

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) NO.43^B/10

In the matter between:

BULANE ANDREW SECHELE

APPELLANT

AND

**PUBLIC OFFICERS' DEFINED
CONTRIBUTION PENSION FUND**

FIRST RESPONDENT

BOARD OF TRUSTEES

SECOND RESPONDENT

**PRINCIPAL OFFICER PUBLIC
OFFICERS' DEFINED CONTRIBUTION
PENSION FUND**

THIRD RESPONDENT

**COMMANDER OF THE LESOTHO
DEFENCE FORCE**

FOURTH RESPONDENT

**ASSISTANT CHIEF OF STAFF
LOGISTICS AND FINANCE**

FIFTH RESPONDENT

**MINISTER OF DEFENCE &
NATIONAL SECURITY**

SIXTH RESPONDENT

**MINISTER OF FINANCE AND
DEVELOPMENT PLANNING**

SEVENTH RESPONDENT

MINISTER OF PUBLIC SERVICE

EIGHTH RESPONDENT

**MINISTER OF LAW, CONSTITUTIONAL
AND PARLIAMENTARY AFFAIRS**

NINTH RESPONDENT

ATTORNEY GENERAL

TENTH RESPONDENT

CORAM: RAMODIBEDI, P
SMALBERGER, JA
MELUNSKY, JA
HOWIE, JA
FARLAM, JA

HEARD: 5 APRIL 2011
DELIVERED: 20 APRIL 2011

SUMMARY

Constitutional Law – Whether compulsory contribution for purposes of pensions benefits under s3 (1) of the Public Officers’ Defined Contribution Pension Fund Act 2008 (“the Act”) violates s150 (4) of the Constitution – Whether such compulsory contribution and mandatory membership under sections 4 and 5 (1) of the Act respectively violate s17 (1) of the Constitution on the right to freedom from arbitrary seizure of property – Whether s27 of the Act violates s150 (1) and (2) of the Constitution.

JUDGMENT

RAMODIBEDI, P

[1] The appellant, a Captain in the Lesotho Defence Force and a duly admitted Advocate, challenges a decision of a Full Bench of the High Court sitting as a Constitutional Court. In its decision the court a quo dismissed the appellant's application for an order seeking the following relief:-

- “1. Declaring Section 3 (1) of the Public Officers' Defined Contribution Pension Fund Act No.8 of 2008 unconstitutional for it establishes the Contribution Fund for purposes of providing pension benefits contrary to Section 150 (4) of the Constitution of Lesotho of 1993 which has already established Consolidated Fund for such purpose.*
- 2. Declaring Section 5 (1) (a) of the Public Officers' Defined Contribution Pension Fund Act No.8 of 2008 unconstitutional for it binds the Applicant to be the member of the Contribution Fund without giving him an option to choose between the Defence Force (Regular Force) (Officers) Regulations No.26 of 1998 and the Public Officers' Defined Contribution Pension Fund Act No.8 of 2008 contrary to section 150 (3) of the Constitution of*

Lesotho of 1993.

3. *Declaring Section 27 of the Public Officers' Defined Contribution Pension Fund Act No.8 of 2008 unconstitutional for it would provide the Applicant with pensions benefits **far less** favourable to what regulation 53 of the Defence Force (Regular Force) (Officers) Regulations No.26 of 1998 would provide him with upon retirement contrary to Section 150 (1), (2) and (3) of the Constitution of Lesotho of 1993.*
4. *Declaring the Public Officers' Defined Contribution Pension Fund Act No.8 of 2008, in toto, unconstitutional and null and void ab initio for it is meant solely for the establishment of the Contribution Fund contrary to the Consolidated Fund already established by the Constitution of Lesotho of 1993 for purposes of providing pensions benefits to the Applicant on retirement.*
5. *Declaring the act of deducting and depositing, into the bank account of the Fund, some monies from the Applicant's gross salary by 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th Respondents since the 20th December 2008 to date pursuant to the provisions [of] section 4 of the Public Officers' Defined Contribution Pension Fund Act No.8 of 2008 unconstitutional, unlawful and null and void ab initio.*
6. *Ordering the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th Respondents to cease deducting and depositing, into the bank account of the Fund, some monies from the Applicant's gross salary pursuant to the provisions of the Public Officers' Defined Contribution Pension Fund Act No.8 of 2008.*
7. *Ordering the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, and 8th Respondents to refund all the Applicant's monies deducted and deposited into the bank account of the Fund, from the Applicant's gross salary since 20th of*

December 2008 to date.

8. *Ordering the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th Respondents to refund such monies with the compound interest accrued while still in that bank account at the bank's rate.*
9. *Ordering the Respondents to pay the costs of the suit.*
10. *Further and/or alternative relief."*

[2] The appellant's case arose out of certain compulsory deductions entitled "Compulsory Pension" made from his gross salary since 20 December 2008. The deductions were made pursuant to the Public Officers' Defined Contribution Pension Fund Act, 2008 ("the Act"). The impugned s3 thereof provides as follows:-

"3. (1) There is established a fund to be known as the Public Officers' Defined Contribution Pension Fund, for the purpose of providing pension benefits to the public officers referred to in section 5(1) or (2).

(2) The Fund shall be a legal entity, capable of -

a) suing and being sued in its own name;

- b) *acquiring, owning and disposing [of] movable and immovable property; and*
- c) *acquiring rights and incurring liabilities.”*

[3] Section 4 of the Act provides that the employer and a member of the Fund shall each make a monthly contribution payable into the bank account of the Fund at the rate to be determined by the Minister on the advice of the Board. The Minister is enjoined to publish the rate in the Gazette.

[4] It is common cause that deposits by the Government into the Contribution Pension Fund are made from the Consolidated Fund. The Government contributes 11.2% while public officers and/or members contribute 5%. As will become evident shortly the appellant challenges the constitutionality of his compulsory contribution as well as his mandatory membership.

[5] In terms of s5 of the Act the members of the Fund are classified into four broad categories in the following terms:-

“(1) A public officer or a person, as the case may be, who -

a) is employed on permanent and pensionable terms and is aged 40 years or below at the commencement of this Act; or

b) joins the public service, after the commencement of this Act, on permanent and pensionable terms 10 years or more prior to attaining the prescribed compulsory retirement age as set out in the relevant laws governing the retirement of public officers, is a member of the Fund,

and membership is mandatory.

(2) A public officer who, at the commencement of this Act, is employed on permanent and pensionable terms may, subject to subsection (3), become a member if he or she still has at least 10 further years of service prior to attaining the prescribed retirement age as set out in the relevant laws governing the retirement of public officers.

(3) The Minister shall, in a phased manner or in such a manner as he or she may deem fit, by notice published in the Gazette, classify public officers referred to in subsection (2) into categories and appoint a date on which a category referred to in subsection (2) may qualify for membership of the Fund.

- (4) *A public officer who does not qualify to be a member under subsection (1) or ceases to be a public officer before being categorised under subsection (3), may qualify for the benefits provided under the Pensions Proclamation 1964 or the Teachers Pensions Act 1994 or the Defence Force Regulations 1998, as the case may be.*”

[6] Section 27 of the Act in turn provides for retirement benefits in these terms:-

“27. On retirement, a member shall be entitled to a portion of his or her fund credit to the maximum of 25% as cash benefit. The remaining percentage shall be used to purchase an annuity for him or her.”

[7] It is the appellant’s case as foreshadowed both in his notice of motion and in his founding affidavit that s3 (1) of the Act is unconstitutional to the extent that it establishes the Contribution Pension Fund for purposes of providing pension benefits contrary to s150 (4) of the Constitution. The appellant also challenges his compulsory contributions

and mandatory membership under sections 4 and 5 of the Act respectively on the ground that they violate s17 (1) of the Constitution. Similarly, the appellant further challenges s27 of the Act on the ground that it violates s150 (1) and (2) of the Constitution to the extent that it provides him with far less gratuity and pension than would be the case under the Defence Force (Regular Force) (Officers) Regulations No. 26 of 1998.

[8] In a nutshell, the respondents' case on the other hand is to the effect that the Act was enacted as a form of social security provision, purely in favour of and for the benefit of public officers. They maintain that the appellant stands to get *“much more than he would otherwise get under the Defence Force (Regular Force) (Officers) Regulations No.26 of 1998.”* They make a further point that the rationale behind s150 (3) of the Constitution was to protect public officers

from imposition of less favourable laws in respect of pensions benefits.

[9] As can be seen from the foregoing, three main issues arise for determination in this appeal. These are:-

- 1) Whether compulsory contribution for purposes of pension benefits under s3 (1) of the Act violates s150 (4) of the Constitution?
- 2) Whether such compulsory contribution and mandatory membership under sections 4 and 5 of the Act respectively violate s17 (1) of the Constitution?
- 3) Whether s27 of the Act violates s150 (1) and (2) of the Constitution?

[10] In determining these issues it is of fundamental importance to recognise that the Court is enjoined to uphold the supremacy of the Constitution in the event of inconsistency (if any) between the impugned Act and the Constitution. In this regard s2 of the Constitution reads as follows:-

“2. This Constitution is the supreme law of Lesotho and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void.”

[11] As a starting point the applicant in a matter such as this bears the onus to establish the alleged infringement of the Constitution. If there is no infringement then the enquiry ends there and then. The application falls to be dismissed. If on the other hand there is infringement the next question is whether the infringement in question is justified. See for example **Attorney General v ‘Mopa 2000**

- **2004 LAC 427** at 433. Equally of importance in a matter such as this is the need to bear in mind the presumption of constitutionality, which of course is rebuttable.

[12] Insofar as the appellant relies on s17 (1) of the Constitution on the right to freedom from compulsory acquisition of property it is instructive, too, to bear in mind that the interpretation of rights provisions requires a generous and purposive approach aimed at realising the full measure of the protection guaranteed in the Constitution. In this regard one must caution against what Lord Wilberforce famously called “the austerity of tabulated legalism” (**Minister of Home Affairs (Bermuda) v Fischer 1980 AC 319 (PC)** at 328H). See also such cases as **Sekoati And Others v President of the Court – Martial And Others 1995 – 1999 LAC 812** at 820 – 822; **Lesotho National General Insurance Co. Ltd v Nkuebe 2000 –**

2004 LAC 877 at 882 - 883. It is upon these principles that I approach the matter.

The first issue: whether compulsory contribution for purposes of pension benefits under s3 (1) of the Act violates s150 (4) of the Constitution?

[13] At the hearing of this appeal the appellant rephrased the first issue in the following terms:-

“Whether the establishment of the first respondent in this matter under s3 (1) of the Act does not violate s150 (4) of the Constitution?”

[14] Section 150 (4) of the Constitution provides as follows:-

“(4) All pensions benefits shall be a charge on the Consolidated Fund.”

In paragraph 8 of his founding affidavit the appellant makes the point that in terms of s150(4) of the Constitution “pensions benefits shall be provided to the public officers from the ‘Consolidated Fund’ but not from the Contribution Fund as expounded by the Act of 2008.” In my view, the notion that the pensions benefits can only be sourced from the Consolidated Fund and not the Contribution Fund is a misreading of s150 (4) of the Constitution.

[15] The starting point in construing s150(4) of the Constitution is to determine the meaning of the words “*a charge on.*” In **Irwin v Davies 1937 CPD 442** at 447 Davis J had occasion to consider the words “*first charge*”. In the process the learned Judge expressed himself in the following apposite terms:-

“Sweet, Law Dictionary, says that a ‘charge’ on property

‘signifies’ that it is security for the payment of a debt or performance of an obligation. It is a general term, and therefore includes mortgages, liens, writs of execution etc.”

[16] It is important to observe that **Irwin v Davies** was followed with approval on this point by the Appellate Division in **Roman Catholic Church (Klerksdorp Diocese) v Southern Life Association Ltd 1992 (2) SA 807 (A)** at 814 E-G. Employing this interpretation, therefore, it follows that the words “*a charge on*” appearing in s150(4) of the Constitution simply mean “*shall be backed by*”. In other words the Consolidated Fund is a form of security for payment of pensions benefits. Viewed in this way, and also bearing in mind the presumption of constitutionality, there can be no inconsistency between s3 (1) of the Act and s150 (4) of the Constitution. The “backing” or security as well as the benefits guaranteed by the latter section have not been removed in any way by establishing the Contributory Pension Fund under s3 (1) of the Act. It is of critical

importance for that matter to recognise that s150 (4) of the Constitution does not prohibit the establishment of an alternative pensions fund.

[17] It follows from these considerations, in my view, that the answer to the first issue in this matter as rephrased in paragraph [10] above is “NO”.

The second issue: whether compulsory contribution and mandatory membership under sections 4 and 5 (1) of the Act respectively violate s17 (1) of the Constitution?

[18] It will be recalled that the appellant challenges the constitutionality of his compulsory contribution to the Contributory Pension Fund established in terms of s3 (1) of the Act. He contends that such compulsory acquisition of

his property as well as mandatory membership without his consent contravene s17 (1) of the Constitution.

[19] Now, in relevant parts s17 (1) of the Constitution provides as follows:-

“17. (1) *No property, movable or immovable, shall be taken possession of compulsorily, and no interest in or right over any such property shall be compulsorily acquired, except where the following conditions are satisfied, that is to say -*

a) the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilisation of any property in such manner as to promote the public benefit; and

b) the necessity therefor is such as to afford reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property.

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4) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) or (2) —

a) to the extent that the law in question makes provision that is necessary in a practical sense in a democratic society for the taking of possession or acquisition of any property, interest or right —

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. .
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(iii) as an incident of a valid contract or of the terms and conditions of service of a public officer.”

[20] As can be seen, subsections 17 (1) (b) and (4) of the Constitution contain exceptions which are pertinent to the instant matter. It is not disputed that the object of the Act was to provide pensions benefits for permanent and pensionable public officers including the appellant himself. Indeed, I accept, and once again this is not disputed, that the Act was enacted as a form of social security provision. Prima facie, therefore, s4 of the Act on compulsory contribution and s5 on mandatory membership do not, in my view, violate s17 (1) of the Constitution. On the

contrary these sections make provisions that are reasonably justified and necessary in a practical sense in a democratic society for the taking of possession or acquisition of property, an interest or a right as an incident of the terms and conditions of service of public officers. In this regard I find myself in respectful agreement with the approach of the Zimbabwe Supreme Court in **Nyambirai v National Social Security Authority And Another 1996 (1) SA 636 (ZSC)**. The court was grappling with the constitutionality of an Act which provided for a compulsory social security scheme, as here. At pages 643-644 Gubbay CJ made the following apposite remarks:-

“The social and economic policies that moved the Government to introduce a compulsory pensions scheme are pertinent to the enquiry of whether the terms of the Pensions and Other Benefits Scheme so formulated benefit the public and provide a service in the public interest. They are spoken to by the Minister in his opposing affidavit, and may be restated and summarised as follows:

- 1) *Previously about a third of the workforce in the country enjoyed no social security. So a scheme was designed both to provide employees with the security they deserve and are entitled to enjoy in retirement and in old age, and to play a significant role as a basis for national social protection. Although presently restricted to formal sector employees, the Pensions and Other Benefits Scheme is the foundation of a more comprehensive coverage, drawing on the underlying concept of national solidarity and as an integral part of national development.*
- 2) *For a considerable period of time the Government was concerned to alleviate the miseries of numerous employees who, after many working years, end up destitute upon leaving employment either on old age or as a result of disability. It was recognised that this country had fallen far behind very many developed and lesser developed countries in the provision of adequate social security for employees.*
- 3) *The objective of social security is to promote the quality of life and to guarantee income security. It is meant to give individuals and families the confidence that their level of living will not be eroded by social ills such as work accident, sickness, death and old age.*
- 4) *It is the Government's national responsibility to make adequate provision for employees. It cannot afford to carry the heavy burden alone. Hence it is necessary to raise the funds for a social security scheme through enforced contributions payable by employers and employees. The employer bears a moral obligation to improve the protection and welfare of the employee. And the employee, as a matter of self-interest, must contribute to his own social security."*

The learned Chief Justice continued at page 646:-

“The design of the Pensions and Other Benefits Scheme involves a system which necessitates support by compulsory contributions from employees and employers. Such mandatory participation seems to me indispensable to its fiscal success. Individual voluntary coverage would undermine the inherent soundness of the scheme. Moreover, voluntary participation would be almost a contradiction in terms and would render the scheme difficult, if not impossible, to administer. Thus, in my opinion, the Government’s interest in assuring a compulsory and continuous participation in and contribution to the scheme is very high”.

[21] I conclude from these considerations, therefore, that sections 4 and 5 of the Act respectively do not violate s17 (1) of the Constitution. The appellant’s compulsory contribution as a burden is by far outweighed by the objectives sought to be achieved by the Act, namely, provision of pensions benefits for permanent and pensionable public officers. Such benefits are admittedly in appellant’s own favour.

The third issue: Whether s27 of the Act violates s150 (1) and (2) of the Constitution?

[22] Sections 150 (1) and (2) of the Constitution provide as follows:-

“150. (1) The law to be applied with respect to any pensions benefits that were granted to any person before the coming into operation of this Constitution shall be the law that was in force at the date on which those benefits were granted or any law in force at a later date that is not less favourable to that person.

(2) The law to be applied with respect to any pensions benefits (not being benefits to which subsection (1) applies) shall -

a) in so far as those benefits are wholly in respect of a period of service as a public officer that commenced before the date on which this Constitution came into operation, be the law that was in force immediately before that date; and

b) in so far as those benefits are wholly or partly in respect of a period of service as a public officer that commenced after the date on which this Constitution came into operation, be the law in force on the date on which that period of service commenced,

or be any law in force at a later date that is not less favourable to that person.”

[23] It is self-evident from these sections that to comply with the Constitution any law or Act in respect of pensions benefits must not be less favourable to the person concerned. Put in positive terms, such a law or Act must be at least as favourable to him or her.

[24] For the sake of convenience it will be recalled that s27 of the Act reads as follows:-

“27. On retirement, a member shall be entitled to a portion of his or her fund credit to the maximum of 25% as cash benefit. The remaining percentage shall be used to purchase an annuity for him or her.”

[25] The appellant complains that the Act provides him with far less gratuity and pension upon his retirement, compared to what he would get under the Defence Force Regulations. Under these Regulations he would, as he says, *“definitely go home with exactly 75% cash benefit.”*

[26] The truth of the matter in my view, however, is that it is premature to determine or predict the appellant's terminal benefits at this stage. The indications, however, are that upon his retirement he will receive more pensions benefits and gratuity under the Act than he would get under the Defence Regulations. This is so because the Act provides for the investment of monies of the Contribution Pension Fund. This is the function of the Board of Trustees established under s6 of the Act. It stands to reason, therefore, that the Contributory Pension Fund has the potential for growth. In this regard s22 of the Act is instructive. It provides as follows:-

“22. The Board may, after consultation with the Minister, obtain an overdraft or loan from a financial institution or borrow money from the Government on such terms as it may think fit, for the purpose of completing any investment or meeting any temporary cash shortage.”

[27] It is important to stress that the Act itself envisages that the Contribution Pension Fund will be operated on a sound financial footing. In this regard s26 of the Act provides as follows:-

“26. (1) If an actuarial valuation of the Fund reveals that the Fund is not in a sound financial position, the Board shall, acting in consultation with the Minister, and after having considered proposals by the Actuary, implement a scheme or an arrangement aimed at restoring the Fund to a sound financial position.

(2) No scheme or arrangement shall be implemented under sub-section (1) if it adversely affects the benefits to be received by members or if it increases the rate of contributions to the Fund, unless such scheme or arrangements have been agreed to by the Board and approved by the Minister.”

Indeed elaborate Rules have been promulgated by the Board to ensure that the Contribution Pensions Fund grows as a viable investment. Subrules 16.1 to 16.4 shall suffice to highlight the point. They provide as follows:-

- “16.1 *All moneys received on account of the Fund shall be paid into a banking account opened in the name of the Fund.*
- 16.2 *The Board shall have power, subject to the Act, to receive, administer and apply the moneys of the Fund and in its discretion to invest, put out at interest, place on deposit, make advances, or otherwise deal with the moneys of the Fund upon such security and in such manner as it may, from time to time, determine and to realise, vary, reinvest or otherwise deal with such securities and other investments as it may, from time to time, determine.*
- 16.3 *The Board shall have power to effect policies of insurance with one or more Registered Insurers for the purpose of investing the Fund’s moneys in order to meet the cost of providing benefits in terms of these Rules and may, notwithstanding the provisions of these Rules, cede all or part of such a policy to a Member in place of a cash sum entitlement in terms of these Rules. The Board shall also have power to insure, in whole or in part, the death benefits and disability benefits payable in terms of these Rules.*
- 16.4 *The Board may obtain an overdraft from a bank or borrow from the Employer or any other party, on such terms as they think fit, such sums as they approve for the purpose of completing any investment or meeting any temporary cash shortage and for this purpose may give such security as they decide.”*

[28] Notwithstanding the foregoing considerations I have come to the conclusion that it is not possible to say

with certainty that when the appellant retires the pensions benefits he will receive will definitely be more favourable than they would have been if the Act had not been passed. This is because it is possible that the Contributory Pension Fund may not do as well as is hoped. If that happens and the appellant receives less than he would have received under the Defence Regulations it will mean that the Act will prove to have violated section 150 (1) and (2) of the Constitution. The only way to remove that risk is to read into section 27 of the Act the words which appear in the order proposed below. I should add that all the parties in this matter fully supported this proposition.

[29] In the result the following order is made:-

- 1) The appeal is dismissed.
- 2) The following words shall be read in at the end of s27 of Act No.8 of 2008:-

“Provided that the retirement benefits payable to a member shall not be less than the benefits such member would have received under the law with respect to pensions benefits which would have applied if this Act had not been passed.”

- 3) There shall be no order as to costs.

M.M. RAMODIBEDI
PRESIDENT OF THE COURT OF APPEAL

I agree:

J.W. SMALBERGER
JUSTICE OF APPEAL

I agree:

L.S. MELUNSKY
JUSTICE OF APPEAL

I agree:

C.T. HOWIE
JUSTICE OF APPEAL

I agree:

I.G. FARLAM
JUSTICE OF APPEAL

For Appellant:

In Person

For 1st – 3rd Respondents:

Adv. K.E. Mosito KC

For 4th – 10th Respondents:

Mr. R. Motsieloa