IN THE COURT OF APPEAL OF LESOTHO

C of A (CIV) 4/2016

HELD AT MASERU

In the matter between

TIMOTHY THAHANE	**1ST APPELLANT**
SEPHIRI MOTANYANE	**2ND APPELLANT**
LETAPATA MAKHAOLA	**3RD APPELLANT**
NTSAILA NTSAILA	**4TH APPELLANT**
KALI SEITLHEKO	**5TH APPELLANT**
LEETO MONAHALI	**6TH APPELLANT**
LIAU NTLELE	**7TH APPELLANT**
MOSEBI KHOTSENG	**8TH APPELLANT**
'MALIJANE MAQELEPO	**9TH APPELLANT**
MAMOLILI MARUPELO	**10TH APPELLANT**
THABANG CHAI	**11TH APPELLANT**
'MAPHOKA MOTOBOLI	**12TH APPELLANT**

And

SPECIFIED OFFICES DEFINED CONSTRIBUTION PENSION FUND	**1ST RESPONDENT**
MINISTER OF LAW & CONSTITUTIONAL AFFAIRS	**2ND RESPONDENT**
ATTORNEY-GENERAL	**3RD RESPONDENT**

CORAM : LOUW, AJA
DR. P. MUSONDA, AJA
M. H. CHINHENGO, AJA
S.N. PEETE, AJA
L.CHAKA-MAKHOOANE, AJA

HEARD : 9 MAY 2017

DELIVERED : 12 MAY 2017

SUMMARY

Constitutional law – Application to declare provisions of section 6 (2) of the Specified Offices Contribution Pension Fund Act, 2011, as amended by section 3 of the Specified Offices Defined Contribution Fund (Amendment) Act, 2014 (the Act (as amended)) to be unconstitutional and invalid – Challenged on bases –'unfair discrimination' contrary to sections 18 (1) and (3) of the Constitution – 'arbitrary differentiation' contrary to section 19 (3) of the Constitution – retrospective effect – interference with the right to property under section 17 of the Constitution – right to freedom of association enshrined in section 16 of the Constitution.

JUDGMENT

LOUW, AJA

[1] The appellants who are retired former members of the Lesotho Parliament, applied to the High Court, sitting as a Constitutional Court, for orders declaring section 6 (2) of the Specified Offices Contribution Pension Fund Act, 2011, as amended by section 3, of the Specified Offices Defined Contribution Fund (Amendment) Act, 2014 (the Act (as amended)) to be unconstitutional and invalid. In a judgment delivered during July, 2016 a full bench of the High Court sitting as a Constitutional Court (per **Sakoane, AJ** with **Moiloa, J** and **Makara, J**, concurring) dismissed the application. This is an appeal against the judgement and orders of the court *a quo.*

[2] The relief sought by the appellants was for an order in the following terms:

1. *The provisions of Section 6 (2) of the Specified Offices Defined Contribution Pension fund (Amendment) Act of*

2014 are declared to be unconstitutional to the extent that they violate the provisions of 18 (1) and (3) and 19 of the Constitution in that:

1.1 *They discriminate against the applicants from the members of parliament to which the provisions of Section 32, of the amendment Act apply in that the applicants are not entitled to payment of all cash available to their credit in the fund when the persons envisaged under Section 32 are entitled to terminate their membership and be paid all cash available to their credit in the Fund;*

1.2 *There is no justifiable reason and rational basis why members of parliament who resign or are dismissed as contemplated under the provisions of Section 32 are accorded the right to terminate their membership while the applicants are denied such right and privilege simply because they opted to retire by virtue of dissolution of parliament or by virtue of reaching retirement age;*

1.3 *The discriminatory effect of the provisions of Section 6 compared with Section 32, makes them unconstitutional;*

2. *It is declared that Specified Offices Defined Contribution Pension Fund (Amendment) Act of 2014 is*

unconstitutional and therefore null and void to the extent that it seeks to have retrospective effect;

3. *That the first respondent pay the applicants all moneys available to their credit in the Fund and be directed to furnish each applicant herein with a statement and vouchers supporting each payment made to any of them;*

4. *It is declared that the first respondent is not entitled to hold on to seventy five percent (75%) of the pensions due and payable to each applicant;*

5. *It is declared that the respondent is not entitled to pay each applicant a monthly annuity in as much as the applicants are entitled to payment of all cash standing to their credit in the books of the respondent;*

6. *The first respondent is ordered to pay the costs of their application and the other respondents only in the event of opposition.*

[3] In essence, the appellants challenged the constitutionality of section 6(2), as amended before the Constitutional Court on two bases. First that the provisions of section 6(2) (as amended) amount to *'unfair*

discrimination' contrary to sections 18 (1) and (3), of the Constitution and that it amounted to '*arbitrary differentiation'* contrary to section 19 (3), of the Constitution. Secondly, that the Amendment Act unconstitutionally interferes with the appellants' right to property under section 17, of the Constitution '. . . *to the extent that it seeks to have retrospective effect.'*

[4] On appeal before this court the appellants advanced a further contention which was not raised in their affidavits nor raised in argument before the Constitutional Court, namely, that section 6(2), has removed the appellants' right to freedom of association enshrined in section 16 of the Constitution.

[5] The background to the appellants' case commences with the passing in 1998 of the Members of Parliament Salaries Act, No 18 of 1998 which provided in section 5 (1), for Members of Parliament and Ministers to become

entitled to be a pension on retirement if they had '. . . *served as a member for a continuous or cumulative period of not less than ten years',* such pension to be paid out of the Consolidated Fund (section 7).

[6] The Specified Offices Defined Contribution Pension Fund Act, 2011 (the Act) established the Specified Offices Defined Contribution Pension Fund, an entity with juristic personality (the Fund) for the purpose of providing pension benefits to holders of certain offices (including members of Parliament) specified in the Schedule to the Act. Section 5(1), provides that *'(T)he employer and a member of the Fund shall each make a monthly contribution at a rate determined by the Minister'.*

[7] Prior to its amendment in 2014, the relevant sections of the Act, read as follows;

Members of the Fund

6 (1) Membership is mandatory for a holder of an office specified in the Schedule.

(2) *A member shall not be permitted to terminate membership of the Fund while still holding office.*

The benefits of membership of the Fund are set out in Part VII of the Act and the relevant provisions, prior to the 2014 amendment, read as follows:

Retirement

31 (1) On retirement, a member shall become entitled to a pension purchased from the pension pool by the Fund credit.

(2) A member shall have the option of exercising a commutation of up to a maximum of 25% of the fund credit and receive that amount in cash, and the balance of 75% in the form of an annuity.

Resignation

32 On resignation from office, a member shall have the following benefits:

(1) a member appointed before the commencement of this Act, shall have a pension

purchased from the pension pool by the fund credit or fund credit paid out as a lump sum net of any applicable tax;

(2) a member appointed after commencement of this Act, shall have fund credit paid out as a lump sum net of any applicable tax.

[8] After their amendment in 2014, sections 6, 31 and 32 read as follows:

Members of the Fund

6 (1) Membership is mandatory for a holder of an office specified in the Schedule.

(2) *A member shall not terminate membership of the Fund.*

Retirement

31 (1) On retirement, a member shall become entitled to a pension purchased from the Pension Pool.

(2) A member shall have the option of exercising a commutation of up to a maximum of 25% of the fund credit and receive that amount in cash, and the balance of 75% in the form of an annuity.

Resignation

32 A member who resigns from office shall receive:

(a) a cash benefit of the member's own contribution plus its net investment returns; and
(b) the employer's net contribution plus its net investment returns.

[9] The relevant provisions of the Act, both before and after their amendment, draw a distinction between the position of a member of Parliament who retires and one who resigns. A member who retires is entitled to withdraw no more than 25% of the fund credit in cash and must take the balance of 75% in the form of an annuity. A member of Parliament who resigns from office is entitled to receive the full amount (as calculated in terms of the section) to his credit, in cash (the option previously afforded to a member who was appointed before the commencement of the Act, to take up a pension purchased from the pension pool instead of a cash payment, was removed by the amendment).

[10] Before the amendments to the Act, a dispute arose between the Fund and some of its members. The dispute concerned two questions, namely whether members who retired from office were thereafter entitled to terminate their membership of the Fund, and whether after the termination of their membership, they were then despite the provisions of section 31, entitled to receive the amount of their Fund credit in cash in terms of section 32.

[11] During 2014, before the amendment to the Act, the Fund applied to the High Court for a Declaratory Order as to the correct interpretation of section 6, read with section 31 of the Act. The Fund sought an interpretation which would disallow a retiree from terminating his membership of the Fund. Secondly, and if it were permissible for a member to terminate his membership after retirement, the Fund sought a declaratory order that such erstwhile member would nevertheless not be

entitled to be paid the remaining 75%, which should be retained by the Fund under section 31, for the generation of the monthly pension payment. **Mr Tšehlana** a retired member of Parliament who contended that he was entitled to terminate his membership of the Fund and to claim his full credit in cash, was joined as a party to the proceedings. In a judgement delivered on 14 August 2014, the High Court (per **Makara, J**) refused the declaration sought by the Fund and held on the original wording of section 6(2), that members of the Fund such as **Mr Tšehlane** who had retired as members of Parliament, were allowed to terminate their membership of the Fund after retirement and to obtain the remaining 75% of their accumulated pension benefits in cash. I point out that the amendment to the Act, was promulgated on 20 June 2014, that is while the Fund's application based on the original wording of Act, was pending before the High Court and before the delivery of the judgement by Makara, J.

[12] The Fund took the decision of Makara, J on appeal and on 7 August 2015, the Court of Appeal dismissed the appeal and held (in **Specified Offices Defined Contribution Pension Fund and Anor v Tšehlana** C of A (CIV) 56/2014), again solely on the wording of section 6(2) before its amendment, that a retired member of Parliament was entitled to terminate his membership of the Fund and to insist that the amount standing to his credit, be paid out to him.

[13] On 20 June 2014, before judgment was delivered in the High Court and in the Court of Appeal, the amendment to the Act, was promulgated. It provided expressly for retrospectivity, that is that the amendments *'shall be deemed to have come into operation (on) the 31st October, 2011'.* Section 6(1) remained unchanged and section 6(2) was amended by the deletion of the words '*be permitted to . . . (*and*) . . . while still holding office'*.

[14] On 9 November 2015, that is after the judgements of the High Court and the Court of Appeal were delivered and after the amendments to the Act, were promulgated and took effect, the appellants' attorney wrote to the Fund, and with reference to the judgement of the Court of Appeal in **Tšehlana**, stated that '. . . *our clients have decided to withdraw from the Fund because they were no longer members of parliament.'* The appellants demanded that the Fund pay out the remaining 75% of their Fund credit in cash. On the basis of the by then amended provisions of section 6(2), the Fund refused to allow the appellants to withdraw from the Fund and refused to pay out the remaining 75% of their funds to the appellants.

[15] The appellants' application, challenging the constitutionality of the relevant provisions of the Act, as amended was, as indicated earlier in this judgement, dismissed by the court *a quo* sitting as a Constitutional

Court, in a judgment delivered during July, 2016. The court rejected the appellants' contention that it was bound by the decision of this court in ***Tšehlana*** and distinguished the latter decision on the basis that in the case before it, the court was called upon to grant a constitutional declaration of invalidity of an Act of Parliament, which would bind not only the parties, but the whole world, while in ***Tšehlana*** the applicant sought *'a conventional declaration'* under section 2(c) of the High Court (Amendment) Act, 34 of 1984, and which '*only avails the parties to the case . . . and is res judicata between them.'*

[16] Prior to the amendment of section 6(2), the position was that a member of the Fund was not allowed to withdraw from the Fund while in office but members who had resigned or retired from office, were not expressly barred from withdrawing from the Fund. In their founding papers and in argument before this court, the

appellants accept that section 6(2), as amended, now does not permit members who have retired or resigned from Parliament to terminate their membership of the Fund. It is for this reason, namely that retired members may not terminate their membership of the Fund, that the appellants challenge the constitutionality of section 6(2), as amended.

[17] The appellants' concession that section 6(2) as amended, prohibits members from withdrawing from the Fund after retirement, is correct. This conclusion appears clearly from the unambiguous wording used in the amended provision and by the fact that the words '. . . *while still holding office',* were deleted by the amendment. The court *quo,* for the reason referred to earlier, held that the judgement of the Court of Appeal in **Tšehlana** was not binding on it. There is another reason. The dispute before the court in ***Tšehlana*** did not concern the validity of the Amendment Act or the

constitutionality of section 6(2), as amended. That case was concerned with the question whether the Fund was entitled to the declaratory relief it sought in respect of section 6 read with other sections of the Act, as originally worded before the Act was amended and the Court of Appeal was not concerned with and did not pronounce on the validity and constitutionality of the Act as amended. The Court of Appeal declined to consider the effect of the Act, as amended, but expressed the view (at para 12.0, footnote 1) that '*The 2014 Amendment Act effectively prohibits termination of membership'*. The judgment in ***Tšehlana*** is therefore no bar to the interpretation of section 6(2), as amended to mean that members of the Fund cannot terminate their membership of the Fund after retirement from office.

[18] The effect of section 6 (2), as amended is that it removed the method by which retired members of Parliament could under the **Tšehlana** ruling, by

resigning from the Fund, circumvent the provisions of section 31 and claim the balance of 75% standing to their credit in the fund, in a lump sum. Mr Letsika who appeared on behalf of the appellants submitted, however, that the appellants were in exactly the same position as Mr Tšehlana and that the judgment in the Court of Appeal governed their position. The second and ninth appellants retired during 2015, after the amendment was effected. Since they retired after the amendment took effect, they were never in the position to withdraw from the Fund. The other appellants all retired from Parliament during 2012 and were therefore on the authority of **Tšehlana** in the position to withdraw from the Fund until the amendment was effected on 20 June 2014. Unlike Mr Tšehlana, who was a party to pending litigation when the amendment was promulgated on 20 June 2014, the appellants did not assert their entitlement to withdraw from the Fund before the amendment took effect, by joining in to oppose the

application brought by the Fund or by bringing their own application. As pointed out earlier, this court did not in **Tšehlana** consider the effect of the amendment to section 6(2) and its retrospective effect on the position of a Member of Parliament such as Mr Tšehlana who had retired after 31 October 2011. The appellants only sought to assert their entitlement to withdraw on 9 November 2015, by which time the amendment had been promulgated and prohibited a member from withdrawing from the Fund. The retrospective operation of the amendment does not affect their position because they did not seek to withdraw from the Fund before 20 June 2014.

[19] The appellants first contention regarding the constitutionality of section 6(2) as amended, is that the section offends against the provisions of section 18 (Freedom from Discrimination) and section 19 (Right to Equality before the Law and the Equal Protection of the

Law) of the Constitution. The appellants contend that it unfairly disallows members who have retired from office to withdraw from the Fund. They point out that retirement from Parliament may occur in a number of ways: members may reach retirement age or may have been forced into retirement by circumstances beyond their control such as the dissolution of Parliament or in the case of members of Parliament on proportional representation, on the grounds of dismissal from parliament. The appellants contend that the amendment has rendered them subject to '*disabilities and restrictions'* not applicable to those who resign from office. They are therefore not accorded '*equality before the law'* and '*equal protection of the law'*. To illustrate the point, the first appellant gives the example of how, by making use of a stratagem, section 6(2), as amended '*can be defeated by a member who would just resign a few days before Parliament is dissolved or before they reach retirement. In that event, such a person would fall under the provisions*

of section 32 and would be entitled to be paid their cash available in the Fund'. In the result, it is contended, section 6(2), as amended, discriminates unfairly between, and does not treat equally, *'persons in the same category attributable wholly or mainly to their status',* that is, between members of Parliament who resign from office and are entitled to receive their benefits in one lump sum cash payment and those who retire and who are entitled to take no more than a maximum of 25 % of their benefits in cash and are obliged to take the balance in the form of an annuity. Mr Letsika on behalf of the appellants contended that such discrimination cannot be justified in a democratic society.

[20] Section 18 of the Constitution reads, where relevant:

Freedom from discrimination

18 (*1) Subject to the provisions of subsections (4) and (5) no law shall make any provision that is discriminatory either of itself or in its effect.*

.....

(3) In this section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

[21] Section 18 (1), prohibits provisions in any law that is '*discriminatory either in itself or in its effect'*. In this case, the appellants rely on the effect of the amendment to section 6(2). The section prohibits all ex offices holders, whether they have resigned or retired, from terminating their membership of the Fund. The effect of the amendment is that because it disallows all members from terminating their membership, retired members are not able to make use of a withdrawal from the Fund to

access their full pool credit as they were able to do in terms of the **Tšehlana** judgment of this court. The definition of '*discriminatory'* in section 18(3) makes it clear that section 18(1), does not prohibit differentiation *per se.* Section 18(1), prohibits different treatment of different persons, on the basis of one of the characteristics (race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status) mentioned in section 18(3). The appellants do not rely on any of the specific characteristics expressly mentioned in sec 18 (3) but relies on the fact that the effect of section 6(2) as amended is that it purports to afford different treatment to '*persons in the same category attributable wholly or mainly to their status . . . it treats persons in the same circumstances differently.'* The appellants object to the difference in treatment between members of Parliament who have resigned, on the one hand, and those that have retired.

[22] The challenge based on section 18(1) and (3) of the Constitution cannot succeed. The differentiation between those that have retired and those that have resigned does not involve a distinction based on their status (**Lesotho General Insurance Co Ltd v Nkuebe**, LAC [2000-2004] 877 AT para 11-12). The distinction relates to persons of similar status, namely members of parliament whose tenure have come to an end in different ways. In **Road Transport Boards and Ors v Northern Venture Association**, LAC [2005-2006] 64 at paras 12-15, this court pointed out that section 18, proscribes differentiation for reasons attributable to status and that there is no discrimination in this sense where in a legislative scheme there is differentiation that is not attributable to one of the characteristics mentioned in section 18(3) or other status of the persons involved. As was pointed out by Mr Farlam on behalf of the first respondent, status in itself is not a prohibited ground of

discrimination and that in the context, *'or other status'* means an attribute related to status that is equivalent or analogous to, but not the same as the specific grounds mentioned. These might, for example, be marital status or sexual orientation.

[23] I agree with the conclusion arrived at by the court *a quo,* that

> *[48] . . . the differentiation between the applicants and their counterparts is permissible and reasonably justifiable in a democratic society having regard to its nature and special circumstances pertaining to the two groups of former members of Parliament . . . the differentiation does not constitute discrimination . . . The Act merely draws a distinction between public-office bearers whose tenure ends in different ways and attracts different benefits.*

[24] As a result of the amendment to section 6(2), those that have retired from office can no longer make use of the method provided for by the judgment in **Tšehlana** to

escape the provisions of section 31, but they could, as is pointed out by the first appellant, have chosen to resign before they retired. There is therefore no differentiation on the basis of a difference in status as contemplated by section 18(3).

[25] I turn to the appellants' challenge under section 19 of the Constitution which reads:

> **Right to equality before the law and equal protection of the law**
>
> *19 Every person shall be entitled to equality before the law and to the equal protection of the law.*

[26] Section 6(2), as amended prohibits all members of the Fund from withdrawing from the Fund. It does not provide for any benefits or the loss of benefits and does not in itself involve any unequal treatment of any persons.

[27] The appellants contend that the inequality arises from the effect of section 6(2), as amended, in that members who retire from office is treated differently from members who have resigned from office. Section 19, does not require all persons to be treated equally. It only prohibits differentiation when it is not rationally related to a legitimate government purpose. In **Prinsloo v van der Linde**, 1997(3) SA 1012 (CC) at para 23, the South African Constitutional Court considered the equivalent section 8(1), of the Interim Constitution and held that the government is required to act rationally which means that it should not '*regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate government purpose . . .'* and in **East Zulu Motors (Pty) Ltd v Empangeni/Ngwelezane Transitional Local Council and Others**, 1998(2) SA 61 (CC) at para 24 it was said that '*The question is not whether the government may have achieved it purpose more effectively in a different manner, or whether its regulation or conduct*

could have been more closely connected to its purpose. The test is simply whether there is a reason for the differentiation that is rationally connected to a legitimate government purpose".

[28] It is not enough for the appellants to rely simply on the fact that retired members of Parliament are subject to rules regarding their pension benefits that differ from those applicable to members of Parliament who have resigned. The fact that the two categories of erstwhile members of Parliament are treated differently and that the appellants fall in the category that cannot access more than 25% of their pension benefits in cash while those that have resigned is entitled to their full benefit in cash, must be shown to be prohibited by section 19. **Lesotho General Insurance Co Ltd v Nkuebe,** supra, at paras 17-18, where this court (per Melunsky, JA) held that difference in treatment '*becomes unfair, however, when there is no rational connection between the*

differentiation and the purpose for which it appears in legislation'. Section 31, provides that retirees from office are not entitled to obtain more than 25% of their benefit in one cash payment. I Agree with Mr Farlam's submissions and analysis of the facts set out hereunder, that the challenge under section 19, must also have regard to the benefit that the appellants acquire on retirement, namely that under section 31 (1) they become entitled to a pension purchased from the Pension Pool and that in terms of section 31(2), they are entitled to receive the minimum of 75% of the balance of their funds in the form of an annuity which will pay a monthly pension. Pension Pool is defined in section 3 of the Act, as amended as '*a pool of* ***fund credits*** *of members operated by the Fund'*. The fund credit consists of the items set out in section 32A, of the Act, as amended, which provides:

Fund Credit

32A A fund credit shall consist of-

(a) any amount of money transferred from the Public Officers Defined Contribution Pension Fund or Pension Proclamation, 1964, or any other law;

(b) deferred pensions;

(c) a member's contribution plus its net investment returns;

(d) an employer's contribution plus its net investment returns;

(e) a pension and gratuity which would have been due and payable by the Government to a member under law if the member had retired on or before the 31st October, 2011, transferred into the fund credit of the member;

(f) any other amount transferred into the fund from a previous fund or an approved fund;

(g) any amount transferred from the gratuity fund if applicable plus its investment return; or

(h) a combination of two or more of any of the items under paragraphs (a), (b), (c), (d), (e), (f) and (g).

[25] The pool of fund credits from which the pension is purchased, is supplemented by investment returns which is likely to offset, in part, in full or more, the monthly amounts paid out as pension. The principal

officer of the first respondent set out in the answering papers, the benefits received since retirement by each of the appellants. These benefits must be compared with the benefit set out in section 32, of the Act, as amended to which a member who has resigned from a specified office, are entitled: a once off cash lump sum payment which is made up of the member's own contribution and the employer's net contribution plus the net investment returns on both contributions. This comparison shows that the member who has retired is probably, at least in the long term, in a better financial position, in at least two respects. First, the fund credit potentially available to a retiring member would generally be more than the member and employer contributions together with the net investment returns thereon available to a member who resigns. Secondly, the member who retires and receives a pension will have the benefit of the likely better investment returns associated with the membership of the fund as opposed to the investment

returns that an individual who has resigned could be expected to obtain. On behalf of the Fund it is pointed out in the answering papers that the Fund has resources to obtain professional investment advice, that the larger pool available for investment should reduce the cost of investment and allow the Fund access to investments not available to the general public. In reply the first appellant categorises the contentions on behalf of the first respondent as baseless speculation. He denies that the annuity returns are more advantageous than what he would have received if he had taken the balance of the fund credit in cash and states that he conducts *'businesses and (so) a number of applicants and I would have used the money to finance the capital requirements of my businesses which make a profit of 30% of every capital investments.'* The appellants' contention that they would be better off had they been able to take all their fund benefits in one lump sum, is in my view unrealistic. In the final analysis, the question whether the retired

members of parliament should be treated the same as those who have resigned, involves a matter of policy and provided that the differentiation is not arbitrary or irrational, it is not for a court to make such choice on the basis that the scheme chosen by the legislature could perhaps be improved in one or more respect. (**Jooste v Score Supermarket Trading (Pty) Ltd**, 1999 (2) SA 1 (CC) at para 17).

[29] The provisions of section 6(2), as amended, read with section 31, of the Act, as amended are designed to further the purpose and the objects of the Act, set out in the Statement of Objects and Reasons of the Amendment Act, published in Government Notice 40 of 2014. Paragraph 4 records that the proposed amendment *'prohibits termination of membership of the Fund by Members to achieve the objective of the Fund which is to protect Members from losing out on certain benefits during their tenure of office and pension upon vacation of their*

offices'. The principal officer of the Fund explains in some detail in the answering papers that the provisions of section 31 which provides that a minimum of 75% of a retired member's fund credit be used to provide for a pension, is made in furtherance of a legitimate government purpose, namely to create a social security system for the holders of the offices specified in the Schedule and *'to provide (them) with security of income, particularly in old age, and to prevent members from being left destitute at the end of their working lives. This is a socially desirable objective.'* Prohibiting retirees from terminating their membership of the Fund, the principal officer of the Funds states is a '*necessary and justifiable provision in order to secure security of income for all retiring members of the Fund'* and he states, sections 6(2), 31, 32 of the Act as amended '*are justified by the social security need for a provision for retirement funding. This is why it is referred to as social security legislation. Without such legislation, members have no protection or security*

for their retirement and they lose the benefit associated with being part of a bigger pool of funds for retirement.' In response to a statement by the first appellant that the first appellant and others told officers of the Fund that '*the economic survival of the Fund is immaterial*' to the Fund's perceived obligation to pay out the full amount in a lump sum to retirees, the principal officer of the Fund states that '*if all members were to be paid out, the Fund might well be brought to its knees with the result that the whole purpose and scheme of the Act, would be nullified . . . (and) . . . Individual voluntary termination (of membership) will undermine the soundness of the Fund . . . (and further that) . . . to allow a member to terminate and claim the full Fund credit, would defeat the whole object of the Act, particularly, as amended.'*

[30] As a further basis for the appellants' challenge under section 19, the first appellant raises a factual issue in his replying affidavit which he says was '*since*

discovered'. It is alleged that the Fund had paid out to Mr Mochesane and Chieftainess Peete '*their pensions in full by giving them all the cash available to their credit during November 2015'.* This is presented as evidence that the Fund has treated the appellants differently from members of the same category of persons. Mr Letsika pointed out that the Fund did not take up the invitation extended in the replying affidavit to present evidence to the contrary. I agree with Mr Farlam's submission that if the Fund has indeed acted in conflict with the provisions of section 6(2), as amended (an issue which was not properly canvassed in the respondents' papers and was not dealt with by the court *a quo),* this is irrelevant to the constitutional challenge to the Act, as amended, which is an objective enquiry (**Ferreira v Levin NO** 1996 (1) SA 984 (CC) at par [26]; **National Coalition for Gay and Lesbian Equality v Min of Home Affairs** 2000 (2) SA 1 (CC) at par [29])

[31] There is consequently no unequal treatment contrary to the provisions of sect 19, of the Constitution by the enactment of the provision of section 6(2), of the Act as amended. In any event, the difference in treatment was justified for the reason set out above. The following statement in the judgment of the court *a quo* in this regard is apposite and is endorsed:

> *[29] I consider it to be in the long-term interest and for the benefit of the applicants that the social security laws in casu have been enacted. The monthly pension annuity provided for in section 31, provides for cash income from retirement to the grave. After death, their families are assured payment on a monthly basis in terms of section 35. In this sense, the pension enures*
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> *to benefit both the applicants and their families. It caters for their personal and their families' welfare. This is a noble legislative intervention to practicalise the principle of state policy in section 30(a)(i), of the Constitution of providing pension or retirement benefits to all workers. It also constitutes the*

implementation of Lesotho's treaty obligations under Article 18 of the 1981 ***African Charter on Human and Peoples' Rights*** *to make special measures to assist the family and protect the aged and disabled.*

[32] I now turn to the challenge under section 17, of the Constitution. Acting in accordance with the powers granted to Parliament by the provisions of section 78(6), of the Constitution to make laws with retrospective effect, the Amendment Act, which was promulgated on 20 June 2014, expressly provides in section 1, that the Amendment Act '*shall be deemed to have come into operation the 31st October 2011'*, the date upon which the Act, first came into operation. In the result members of the Fund that have retired or resigned from office and who had not terminated their membership of the Fund prior to 20 June 2014, are precluded from doing so. Mr Letsika, with reference to the provisions of section 18 of the Interpretation Act and the judgment of Melunsky, JA in **Mokoena v Mokoena and Others** LAC [2007— 2008]

2003 at 212, submitted that there is a presumption against a statute interfering with existing rights and interests. The rights and interests of retired members of Parliament such as those of the appellants that retired in 2012, which arise from the **Tšehlana** judgment, were unconstitutionally interfered with, he submitted.

[33] The constitutional challenge based on the retrospectivity of the Amendment Act, is raised as follows by the first appellant's launching affidavit:

> '*The Amendment Act is unconstitutional in its entirety in that it seeks to apply with retrospective effect . . . The consequence . . . is that it deprives the applicants who were entitled from terminating their membership after the dissolution of Parliament in 2012, from withdrawing from the Fund. It seeks to do so without affording such members a hearing yet it deprives them of their property rights as sanctioned by section 17, of the Constitution.*'

[34] The relevant provisions of Section 17, of the Constitution provide:

Freedom from arbitrary seizure of property

17 (1) No property, moveable or immoveable, 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 interest 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 therefore 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; and

(c) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.

[35] The absence of a hearing as ground was correctly not taken up in argument by appellant's counsel. There is no provision for a prior hearing in section 17. The Act, has conferred pension benefits on holders of specified offices. It regulates the nature and extent of the benefits and the circumstances and manner in which it can be acquired. Counsel did, however, continue to submit that entitlement to withdraw from the Fund, which was retrospectively removed by the amendment to section 6(2), did constitute the compulsory acquisition of an *'interest in or right over'* property, being the cash portion of the minimum of 75% of the appellants' pool benefit which is held back by the Fund to purchase and pay out an annuity to the appellants. In my view the ability to withdraw from the Fund was not a right to or an interest in the appellant's pool credit in the Fund. The Amendment Act, is clear that no member of the Fund may withdraw from the Fund. This to ensure that the objectives of the Act, to make provision for retirement

benefits for the holder of specified offices, are attained by preserving the viability of the pool funds held for the retired members of Parliament and other designated offices. The amendment has not taken possession of any property, moveable or immoveable or acquired any interest in or right over any such property. The amendment did remove the opportunity, by withdrawing from the Fund, to take the balance of the funds standing to their credit in the Fund by way of one cash withdrawal under section 32, instead of continuing to receive the funds to their credit by way of an annuity over time. The Amendment Act, has not removed any pension benefits that the appellants had before the Amendment Act, was promulgated. The appellants still have those pension benefits and no money or property was taken possession of or acquired. The Fund credit is remains available to the appellants who are entitled to receive the benefit in the prescribed manner, namely a minimum of 75 % of the Fund benefit in the form of an annuity. The election

to resign from the Fund after retirement from office which was removed by the amendment of section 6(2), does not constitute property or an interest in or a right over property. In any event, even assuming that there was a right to withdraw from the fund prior to the promulgation of the amendment on 20 June 2014 and assuming that such right constituted *'a right over or interest in'* property, the appellants were not hit by the retrospective operation of the amendment because they did not seek to exercise the option to withdraw from the Fund before 20 June 2014. The retrospective effect of the amendment therefore did not interfere with any right or interest the appellants had (assuming they did have such a right or interest) to withdraw from the Fund. The challenge under section 17, of the Constitution must consequently fail.

[36] The appellants seek to rely in argument on section 16 of the Constitution as a basis for a constitutional

challenge to section 6(2), as amended on the grounds that it takes away the appellants right to freedom of association. Section 16, was not raised by the appellants in the founding or replying affidavits and there is no factual basis for the challenge.

[37] Assuming that it is nevertheless competent to raise the challenge under section 16 (1), of the Constitution, it reads as follows:

Freedom of association

16 (1) Every person shall be entitled to, and (except with his own consent) shall not be hindered in his enjoyment of freedom to associate freely with other persons for ideological, religious, political, economic, labour, social, social, cultural, recreational and similar purposes.

[38] The contention on behalf of the appellants is that the effect of section 6(2), as amended is to compel a retiree to remain a member of an economic association

'*even when one is no longer contributing to it'*. Of course, a retiree is no longer contributing to the Fund, but retains a direct interest in the management of the Pension Pool, that is, of the pool of fund credits, as the source from which the retiree receives an annuity. It is contended in argument on behalf of the appellants that the compulsory membership of a retiree has the effect of differentiating between those who retire and those who have resigned from office, a differentiation, it is contended, which has no rational connection to a legitimate government purpose. I agree with Mr Farlam's submissions that to the extent that section 6(2), as amended has the effect that it not only prohibits the appellants from terminating their membership of the Fund, but also makes it impossible to withdraw more than 25 % of their pool credit in cash, their mandatory membership of the Fund as economic association does not constitute an arbitrary infringement of their right to associate freely for economic purposes or of any other

right mentioned in section 16(1) of the Constitution. The appellants' mandatory membership serves to further the legitimate government purpose of providing effective retirement benefits for holders of designated offices by achieving one of the objectives of the Act, that is to put in place and maintain a viable pool from which pensions are to be paid to retired members of the Fund. In **Oostelike Gauteng Diensteraad v Transvaal Munisipale Pensioenfonds en ander**, 1997 (8) BCLR 1066 at 1077 G-H, Cameron, J (as he then was) rejected a challenge under section 17, (the right to freedom of association) of the South African Interim Constitution, to compulsory membership of a pension fund. The court held on the facts of that case, that the obligation to be associated with the particular pension fund related to a purely financial question and was not shown to be related to the infringement of any right under section 17, of the Interim Constitution.

[40] It follows that even if it is open to the appellants to raise the challenge under section 16, of the Constitution in the absence of their having established a factual basis for the challenge, the challenge under section 16, must fail.

[41] It follows that the appeal must be dismissed. I wish to thank counsel for their valuable assistance in this matter. I have in particular been assisted Mr Farlam's formulation of the issues and marshalling of the authorities.

[42] Before dealing with the issue of costs on the basis that this is a constitutional matter, there is another issue related to costs that must be dealt with. When this matter was called on the morning of Tuesday 2 May 2017, the day on which this matter was set down for hearing in this court, we were informed from the bar that out of town senior counsel appearing for the appellants

was unavailable and had not travelled to Maseru for the hearing of the appeal. Mr Letsika who stood in for the absent counsel could not enlighten us as to the reason for the absence of counsel, but applied from the bar for the matter to be postponed to the next session of this court or to a special sitting of the court to hear the appeal. It has been the practice in this court that matters that are set down for a particular session of this court, should if possible be disposed of during the current session. In absence of a proper application supported by evidence on affidavit there is no basis upon which this matter should be postponed to the next session. That goes also for the suggestion that the matter be postponed to a special session of this court. In any event, the costs of arranging a special sitting of a court of five judges would be exorbitant. In the result, it was decided after consultation with the Acting President, that the matter will stand over for hearing on Tuesday 9 May, 2017. Mr Farlam on behalf of the respondents initially opposed the

application for a postponement on the basis that the appellants were seeking an indulgence, were not entitled to a postponement as of right and have not fully explained the reasons for their unpreparedness. In the event Mr Farlam consented to a postponement to 9 May 2017, but insisted that the prejudice to the respondents be overcome by an appropriate cost order (**Pitso Selogile v Total Lesotho (Pty) Ltd** C of A (CIV) 27/2010, delivered 21 October 2011). Mr Letsika was not in position to agree to a costs order and suggested that the matter of the wasted cost of the day stand over for determination at the postponed hearing. In our view the respondents should not be out of pocket in regard to the wasted cost. This is a case where an order for the wasted cost of the postponement should be made at the time of the postponement. The court consequently made the cost order in regard to the postponement which is set out hereunder. I mention that when the matter resumed on 9 May 2017, Mr Letsika conveyed the apology tendered

by the absent senior counsel and informed the court that counsel's unavailability on 2 May 2017 was caused by a serious, sudden and unexpected family crisis. Suffice to say that this court has accepted the apology and explanation given by counsel.

[43] This is a constitutional matter where costs are not normally ordered (**DPP v Lebona,** LAC [1995-1999] 474 at 505; **Baitsokoli v Maseru City Council,** LAC [2005-2006] 85 at 98). In my view this is a case where the normal order of no order as to costs should be made.

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

1. The appeal is dismissed.
2. Save as is set out in paragraph 3 below, there is no order as to costs.
3. The appellants are ordered to pay, jointly and severally, the one paying the other to be absolved, the wasted costs of the respondents

occasioned by the postponement of the appeal on 2 May 2017, such costs to include the reasonable and travelling and accommodation costs incurred in respect of first respondent's counsel and attorney.

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W.J. LOUW
ACTING JUSTICE OF APPEAL

I agree:

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DR. P. MUSONDA
ACTING JUSTICE OF APPEAL

I agree:

_____

M.H. CHINHENGO
ACTING JUSTICE OF APPEAL

I agree:

_____

S.N. PEETE
ACTING JUSTICE OF APPEAL

I agree:

_____

L.CHAKA-MAKHOOANE
ACTING JUSTICE OF APPEAL

For the appellant	:	Adv Letsika
For the respondents	:	Adv P B J Farlam, S C, with Mr D P Molyneaux