

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) NO.12/13

In the matter between

SPECIFIED OFFICES DEFINED

CONTRIBUTION PENSION FUND

FIRST APPELLANT

BOARD OF TRUSTEES OF SPECIFIED

OFFICES DEFINED CONTRIBUTION

PENSION FUND

SECOND APPELLANT

PRINCIPAL OFFICER, SPECIFIED

OFFICES DEFINED CONTRIBUTION

PENSION FUND

THIRD APPELLANT

And

RANTELALI SHEA & 29 OTHERS

RESPONDENTS

CORAM: HOWIE JA
FARLAM JA
THRING JA

HEARD: 10 OCTOBER 2013

DELIVERED: 18 OCTOBER 2013

SUMMARY

Retirement benefits of former Members of Parliament — application for declaration as to their benefits and payment of such benefits — High Court not granting either form of relief but rather an order directing payment of due benefits within a stated time and ancillary orders — alteration of one such ancillary order on appeal — appropriate order as to costs in both courts.

JUDGMENT

HOWIE JA

[1] The result of the general election of May 2012 led to the termination as of 31 May 2012 of the respective terms of office of the respondents as members of Parliament and led to their consequent entitlement to various pension, gratuity and cash benefits depending on the number of terms each had served.

[2] Earlier, by letter from the Minister of Finance dated 24 May 2012, every respondent was informed as follows –

“I have made arrangements for your gratuity to be paid into your respective Bank Accounts (less outstanding loans where applicable) by 31st May, 2012.

Following your Membership in the Specified Offices Defined Contribution Pension Fund from 31 October, 2011, your accumulated benefits including those from 21 February, 2007, have been transferred to the Secretariat of the Fund which will pay them directly into your Bank Accounts...”

[3] By letter dated 13 August 2012 to each respondent, the company effecting benefit payments on behalf of the Fund conveyed details of the monetary benefits due to them, payment of which was said to have been made into their bank accounts.

[4] Because unequal payments were made to members who had served equally long and because members who had served for one term had not been paid sufficient benefits under s 38 of the Pension Fund Act, 19 of 2011, the respondents’ legal representative wrote to the secretary of the Fund’s Board a letter of demand dated 22 October

2012. The writer said that despite “*repeated pleas*” for payment to be made “*fully and speedily*” the Board and its secretariat had “*refused for reasons that are unfathomable in law*”. He went on to say that non-payment was causing the entitled beneficiaries financial harm. Payment within seven days was demanded on pain of “*judicial remedies*”.

[5] The demand not having been met, but no correspondence from the Board having been received or further elicited, the respondents launched a High Court application on 20 November 2012 essentially aimed at the grant of an order –

1. Declaring that respondents who had served equally long be paid the same in respect of past service.
2. Declaring that respondents who had served one term were entitled to be paid Government’s net contribution plus net investment return for the period February 2007 to October 2011.

3. Directing payment of outstanding benefits due to the respondents.

[6] The parties cited by the respondents included the Fund, its Board and the Principal Officer of the Fund who all opposed the application.

[7] In the opposing affidavit, deposed to by the Principal Officer, he admitted the unequal payments but said that the recipients were advised that regularisation of payments was being undertaken and that the application was unnecessary. As regards one-term members it was alleged that they had been paid Government's contributions plus net investment returns.

[8] An allegation by the respondents that the letter of demand had been met by silence and that this constituted a denial of liability was denied by the Secretary who repeated that the respondents had been informed that regularisation was being effected. He also denied that benefits in terms of s 38 of the Pension Fund Act had not

been included in the computations of the benefits of one-term members. He went on to say that whatever was due to the respondents would ultimately be paid and that he had “*told them to please wait as we are finalizing the exercise, but they would not wait.*” No denial of liability to pay the respondents their lawful due was expressed.

[9] A replying affidavit was filed. It was not denied that the respondents had been told that they would eventually be paid what was their lawful due.

[10] The matter came before Majara J. The learned Judge declined to grant the declaratory relief sought or to order any payments. She held that benefits in terms of the Specified Offices Defined Contribution Pension Fund Act 2011 (the Pension Fund Act) were only due from October 2011 but that the respondents were entitled also to benefits in terms of other laws applicable prior to October 2011. She then made the following order:

- “1) *The respondents are ordered to regularize the payment process by recalculating and paying the applicants their accumulated benefits within three (3) months from the date of delivery of this judgment.*
- 2) *The respective payments should properly reflect the actual differences in the terms of services of all the applicants as retired MPs with those having served the same terms receiving the same amounts.*
- 3) *All the applicants should be paid their benefits in terms of the Pension Fund Act 2011 from October 2011 and in terms of other laws that had hitherto been applicable to them prior to October 2011.*
- 4) *The respondents are ordered to pay the costs of this application.”*

Hence the appeal by the Fund, its Board and its Secretary.

[11] Before us only the situation of the one-term members was in issue, the other members having been paid. It was argued for the appellants that the one-term members were not entitled to Pension Fund Act benefits from October 2011 seeing that benefit rates were only determined with effect from February 2012 and should only have been payable with effect from the latter date. It was also argued that the Judge had erred in ordering the Fund to pay the benefits due in terms of other laws applicable before

October 2011 seeing that the Fund had no power to pay benefits under any law save the Pension Fund Act.

[12] For the respondents, reliance was, justifiably, I think, placed on the letter from the Minister of Finance for the argument that whatever was due under laws applicable before October 2011 had been paid over to the Fund so that it could pay over to the beneficiaries. Paragraph 3 of the Judge's order was thus justified.

[13] In my view the only change that is necessary to paragraph 3 of the Judge's order is one altering the commencement date for payment of the one-term members Pension Fund Act benefits from October 2011 to February 2012. By itself that hardly rates as appellate success.

[14] As to costs in the court below, it is one of the appellants' grounds of appeal, pursued in argument, that the award of costs to the respondents in that court was unjustified.

[15] As I have said, the respondents did not contest the repeated allegations in the opposing affidavit that they were told that regularisation of the payment process was under way and that they would be paid their due benefits. It would have been quite sufficient answer to the letter of demand if they were, and the appellants' allegations that they were indeed told must be accepted. In addition, no denial of liability was advanced in the opposing affidavit and it was not alleged by the appellants that the litigation was prompted by a denial that might have founded an allegation of anticipated harm.

[16] I conclude that the litigation was not necessary to protect or achieve realization of the appellants' rights and that costs in the court below should not have been awarded to the respondents. And although the payment process appears to have taken remarkably long (a fact which the appellants have never explained) the fact remains that, having resorted to litigation prematurely, the respondents persisted in the application despite the assurances in the opposing affidavit that the calculations were being done and that due benefits would be paid. Not

only that, the respondents attempted to persuade the Judge that Pension Fund Act benefits were payable as from 2007 and in that regard, as also their quest for the relief set out in the notice of motion, they failed. I therefore consider that it should have been ordered that the costs in the court below be paid by the respondents. That does constitute appellate success.

[17] As to the appeal costs, the respondents decided not to abandon the costs order made by the Judge when it was pertinently a ground of appeal that such order was not justified. In addition, those costs would no doubt involve a not inconsiderable sum. In my view, therefore, the measure of appellate success achieved warrants an order that the appeal costs be paid by the respondents.

[18] As regards the first two paragraphs of the Judge's order, the appellants did not seek the setting aside of the first and the respondents did not inform us that it had not been complied with. And paragraph 2 merely states what is common cause. Those paragraphs can simply be left

undisturbed notwithstanding that the litigation has been found to have been unnecessary.

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

1. The appeal succeeds with costs.
2. Paragraph 3 of the order of the court below is altered by deletion of “*October 2011*” where that expression first appears and by the substitution for it of “*February 2012.*”
3. Paragraph 4 of the order of the Court below is set aside. In its stead the following is substituted:

“The applicants are ordered to pay the costs of the application.”

C.T. HOWIE
JUSTICE OF APPEAL

I agree

I.G. FARLAM
JUSTICE OF APPEAL

I agree

W.G.G. THRING
JUSTICE OF APPEAL

For the Appellants: K.E. Mosito KC

For the Respondents: S.P. Sakoane KC