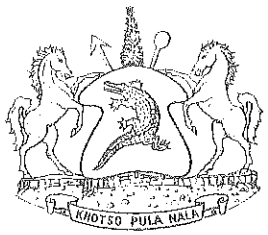

LESOTHO

IN THE HIGH COURT OF LESOTHO

Held at Maseru

CONSTITUTIONAL CASE NO: 16/2019

In the matter between:

LIKANO TŚIU AND 85 OTHERS	**APPLICANTS**
And	
THE SPEAKER OF THE NATIONAL ASSEMBLY	**1ST RESPONDENT**
THE CLERK OF THE NATIONAL ASSEMBLY	**2ND RESPONDENT**
PORTFOLIO COMMITTEE OF ECONOMIC AND DEVELOPMENT CLUSTER	**3rd RESPONDENT**
THE NATIONAL ASSEMBLY	**4TH RESPONDENT**
MINISTER OF LAW, CONSTITUTIONAL AND PARLIAMENTARY AFFAIRS	**5TH RESPONDENT**
THE PRINCIPAL SECRETARY – MINISTRY OF FINANCE	**6TH RESPONDENT**
MINISTER OF FINANCE	**7TH RESPONDENT**
ACCOUNTANT GENERAL	**8TH RESPONDENT**

FINANCIAL CONTROLLER	**9TH RESPONDENT**
MASTER OF THE HIGH COURT	**10TH RESPONDENT**
ATTORNEY – GENERAL	**11TH RESPONDENT**
METROPOLITAN LTD.	**12TH RESPONDENT**

Neutral citation: Tśiu and Others v. The Speaker of the National Assembly and Others [2023] LSHC 64 Const (21st April, 2023)

CORAM: S. P. SAKOANE CJ, K.L. MOAHLOLI and P. BANYANE JJ

HEARD: 13TH FEBRUARY 2023

DELIVERED: 21st APRIL 2023

SUMMARY

Constitutional law – claim of payment of benefits from Pension Fund created as a legal persona – claim not provided for in the Pension Fund Rules – Ombudsman recommending to Government to pay – Government responding by approving budget for payment – meantime applicants petitioning National Assembly in the matter – National Assembly passing resolution that Government is not liable to pay – whether necessary to reach the constitutional issue of discrimination raised in connection with the effects of the resolution of National Assembly – Government as a sole shareholder of a bank that was liquidated – whether requirements for lifting the corporate veil are satisfied – validity of application of doctrine of legitimate expectation to be paid – Lesotho Agricultural Development Bank Act No.5 of 1976, sections 2, 13(3) and (4); Lesotho Agricultural Development Bank (Amendment) Act No.13 of 1988 section 4; Lesotho Agricultural Development Bank (Liquidation) Act No.2 of 1999.

ANNOTATIONS

Cases cited:

LESOTHO

Former Employees of the Lesotho Agricultural Development Bank v. The Government of Lesotho and Others C of A (CIV) No.35/2020 (14 May 2021)

Monaheng v. Mapiloko C of A (CIV) No.49/2017 (01 November 2019)

Ramoepana v, Director of Public Prosecutions Constitutional Case No.5 of 2018 [2018] LSHC 33 (06 June 2018)

Sekoati and Others v. President of the Court-Martial and Others LAC (1995-99) 812

SOUTH AFRICA

Gcaba v. Minister for Safety and Security 2010 (1) SA 238 (CC)

Shipping Corporation of India Ltd v. Evdomon Corporation 1994 (1) SA 550 (AD)

TEK Corporation Provident Fund and Others v. Lorentz 1999 (4) SA 884(SCA)

STATUTES:

Lesotho Agricultural Development Bank Act No.5 of 1976

Lesotho Agricultural Development (Amendment) Act No.13 of 1988

Lesotho Agricultural Development Bank (Liquidation) Act No.2 of 1999

JUDGMENT

SAKOANE CJ:

I. INTRODUCTION

[1] The applicants are former employees of the now defunct Lesotho Agricultural Development Bank (LADB). LADB was liquidated in 1999 with applicants' employment terminating in September the same year[1]. The LADB had been established in terms of the **Lesotho Agricultural Development Bank Act No.5 of 1976** as "a body corporate with limited liability and capable of suing and being sued."[2]

[2] The Government was the sole shareholder whose liability was limited to the amount of shares it held[3]. The Board of Directors consisted of:

> "(a) the Minister of Finance who shall be the chairman of the Board;
>
> (b) three persons appointed by the Minister of Agriculture; Co-operatives and Marketing;
>
> (c) the Managing Director and
>
> (d) Four other members appointed by the Minister".[4]

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[1] Lesotho Agricultural Development Bank (Liquidation) Act No.2 of 1999
[2] Section 2
[3] Section 14
[4] Section 4 of the Lesotho Agricultural Development Bank (Amendment) Act No.13 of 1988

[3] According to section 13 (3):

> "The Bank may grant pensions, gratuities or retiring allowance to officers and employees of the Bank and require them to contribute to any pension or provident fund or superannuation scheme."

[4] In the exercise of its powers under section 13 (3), LADB established a Pension Fund and made rules for its administration[5]. Rules relevant to the issues raised in this case will be referred to in due course.

Reliefs

[5] The reliefs that the applicants seek in terms of the second amended notice of motion are these:

> "1. 3rd Respondent be ordered to dispatch the record of its proceedings, particularly of the 16th January 2019.
>
> 2. 12th Respondent be ordered to dispatch its records pertaining to the administration of the LADB Fund.
>
> 3. Declaring that the Resolution of the 4th Respondent is unconstitutional for its inconsistency with Section 19 and 30 (a) (ii) of the Constitution of Lesotho, 1993.
>
> 4. Reviewing and setting aside the resolution adopted by the 4th Respondent on grounds of inconsistency with Section 19 of the Constitution of Lesotho, 1993.
>
> 5. Declaring the 6th Respondent to pay Applicants' 22% (sic) Employer's Contributions.
>
> 6. Declaring the 6th Respondent liable to pay the 16th, 17th, 18th, 19th, 26th, 30th, 31st, 33rd, 46th, 59th and 60th Applicants' 2% Contributions as well as 5% compound interest.

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[5] The Rules of the Lesotho Agricultural Development Bank Pension Fund 1987

7. Ordering the 5th, 6th, 7th, 8th and 9th Respondents to calculate the amounts due to the Applicants on finalization of this matter.

8. Ordering the 9th Respondent to make payments based on the calculations above.

9. Costs of suit.

10. Further and / or alternative relief.

11. Declaring 7th Respondent to be in breach of agreement by failing to contribute the 22% into the fund."

[6] It is clear from these reliefs that the applicants are invoking the constitutional jurisdiction of this court to do two things:

6.1 Enforce payment of outstanding monies that LADB allegedly paid into the Pension Fund for their benefits.

6.2 To pronounce on the constitutionality or otherwise of the resolution of the National Assembly that the Government is not indebted to the applicants.

Jurisdiction

[7] This mix-up of claim of payment of money and the striking down of the resolution of the National Assembly on grounds for breach of provisions of the Bill of Rights in the Constitution called for an objection by Mr *Moshoeshoe,* counsel for the respondents. He takes the point that this court's jurisdiction can be invoked in two ways only. The first is by way of section 22 if the complaint is about violation of a protected right or

freedom. The second is the rule of law review in terms of section 2 under which this court can strike down a provision of a law if found inconsistent with the Constitution.

[8] Mr *Moshoeshoe* contends that a resolution of Parliament does not have the force of law and binds no one but Parliament itself. It cannot then have the binding effect on a party or affect rights and freedoms.

[9] Miss *Thabane*, for the applicants, counters that the question of jurisdiction is determined by the claim as formulated in the pleadings and not whether the pleaded claim is cognizable only in another court. If the applicants say their claim is to enforce a constitutional right, that is what the court is properly seized with. Whether the claim is good or bad is beside the point.

[10] There is authority from South Africa to support Miss *Thabane's* contention. In **Gcaba v. Minister of Safety and Security and Others**[6], the Constitutional Court said:

> "[75] ...In the event of the court's jurisdiction being challenged at the outset (*in limine*), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including, in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognisable only in another court. If, however, the pleadings, properly interpreted, establish that the applicant is asserting a claim under the LRA, one that is

[6] [2009] ZACC 26; 2010 (1) BCLR 35 (CC)

> to be determined exclusively by the Labour Court, the High Court would lack jurisdiction."

[11] This is to say that the alleged discrimination arising from Parliament's resolution that the Government is not obliged to pay the applicants suffices for this court to assume jurisdiction over the entire reliefs. That was our *prima facie* view at the end of arguments on the point of jurisdiction. Hence we allowed the parties to argue the case on the merits.

II. MERITS

The Applicants' case

[12] The applicants' case is that the Government is liable to pay them the LADB's/Employer's contribution to the Pension Fund[7] plus 5% interest. On liquidation of LADB, the applicants were paid their own contribution by Metropolitan Ltd as the insurer. The Principal Officer is to blame in that he negligently failed to ensure that the applicants are paid both the employer's contributions and their own contributions.

[13] The LADB Pension Fund was dissolved in 1994. As members, they contributed 2% of their "monthly pension remuneration whilst the

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[7] being 22% of each employee member's monthly pensionable remuneration. Hereinafter referred to as "the Employer's Contribution".

employer made a 22% employer's contribution into the Fund, due and payable to the employee upon retirement".[8]

[14] The Pension Fund was dissolved in 1994. They were each paid their 2% own contributions as well as 5% compound interest. None of them were paid the 22% employer's contribution.

[15] On 3 March 1998 the Minister of Finance issued a public statement in which he announced that LADB is under administration and that, among others, the following will apply:

> "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 entitlements."

[16] In 1998 one *Khaile,* also a former employee, was paid the 22% employer's contribution by Metropolitan Ltd. By this "we reasonably expected that we would also receive the employer's contribution, but we never did."[9]

[17] In 2007 applicants approached Metropolitan Ltd which informed them that all payments had been made and that they should approach the employer. What Metropolitan told them surprised them greatly because they had not

[8] Founding affidavit para 3.3
[9] Op.cit. para 3.5

received the 22% contributions from the Fund. Thereafter, they sought assistance from the Ombudsman who recommended compensation by Government. On receipt of the recommendation, the Minister of Finance sought advice from the Attorney General who advised that Government is liable to pay.

[18] The Minister of Finance then caused the necessary calculations to be made and prepared a cabinet memo requesting additional funds. Cabinet accepted and approved a budget in November 2016. This notwithstanding, no payments were made.

[19] The applicants then petitioned the National Assembly's Portfolio Committee on Economic and Development Cluster to investigate. The Portfolio Committee submitted a report in the National Assembly which said the Government is not liable to pay. The National Assembly adopted the report on 29 March 2019 and passed a resolution that the Government was not liable to pay and should not pay.

[20] The resolution of the National Assembly absolving Government from paying is unconstitutional in that it failed to grasp that other employees were paid the employer's 22% contribution well after the dissolution of the Fund when others did not. The effect of the resolution was to disadvantage

the applicants. This constitutes a violation of the right to equality and equal protection of the law as guaranteed in section 19 of the Constitution.

[21] The Government's liability to pay the 22% arises from LADB's status as its agent and sole shareholder. In situations where a company is an agent and becomes negligent, the court has the power to hold shareholders liable.

Respondents' answer

[22] The Minister of Finance denies liability of Government. He avers that:

22.1 The LADB was a limited liability corporation whose liability does not extend to shareholders unless there is proof that shareholders participated in an unlawful and negligent act that resulted in corporate insolvency. There is no evidence to demonstrate any negligence or unlawfulness on the part of the Government.

22.2 The Fund was created as a separate legal entity with its administration independent from LADB and Government. Neither the employer nor Government were members or shareholders in the Fund. There is, therefore, no basis to impute liability to the employer and Government.

22.3 The Fund was dissolved. In terms of Rule 6, all benefits due to employees were limited to what is available in the purse of the Fund. Its Rules did not bind LADB as it was not a signatory to them. LADB assisted in its establishment but did not participate in its administration. It is wrong to attribute liability of Government for negligent actions of the Principal Officer of the Fund even if he was the Managing Director.

22.4 There is no promise to pay in the speech of the Minister of Finance that could raise a legitimate expectation that the applicants were to be paid. Neither is there anything said that payment would be made out of the employer's contributions.

22.5 The 22% contribution does not have a basis. Nowhere do the Rules of the Fund require the employer to contribute 22%. There is also no evidence filed of record to show that the employer agreed or undertook to contribute 22% or made such contribution.

22.6 It is accepted that one *Khaile* was paid some amount reflected in the annexure **LADB4** but it does not say that the amount is an employee's contribution.

22.7 It is also admitted that the Ombudsman recommended payment. But the recommendation was not acted upon because the National Assembly rejected the applicants' petition and thereby made an adverse finding.

22.8 The admissibility of the legal opinion by the Attorney General is challenged on the basis of lawyer and client privilege. The applicants cannot tender it in evidence.

[23] Metropolitan Ltd was the administrator of the Fund and administered it on the instructions of LADB. Every member was required to contribute 2% to the Fund in terms of Rule 8.1. The Rules made no provision for a 22% contribution by the employer. The employer's liability is set out in Rule 8.2. The employer's contribution was to cover costs and benefits of the Fund.

[24] Metropolitan Ltd accepts the letter to one *Khaile* dated December 1998 to which is attached "cheque for M17,232.73 for a withdrawal benefit." The letter does not refer to a 22% contribution but merely a withdrawal benefit.

The payment was a mistake and *Khaile* returned the cheque of M16,642.79[10].

III. DISCUSSION

[25] The applicants' case rests on the following four pillars:

25.1 Payment of the employer's contribution in the LADB Pension Fund.

25.2 Liability of Government to pay same from public funds arises from it being the sole shareholder of LADB and the latter being its agent.

25.3 A promise to pay made by the Minister in a 1998 public statement.

25.4 Discrimination arising from the resolution of the National Assembly that Government should not honour the payment whereas others had been paid.

[10] Annexure "MP4" to answering affidavit of 12th respondent

Constitutional avoidance

[26] The salutary approach where constitutional issues are commingled with non-constitutional issues is that the court "will not determine a case on a constitutional basis if it is properly capable of being appropriately adjudicated on another basis".[11] In **Ramoepana v. Director of Public Prosecutions**[12], this proposition is expounded thus:

> "[22] This proviso [to section 22(2) of the Constitution] encapsulates what is known as the principle of constitutional avoidance, which requires that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed. In other words the principle requires the court to first try and resolve a dispute by applying ordinary legal principles before applying the chapter on Fundamental Human Rights and Freedoms contained in our Constitution directly to the dispute.
>
> .....
>
> [24] This would not amount to this Court shirking its responsibility to enforce constitutionally protected rights, as suggested by Applicant's counsel in his heads of argument. It would be an application of the principle of adjudicative subsidiarity (whereby the authority of the Constitution is not overused to decide issues that can be disposed of by invoking specific, subordinate and non-constitutional legal norms). The advantages of this approach are that it avoids constitutional over-adjudication and apportions authority and decision-making responsibility. I must however stress that I am fully conscious that adjudicative subsidiarity should not be applied inflexibly to compromise the supremacy of the Constitution or to stand in the way of the interests of justice."

[27] In my respectful view, this legal proposition applies *in casu*. The crux of the applicants' case is that the Government is liable to pay them the alleged 22% employer's contribution to the Pension Fund. The question is whether

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[11] Sekoati and Others v. President of the Court-Martial and Others LAC (1995-99) 812@822 E-F

[12] Constitutional Case No.5 of 2018; [2018] LSHC 33 (06 June 2018)

such contribution is provided for in the Penson Fund Rules and, therefore, payable. This can be answered without reaching the constitutional issue whether the National Assembly's resolution purporting to exonerate Government from liability constitutes a discriminatory conduct in contravention of sections 19 and 30 (a) (ii) of the Constitution.

Pension Fund Rules

[28] The parties are on common ground that the Rules govern their respective relationship with the Pension Fund and the employer and employee obligations to make contributions. Rule 4.1 provides that "the Fund shall become a separate corporate body and legal *persona* distinct from its members, shall be the lawful owner of its property and shall be capable in law of suing and being sued in its own name."

[29] Rule 8 provides for contributions by members and the employer in the following manner:

> " **RULE 8 - CONTRIBUTIONS**
>
> 8.1 Contributions by the Member
>
> Every Member who is an Employee and who has not yet retired on pension, contributes monthly to the Fund an amount equal to 2% of his Monthly Pensionable Remuneration, subject to such maximum as laid down from time to time as deductible from taxable income in terms of the Income Tax Act (Lesotho). Contributions are rounded off to the nearest cent and are deducted from the Member's remuneration by the Employer.
>
> 8.2 Contributions by the Employer

The Employer contributes monthly in respect of each Member who is an Employee and who has not yet retired on pension to the Fund an amount to pay the cost of the benefits in terms of these Rules, after taking into account the Members' contributions. This amount shall be recommended by the Valuator and reviewed at least once every 3 years.

8.3 Mode of payment of contributions

8.3.1 The Employer shall remit the total of the Members and the Employer's contributions to the insured at the end of each month."

[30] Rule 6.2 gives the Employer the right to dissolve the Fund by giving written notice to the Insurer. In the event of dissolution, Rule 6.1.1 shall apply. This Rule reads as follows:

" **RULE 6 – DISSOLUTION OF FUND**

"6.1.1 If the Employer is wound up, whether voluntarily or not, or if the Employer ceases to carry on business, the Employer shall instruct the Principal Officer to dissolve the Fund by dividing the monies of the Fund, after payment of all expenses incurred in terminating the Fund, among the Members and persons in receipt of pensions and prospectively entitled to pensions in a manner recommended by the Valuator and approved by the Insurer ..."

[31] In my respectful view, the following *dictum* in **TEK Corporation Provident Fund**[13] captures the essence of the scheme of the Rules of the Pension Fund:

"[15] A number of propositions are either axiomatic or not in dispute. The pension fund, the powers and duties of its trustees, and the rights and obligations of its members and the employer are governed by the Rules of the fund, relevant legislation and the common law. The fund is a legal *persona* and owns its assets in the fullest sense of the word "own" (Section 5(1) (a) and (b) of the Pension Funds Act 24 of 1956). The object of the fund is 'to provide retirement and other benefits for employees and former employees of the employers in the event of their death'. (Rule 1,3,) The trustees of the fund owe a fiduciary duty to the fund and to its members and other beneficiaries. (Section 2(a) and (b) of the Financial Institutions (Investment of Funds) Act 39 of 1984 and rule 18.1.4.) The employer is not similarly burdened but owes at least a duty of good faith to the fund and its members and beneficiaries. (*Pension Trust Ltd and Others v Imperial Tobacco Ltd and Others* [1991] 2 All ER 597 (Ch) at 604g-606j.)

[13] TEK Corporation Provident Fund and Others v. Lorentz 1999 (4) SA 884 (SCA)

> The rules of the fund spell out the circumstances in which the employer must contribute to the fund and how the *quantum* of the contribution is to be determined. (Rules 4.2.1 and 19.5.)"

[32] The crisp issue is whether the claimed 22% contribution by the Employer is provided for in the Rules. Rule 8.2 answers this question by saying the Employer contributes "an amount to pay the cost of the benefits in terms of these Rules after taking into account the Members' contributions." This amount of the cost of the benefit payable by the Employer is a matter for recommendation by the Valuator reviewable at least once in three years.

[33] The applicants' assertion that the 22% they claim constitutes the Employer's contribution as cost of benefits is vehemently denied by Metropolitan Ltd as the Insurer. Its version is that:

(a) the Rules make no provision for a 22% contribution by the Employer. The Employer's contribution was to cover cost of benefits – the latter being provided in Rule 8.1;

(b) the amount of money mistakenly paid to one *Khaile* which the applicants refer to as an example of the Employer's 22% contribution is not. That was a withdrawal benefit provided for in Rule 9.1 as a cash "refund of twice the Member's own contributions to the Fund together with compound interest therein at 5% per annum".

[34] This dispute must be settled in accordance with the version of the Insurer whose duty under Rule 5.1 is to pay according to the instructions of the Fund. By demonstrating that the payment of a withdrawal benefit to one *Khaile* and not 22% Employer's contribution and that *Khaile* was mistakenly paid and returned the cheque, the soft underbelly of the applicants' case is exposed. It rests on a mistaken payment that has been corrected.

Liability of Government

[35] The liability of Government is asserted on two bases:

35.1 That the Employer was a Government agent whose negligence caused loss of payment of the 22% Employer's contributions.

35.2 Legitimate expectation arising from a promise by the Minister of Finance that despite the liquidation of LADB, employees' lawful entitlements are guaranteed.

Veil-piercing

[36] The contention that the government is liable for the Employer's negligence for non-payment of its 22% contributions founders on the rock of separate corporate responsibility. That is to say the LADB was a legal person with

limited liability. It could sue and be sued in its own right.[14] Faced with this difficulty, the applicants' contention mutated to the proposition that the LADB's corporate veil should be pierced so that the Government as the sole shareholder can be held liable.

[37] The jurisprudence on the justification for piercing the corporate veil is laid down in **Shipping Corporation of India Ltd v. Evdoman Corporation**[15] and **Monaheng v. Mapiloko**[16].

[38] In **Shipping Corporation of India Ltd** *Corbett* CJ said:

> "It seems to me that, generally, it is of cardinal importance to keep distinct the property rights of a company and those of its shareholders, even where the latter is a single entity, and that the only permissible deviation from this rule known to our law occurs in those (in practice) rare cases where the circumstances justify 'piecing' or 'lifting' the corporate veil. And in this regard, it should not make any difference whether the shares be held by a holding company or **by a Government**. I do not find it necessary to consider, or attempt to define, the circumstances under which the Court will pierce the corporate veil. Suffice it to say that they would generally have to include an element of fraud or other improper conduct in the establishment or use of the company or the conduct of its affairs. In this connection the words 'device', 'stratagem', 'cloak' and 'sham' have been used (see the discussions in *Lategan and Another NNO v Boyes and Another* 1980 (4) SA 191 (T) at 200E-202A; *Dithaba Platinum (Pty) Ltd v Erconovaal Ltd and Another* 1985 (4) SA 615 (T) at 624B-625J; and the recent decision of the English Court of Appeal in the case of *Adams and Others v Cape Industries plc and Another* [1991] 1 All ER 929 (Ch & CA) at *1022b-j, 1024d-1025f.*" [Emphasis added]

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[14] But not only that: in terms of Rule 4.1, "upon approval of the Fund by the Commissioner, the Fund shall become a separate corporate body and legal persona distinct from its Members, shall (sic) be the lawful owner of its property and shall be capable in law of suing and of being sued in its own name."

[15] 1994 (1) SA 550 (AD) @ 566 C-F

[16] C of A (CIV) No.49/2017 (01 November 2019)

[39] In **Monaheng** *Mosito* P said:

"[17] The separate personality of a company may be 'pierced' if public policy makes it undesirable to recognise such separate personality, and then only to the extent of avoiding the undesirable effects. The 'piercing' or 'lifting' of the corporate veil can be done in terms of common law principles or in terms of statutory provisions.

[18] The court's power to ignore the separate personality of a company was evident from the Salomon case itself when Lord Watson said that he was prepared to assume that proceedings which are permitted by the Act may be so used by the members of a limited company as to constitute a fraud upon others, to whom they in consequences incur personal liability. Nevertheless, there is considerable judicial and academic consensus in favour of limited veil-lifting principle for purpose of relevant wrongdoings, to avoid abuse of separate personality. The rational for a veil-lifting principle in company law is the law's fundamental assumption of honest dealings, that is, that the normal incidents of legal relationships between persons will not necessarily be expected where their dealings have not been honest. In the case of **United States v Milwaukee Refrigerator Transit Co (1906) 142 F 247 at 255**, the court expressed the principle as follows:

> 'If any general rule can be laid down ... it is that a corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to (sic) contrary appears, but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons.'

[19] The scope of the principle is limited to evasion and concealment. Evasion of existing obligation occurs when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he or she deliberately frustrates by interposing a company under his or her control.

[20] Thus, from a civil procedure perspective, it seems to me that 'lifting' and 'piercing' must be preceded by either an application to the court or as a result of the court having invited the parties to address it on why it should not lift or piece the veil. In the present case, there was neither an application for the lifting of the veil, nor were the parties invited to address them thereon. In the English case of **Faiza Ben hashem v Shayif [2008] EWHC 2380 (Fam.)** the court set the following principles regarding when a court may 'pierce' the corporate veil:

(a) Ownership and control of a company are not of themselves sufficient to justify 'piercing' the veil.
(b) The court cannot 'pierce' the veil, even when no unconnected third party is involved, merely because it is perceived that to do so is necessary in the interest of justice.
(c) The corporate veil can only be 'pierced' when there is some impropriety.

(d) The company's involvement in an impropriety will not by itself justify a 'piercing' of its veil: [furthermore] the impropriety must be linked to use of the company structure to avoid or conceal liability.
(e) It follows that if the court is to 'pierce' the veil, it is necessary to show both control of the company by the wrongdoer and impropriety in the sense of a misuse of the company as a device or façade to conceal wrongdoing.
(f) A company can be a façade for such purposes even though not incorporated with deceptive intent, the relevant question being whether it is being used as (sic) façade at the time of the relevant transaction(s).
(g) The court will 'pierce' the veil only so far as is necessary to provide a remedy for the particular wrong which those controlling the company have done. In other words, the fact that the court 'pierces' the veil for one purpose does not mean that it will necessary be 'pierced' for all purposes.

[21] On a similar note, in the most recent judgment of **Prest v Petrodel 2013 UKSC 34**, *Sumption* J. confined the lifting of the veil to only two situations, namely, (a) the 'concealment principle', akin to the sham or façade exception; and (b) the 'evasion principle', being the fraud exception. Deciding not to pierce the corporate veil on the facts, this case once again reinstated the Salomon rule."

[40] The applicants have not pleaded any improper conduct or misuse of LADB by Government to warrant the invocation of the veil-lifting principle. They seek its invocation on the basis of negligence. This does not suffice. I, therefore, reject to pierce the corporate veil of LADB in order to hold Government liable for alleged negligence of the Principal Officer.

Legitimate expectation

[41] The applicants' assertion of legitimate expectation is grounded in the public statement of the Minister of Finance that despite the liquidation of LADB, the employees' lawful entitlements are guaranteed. In its endeavour to fulfil the promise, the Minister prepared a supplementary budget for approval by Cabinet in 2016 only to turn around when the National Assembly resolved otherwise.

[42] The Minister's response is that:

42.1 He did not make any promise to pay the claimed 22% of the Employers' contribution as it is not provided for in the Rules of the Pension Fund.

42.2 The Government did not effect any payments as recommended by the Ombudsman because of Parliament's resolution that it was not obligated to pay.

42.3 The move to pay was wrong in law in that Government cannot assume liability of the Employer that was a corporate entity with limited liability.

[43] During oral argument, we brought to the attention of counsel for the applicants the judgment of the Court of Appeal in the case of **Former Employees of the Lesotho Agricultural Development Bank v. The Government of Kingdom of Lesotho, Minister of Finance and the Attorney General**[17]. Miss *Thabane* sought to distinguish that case from the one before us on the basis that *in casu* the Government had promised to pay and even approved a budget for this payment.

[17] C of A (CIV) No.35/2020 (14 May 2021)

[44] In **Former Employees of the Lesotho Agricultural Development Bank** the Court of Appeal held as follows:

> "[53] The claim of legitimate expectation as formulated in the present case is in reality a contention that the Government of Lesotho is 'estopped' from reneging on undertakings made to the former employees. Now that argument is fundamentally in conflict with the basic principle of constitutionalism which states that a public body cannot exercise power that it does not enjoy.
>
> .....
>
> [57] However one might try to dress it up, to commit the Fiscus to pay the benefits of the former employees such as they claim is the exercise of a power. Under Lesotho's democratic system of Government, the Executive can only assume financial liability for obligations which arise under law and which unless they are contingent liabilities have been authorised by Parliament through appropriation.
>
> [58] Counsel for the former employees argued on appeal that the undertaking made by the Government of Lesotho absolved the LADB Pension Fund from its liability towards the employees. In other words although the Pension Fund is in law the body liable to make good the benefits of the former employees the Government had since assumed that liability and it matters not that the Fund is able to meet those obligations. Counsel was not able to point us to any power either under the constitution or statute empowering the Government of Lesotho to do such a thing. It would in effect amount to excusing the Pension Fund from complying with its obligations under law.
>
> [59] The LADB Act made the Bank an independent juristic person for whose debts the Government of Lesotho is not legally liable. The debt being claimed by the former employees is not even that of the Bank but of the Pension Fund. The public as taxpayers have an undoubted interest that the Government of Lesotho will comply with the law insofar as it shields the public purse from liabilities properly attributable to a separate juristic body.
>
> [60] It is not enough to say as the employees do that a guarantee was made. They ought to have shown the legal basis UPON WHICH Minister *Ketso* made such a guarantee when the LADB Act made (sic) clear that the Government of Lesotho was not liable for the debts of the Bank. Assuming the Minister purported to assume the Pension Fund's or LADB's debts, he would be acting contrary to the law of the land. He would have had to return to the legislature and amended (sic) the LADB Act to render the Government of Lesotho liable.
>
> [61] To permit ministers and the government to assume power which they do not enjoy can lead to excesses of unimaginable proportions. And what is the limit?

> Can government assume liability for the debts of every failed public enterprise?
>
> [62] Government revenue is primarily tax revenue. In other words, it is the taxpayer that ultimately pays for the money government spends.
>
> [63] There is a sound public policy reason why estoppel does not operate against public authorities. Precisely to prevent the abuse power. What if the next parastatal folds and the employees say since the Government of Lesotho did that for LADB employees we have a 'legitimate expectation' to be treated similarly?
>
> [64] I come to the conclusion therefore that the High Court misdirected itself in finding that the statements made by Minister *Ketso* in 1989 (sic) and Government's subsequent ill-fated preparatory steps to pay debts allegedly owing to the former employees by the Pension Fund amounted to an enforceable legitimate expectation in favour of the employees."

[45] Surely, these *dicta* are complete answers to the applicants' reliance on the doctrine of legitimate expectation. There is nothing more that needs to be said by this court.

IV DISPOSITION

[46] The applicants' claim of payment of the 22% Employer's contribution was ill-fated from inception. No such contribution is provided for in the Rules of the Pension Fund. They could not even state how the 22% was calculated and arrived at. To build their case, they latched onto a "benefit withdrawal" mistakenly made to one *Khaile*. Perhaps they were not even aware that *Khaile* had returned the cheque.

[47] The Ombudsman's recommendation to Government to pay and Cabinet's approval of a budget gave the applicants hope that their cause was just. For this reason, I would not mulct them with costs.

Order

[48] In the result, the following order is made:

1. The application is dismissed.
2. Each party to pay its own costs.

.....
S. P. SAKOANE CJ

I agree

.....
K. L. MOAHLOLI J

I agree

.....
P. BANYANE J

For Applicants: Miss P. Thabane

For Respondents: Adv. M. Moshoeshoe