therein declining continued jurisdiction over LC 112/95 shall not be reviewed, corrected and/or set aside.
 - (c) The Respondents herein shall not be directed to pay the costs hereof in the event of opposition.
 - (d) The Second Respondent herein shall not be directed to proceed with the hearing of LC 112/95 to finality.

- (e) The Applicant herein shall not be granted such further and/or alternative relief as this Honourable court may deem fit.
2. The facts leading to the present application are as far as relevant to the determination of this matter in a nutshell as outlined herein below.
3. The Applicant is the widow of the late Peter Lefume Lepamo who was the Applicant in the main case in LC 112/95. The said Peter Lefume Lepamo (hereinafter called “the Deceased”) had lodged a claim against the First Respondent (hereinafter called the “bank”), claiming *inter alia*, his pension benefits. The proceedings went on until they reached a stage whereat they were almost complete and what was remaining was for Counsel on both sides to address the Labour Court.

4. Unfortunately, the Deceased passed away on the 5th day of November 2001 while the proceedings had not yet been finalized. The Applicant then brought an application for substitution in terms of which she asked the Labour Court to substitute her in her late husband's stead in LC 112/95 as Applicant. It is not clear from the record whether the application for substitution was ever granted by the Labour Court, but Mr Nathane who was always appearing for the Deceased and lately, for Applicant, informed the court from the bar in response to this court's question that it was in fact granted by consent in the Labour Court. There is no information on record on this aspect. The learned Counsel for the First Respondent, Mr Mpobole informed the court that he had no information on this point as he had since handed over the matter to another Counsel. Be that as it may, it appears that on the 22nd day of July 2003, Messrs Nathane and Chobokoane appeared before the President,

and by consent the matter was to be withdrawn to enable it to be filed with the Directorate of Dispute Prevention and Resolution (DDPR), purportedly following the decision of the Court of Appeal of Lesotho in the case of the *Attorney General & 2 Others v S J Kao C of A (CIV) No.9 of 2002* which was delivered on the 14th day of April 2003.

5. The present Applicant deposes in her affidavit that, when her Counsel appeared before the President of the Labour Court with First Respondent's Counsel, they were informed by the President that he could not proceed with the matter as his hands, were tied by the Kao's decision. She deposes that she and her Counsel had not seen the decision and they just took what they were told by the President that his hands were tied. It was on that occasion apparently that the Applicant's Counsel requested that he withdraws the matter so that he could institute it in the DOPR. The President

then “dismissed” the matter in terms of *Rule 10* of the *Labour Court Rules*.

6. One may pause here and remark that whether the President could correctly “dismiss” the said application sitting alone not sitting, as a court is rather doubtful. We have however not been called upon to express an opinion on this issue, and we accordingly avoided doing so in this matter.
7. The Applicant then deposes that, she asked her lawyer to consider the propriety of the course taken at the suggestion of the President and consequently decided to institute the present application before this court.
8. The matter was set down for hearing on the 31st day of October 2006, but Applicant’s Counsel was not available.

On that very day, First Respondent's Counsel filed an application for condonation for the late filing of the opposing affidavit to this review application as well as heads of arguments. The court then granted a postponement to Monday the 6th November 2006 to enable Applicant's Counsel to be before the court and for the matter to be proceeded with.

9. In the opposing affidavit, the First respondent raised two questions of law, namely: the *locus standi* of the Applicant and the issue whether this court could properly entertain this matter regard being had to the terms of section 180 (a) of the Company's Act 1967.

10. The latter section provides that:

“No action or proceedings shall be Proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may propose.”(Emphasis supplied)

This court characterized the above issue as one of jurisdiction. It then decided that the parties should address it on that issue, as in its opinion, the issue had to be determined first. The reason for this was that, if the court could be shown to lack jurisdiction to entertain the matter in the light of section 180 (a) of the Company's Act No.25 of 1967, then there would be no need to go further with the other issues raised.

- 11.* In his address, the learned Counsel for the First Respondent Mr Mpobole contended that the above mentioned section had the effect of a liquidation order, which is to automatically suspend all civil proceedings whether they are already proceeding or they are commencing. For this proposition he referred the court to the valuable work by Celia, Venadi, Botha, Oosthuizen and De La Ray, Corporate Law, Butterworths 1987 at p 463. He contended further that, in casu since the proceedings

had already commenced, they are also suspended by operation of the section. For this contention he relied on *SAPS v Joubert N.O 1986 (2) SA 395 (c)*. He contended that failure to apply for leave to institute the proceedings against a company in liquidation was fatal to this application. He relied on *Nkopane Monyane v The Liquidator Lesotho Bank, CIV/T/450/2002*, and cases cited therein. The Learned Counsel also relied on *Mampe Khaebana v IFTS (PTY) Ltd in Liquidation & 3 Others C of A (CIV) No.26 of 2005*.

12. The learned Counsel Mr Nathane quickly conceded, and quite properly so in our view. As the court of Appeal put it in the Khaebana's case (*supra*):

IFTS was placed under provisional liquidation on 20 August 1998 and finally on 19 September 1998. The bank was voluntarily wound up on 31 January 2001.

It was conceded that at no stage was leave of the court - by definition the High Court - requested or granted. The section 180

(a) requirement is so explicit and mandatory that Mrs Kotelo so (sic) be forgiven for not having any tenable submission to overcome this obstacle of non-compliance on the part of the applicant.

13. We are in respectful agreement with the above view. The present application is on all four with the Khaebana's case on this point.

14. In the result, this application in to be dismissed with costs for failure to comply with the terms of section 180(a) of the company's Act No. 25 of 1967.

15. My Assessors agree.

K. E. Mosito
Judge of the Labour Appeal Court

For Applicant: Mr. H Nathane
For First Respondent: Mr. M Mopobole
No appearance for the 2nd & 3rd Respondents.