IN THE HIGH COURT OF LESOTHO

CIV/APN/100/2014

In the matter between:

SPECIFIED OFFICES DEFINED CONTRIBUTION FUND **1ST APPLICANT**

PUBLIC OFFICERS DEFINED CONNTRIBUTION PENSION FUND **2ND APPLICANT**

And

LEHLOHONOLO TSEHLANA **RESPONDENT**

JUDGMENT

Coram : Honourable Mr. Justice E.F.M. Makara
Dates of Hearing : 28 May, 2014
Date of Judgment : 14 August, 2014

Summary

The applicants seeking for a declaratory order that S. 6 read in conjunction with S. 31 of the Specified Offices Defined Contributions Pensions Fund Act no 19 of 2011 be interpreted not to countenance the idea of a retiree who has terminated his membership to the pension Fund established under the Act to be paid the remaining 75% retained by the 1st Applicant for the regeneration of the monthly pension payment. And that the same applies to S. 5 harmonised with S. 27 of the Public Officers Defined Contribution Pension Fund Act no 57 of 2008. The Court refusing to make the orders on the basis that the literal rule of interpretation indicates that the Legislature intended a retiree who has left the fund to obtain the remaining 75% of his invested amount of money. The remaining complexity being, however, a translation of that percentage into the exact amount since the Court has not been assisted with the expert based formulation.

CITED CASES

Bulane A Sechele V Public Officers' Defined Contributions Fund and others C of A (CIV) NO.43/10. Grant Thorn Capital Umbrella Fund V Da Silva, Egidio No. A5066/2012 (unreported). Venter v R 1907 TS 9. Seluka v Suskin & Salkon 1912 TPD 258. R v Tebetha 1959 (2) SA 337 (AD).

STATUTES & SUSIDIARY LEGISLATION

Specified Offices Defined Contributions Pensions Fund Act no 19 of 2011.
Public Officers Defined Contribution Pension Fund Act no 57 of 2008

MAKARA J

Introduction

[1] This case originates from an *ex parte* notice of motion initiated by the applicants for a declaratory orders that:

1. Upon the correct interpretation of S. 6 read in harmony with S. 31 of the Specified Offices Defined Contributions Pensions Fund Act no 19 of 2011 (SODCPF Act), a retiree is not entitled to be given a 75% fund credit as a lump sum in cash irrespective of whether or not such a retiree has left the membership of the fund;
2. Upon the correct interpretation of S. 5 read in conjunction with S. 27 of the Public Officers Defined Contribution Pension Fund Act no 57 of 2008 (PODCPF Act), a retiree is not entitled to be given a 75% fund credit as a lump sum in cash irrespective of whether or not a retiree has left the membership of the fund.

[2] The initiation was primarily accentuated by the applicants' quest for the ascertainment of a true legal and technical interpretation of S. 6 of the SODCPF Act when interfaced with S. 31 of same and, correspondingly, the interpretation of S. 5

and S. 27 of the PODCPF Act when read in conjunction with each other. The litigation was calculated at presenting an opportunity for a judicial pronouncement that a proper construction of the impugned sections in both legislative enactments, should culminate in the meaning that a retiree is not entitled to be given a 75% fund credit as a lump sum in cash irrespective of whether or not the retiree has left the membership of the fund.

[3] Another contextually derived background which triggered the application is a counter meaning which the respondent Lehlohonolo Ts'ehlana and one Motente Francis Likhama had ascribed to the sections and on that basis maintained that they were as the retirees entitled to the 75% fund credit as a lump sum in cash. The applicants had in recognition of the adverse belligerent positions held by the two, found it procedurally imperative to serve them with the application thus, the respondent reacted by filing an application to intervene in the proceedings in order to resist the declaratory pronouncements sought for by the applicants. His application was not opposed and he consequently featured as the respondent in these proceedings while the said Likhama did not demonstrate any enthusiasm in being a party in the contestations before the Court despite having filed an affidavit.

Common Cause

[4] The parties share a convergence of understanding on almost all the material facts which have precipitated these proceedings. They firstly subscribe to the particularisations assigned to them respectively by each other. In this respect, the first applicant has been described as juristic person and body cooperate duly established in terms of S. 4 of the SODCPF Act and that the purpose therein is to

provide pension benefits to holders of offices as set out under the Schedule. The respondent was at all material times a Member of Parliament and by virtue of that status fell under the category of the Specified Offices listed in the schedule.

[5] The 2nd Applicant is a Public Officers Defined Contributions Pensions Fund established under S. 3 of the PODPF Act. Its purpose is to provide pension benefits to the Public officers as referred to under S. 5 (1) and (2) of the Act. It similarly commands a juristic personality which grants it a *loco standi* in litigation.

[6] There is harmony in the parties' recognition that the respondent Lehlohonolo Ts'ehlana who had been a parliamentarian qualified for the pension benefits under the Fund, had a direct and substantial interest in the judicial determination which has been sought for by the applicants and that he had filed a notification for his resignation from membership of the Fund. He perceived the statutory formulation that he would get 25% of his pension as a lump sum and consequently, the remaining 75% in the form of annuities on a monthly basis to be detrimental to his financial interests. According to him, it would be advantageous to him if he would, instantly, receive the remaining portion of the 75%. The understanding being that he has already received part of the outstanding 75% through the monthly annuities already paid to him.

[7] The scheme in both enactments that constitute the subject matter is that by operation of law the qualifying serving officers are mandatorily and compulsorily made members of the respective Pension Fund. This is clearly provided for under S. 6 of the SODCPF Act and in terms of S. 5 (1) (b) of the PODCPF Act.

It is the common understanding of the parties that a holder of a specified office is at liberty to terminate his membership to the fund upon his retirement from the relevant office.

The Issues for Determination

[8] The key issue is whether when S. 6 is considered with S. 31 a retiree from a specified office who elects to cease his membership to the fund, would be entitled to be paid a 100% of his retirement benefits immediately upon such termination or the outstanding balance of the 75% benefits where he has already received a portion of the latter percentage in the form of monthly paid annuities. The same question has arisen in relation to the interpretation of S. 5 when read side by side with S. 27 of the PODCPF Act.

The Arguments

[9] Tellingly, the common cause scenario and the identified points of divergences have, in a nutshell, already foreshadowed the arguments advanced for the parties respectively. Starting with the applicants, a pillar of their position is that theoretically a Defined Contribution Fund is a retirement plan in which the employer is effectively compelled to contribute a given amount of money from his monthly income while the employer reciprocates by paying another portion for the purpose of building up a pension fund for the concerned employees. It was here augmented that in arithmetically in the instant case, the ratio of the contributions are that 5% is paid by the employee while the employer's share is 20%. It was

stressed that by the dictates of the law the accumulated contributions would, ultimately translate into a pension income for the employee at the time of his retirement. On this note, a distinction was drawn between a defined contribution plan and a defined benefit scheme. In the former according to him there is no promised specific pension income while in the latter this is subject to the amount of the contributions for the employee and the market performance in the investments ventures in which the fund is involved. There is in clear terms no certainty about the amount which the fund will ultimately generate for the employee.

[10] The understanding sought to be created was that the very nature of the Fund and the material limitations attached to it is indicative that its membership transcends into the post retirement. This was grounded upon reasoning that given the intended social benefit from the scheme, the legislation has not contemplated a situation in which a retiree could terminate his membership. If otherwise, that would constitute an antithesis of the social benefit since there would be a possibility that a substantial number of the retirees could upon the termination of their membership claim the entire 100% of the accumulated benefits. Ultimately, this would culminate into the collapse of the social scheme.

[11] Arguing with specifism to S. 6 interfaced with S. 31 of the SODCPF Act, the 1st Applicant maintained that they do not conceptualise a retiree from a Specified Office listed in the Schedule, leaving the membership of the Fund and thereby being automatically entitled to receive the 100% pension benefit as a lump sum. The same position would, according to the 1st Applicant apply in the present case where

the Respondent, having received the 25% benefit, has terminated his membership to the Fund in an endeavour to attain the outstanding 75%. This means that he would finally still get a 100% of the pension benefit. It was reiterated that if the interpretation would be otherwise, the legislatively created social benefit would be frustrated and that this cannot be regarded to have been the intention of the Legislature. The case of **Bulane A Sechele V Public Officers' Defined Contributions Fund and others C of A (CIV) NO.43/ 10** was heavily relied upon for the proposition. Here the Court of Appeal had in dismissing the argument that sections 4 and 5 of the PODCF Act violated S. 17 (1) of the Constitution in that it provides for a compulsory contribution to the PODC Fund; reasoned that the Legislative arrangement provided for pension benefits for permanent and pensionable Public Officers and, therefore, that this represented one of the exceptions to the Constitutional rule against appropriation of property in that the measure is justified under S. 17 (4) (a). This sanctions the acquisition of property if it is necessary in a practical sense in a democratic society.

[12] The same legislative based contentions were advanced on behalf of the 2nd Applicant in relation to S. 5 read in conjunction with S. 27 of the PODCF Act.

[13] In conclusion, the Applicants maintained that since the sections under consideration do not conceptualise a termination of the membership, it would be *ultra vires* the enactment to interpret the same to countenance a 100% payment to such a person. Otherwise, that would tantamount to the wrong application of the principles applicable to the *conditio indebitti* or *conditio sine causa* because in the instant case the applicants are not in any manner, whatsoever, indebted to the

Respondent. The case of **Grant Thorn Capital Umbrella Fund V Da Silva, Egidio No. A5066/2012 (unreported)** was relied upon in support of the submission. A specific part of the judgement which was drawn to the attention of the Court was in paragraph 18 where it was stated:

> It is also trite law that any payment made by the plaintiff to someone who is not entitled to such payment, will in effect be *ultra vires* the provident fund's rules and regulations. Reclaiming such payment by the plaintiff in terms of a *conditio indebetti* or *conditio sine causa* constitutes a prime example of a payment *indebite* as by its very nature it was a payment of something not owing to the payee.

[14] The Respondent in response proceeded from the premise that S. 6 of the SODCF Act has imposed a membership to the Fund upon the holders of the offices provided for in the Schedule. He warned that the section specifically prohibits any such serving officer from excluding himself from the membership of the Fund and that it does not in any manner, whatsoever extend the same bar over the retirees. His position was that a retiree was *ex facie* the provision, at large to retain his membership or to terminate it.

[15] The Court was persuaded to apply a literal rule of interpretation for it to properly construct the intention of the legislature under S. 6 of the SODCF Act and correspondingly S. 5 of the PODCF Act. In this connection, the Respondent drew a distinction between the compulsory phase of the membership to the Fund which applies to a serving officer and to the non-compulsory one which operates upon the leaving of office. The old case of **Venter v R 1907 TS 9** was proposed for guidance in the application of the literal rule of interpretation in an endeavour for the appreciation of the mind of Parliament.

[16] As a logical consequence of the arguments advanced by the Respondent, he maintained that having resigned from the membership of the Fund, he becomes automatically and by operation of law, entitled to receive his remaining investment under the trust of the 1st Applicant.

[17] It is worthwhile to record that the Respondent did not bother to launch any contestation on the jurisprudence pertaining to the meaning radiated under S. 5 considered side by side with S. 27. This is understandable because his case is not founded thereon but rather on the meaning reflected by S. 6 when reconciled with S. 31 since as a former parliamentarian, he fell under the Schedule of offices provided for under the SODCF Act and not under the PODCF Act.

The Findings and the Decision.

[18] It is from the onset found that justice in this case turns basically on the interpretation which this Court assigns to S. 6 harmonised with S. 31 of the SODCF Act and by analogy, S. 5 interfaced with S. 27 of the PODCF Act. Thus, it becomes imperative to record these provisions *in extenso.*

S. 6 details that:

> (1) Membership is mandatory to a member of an office specified in the Schedule.
> (2) Provides that a member shall not be permitted to terminate membership of the Fund while still holding office.

S. 31 states that:

> (1) On retirement, a member shall be 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.

The relevant parts under S. 5 of the PODCF Act unfolds:

(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** (my emphasis)

Ultimately, S. 27 stipulates:

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.

Ex facie the common cause factual landscape, it obviously emerges that the key facts which are of significance for the final determination of the case are that:

- the First applicant had concluded a pension annuity contract with the respondent;
- the relationship had continued after his retirement;
- he was in accordance with S. 31 of the SODCF Act paid a lump sum of 25% of his total pension benefits immediately upon his retirement while the 75% was withheld for the purpose of its continuance to generate him a monthly annuity payment;

- the Respondent has ultimately terminated his membership to the Pension Fund which is administered by the First Applicant and on that basis, demanded that he be furnished with the remaining 75% as a **lump sum**;
- the Respondent perceived S. 6 to allow a retiree to unilaterally decide to leave the membership of the Pension Fund and, therefore, qualifies him to receive the rest of the remaining part of the benefit.

[19] The resultant assignment is for the Court to primarily interpret both S. 6 and S. 31 for it to determine if the former's accommodation of an avenue for a retired member of the Fund, to terminate his membership and, thereafter, be eligible for the 1st Applicant to pay him a lump sum of his remaining investment which is proportioned under S. 31.

[20] The Court is in concert with the proposition by the Respondent that the meaning contemplated under S. 6 should be construed through the instrumentality of the *literal rule* of interpretation. This is so because the words employed therein are clear and unambiguous for the comprehension of the message of the legislature. In **Venter V R 1907 TS 9** Innes CJ had formulated a simple approach in these terms:

> In construing the statute, the object is of cause to ascertain the intention which the Legislature meant to express from the language which it employed. By far the most important rule to guide the courts in arriving at that intention is to take the language of the instrument...as a grammatical whole, and when the words are clear and unambiguous, to place upon them their grammatical construction, and to give them their ordinary effect.

[21] It is definitely clear from the text of S. 6 that it is by necessary implication permissible for a retiree to terminate his membership to the Pension Fund. This

dictates that the decision of the Respondent to leave the organisation is in the same token sanctioned under the section.

[22] When interfacing S. 6 with S. 31 it is, in the view of the Court, a logically and legally justifiable conclusion that since the Respondent was not legislatively barred from resigning from the membership, he was entitled to exercise the right and to consequently, be given whatever amount of money that would worth his outstanding balance. It is gathered from the undisputed facts that he had, following his retirement from Parliament been receiving a monthly pension from the invested 75% of his benefit. It would, otherwise, occasion a grievous injustice and absurdity if the understanding would be that he could in the exercise of his optional right under S. 6, cease his membership but leave his investment in the hands of the 1st Applicant despite the extinction of the contractual and trust relationship between them. The analysis receives reinforcement from its finding that S. 6 should be ordinarily and grammatically interpreted before interrelating it with S. 31 for the purpose of the determination the end result. In simplistic words and for the sake of clarity, **this pertains to the decision on the question of the eligibility of a retiree to get his fiscal benefit in full or the outstanding balance as in the case of the Respondent.**

[23] It follows from the jurisprudence upheld by the Court in its synchronisation of S. 6 and S. 31 that the argument advanced for the applicants that they should not be construed to authorise a retiree to end his membership to the Fund and then qualify for the 75% credit as a lump sum is not found to be persuasive. This is the decision despite the fact that the Court has duly attached consideration to the supportive reasoning that a contrary view would tantamount to creating a situation

which would be detrimental to the sustenance of the Fund. The antecedent illustration was that retirees could almost simultaneously terminate their membership and, therefore, deplete the finances which constitute the foundation of the Fund itself. The decision rests upon a determination that the application of the *literal rule* of interpretation on the sections, would result in the perception that the Legislature had deemed it appropriate to render a retiree able to terminate his membership and that, unfortunately, it cannot be reasonably envisaged that such a person would effectively leave his property behind.

[24] This is a typical case in which the Court is, despite the modern jurisprudential dynamisms in interpretation which may in deserving instances, occasion a supplementation of legislation; feels duty bound to pronounce itself on the *law as it is and not on what it ought to be* even if it wished the contrary. It is reminiscent of the assertion of the function of the Court as narrated by Wessels J in **Seluka v Suskin & Salkon 1912 TPD 258** @ 270 in these words:

> My function is jus decare not jus facere ..... I have only to interpret what the legislature enacts and apparently intends.

[25] On the same note on the role of the Judiciary Hoexter JA had in **R v Tebetha 1959 (2) SA 337 (AD)** @ 346 reiterated:

> *Jus decere non dare* is the function of the Court, and the language of an Act of Parliament must neither be extended beyond its natural sense and proper limits in order to supply omissions or defects, nor strained to meet the justice of an individual case.

[26] The adopted interpretational canon is found to be appropriate because the Legislature had demonstratively under S. 6 been cognisant of the technical

significance of the word "*terminate"* since it has employed it in the section and specifically applied it to express in an unambiguous wording that a member shall not be permitted to *terminate* membership of the Fund while still holding office. This is contextually indicative that there was a corresponding conscientiousness about the existence of the members who shall have retired from the office. Here, what is of interpretational substance is that there is no such restriction imposed upon the retiree and further that there is no express **prohibition** against a *termination of the membership* by the retiree and understandably against a recognisably potential right to demand all the outstanding financial benefit from the investment. In the circumstances, there is no justifiable basis for an inferential reading that the **prohibition** is necessarily implied.

[27] The Court is in disharmony with the applicants' reliance on the case of **Bulane A Sechele v Public Officers' Defined Contribution Pension Fund and Others *(supra)*** for a proposition that S. 31 does not embrace a notion that a retiree who has ended his membership to the Fund, qualifies to receive the 75% investment or part thereof depending on the time of the action. It is found that there is a material distinction between this case and the one relied upon. Here a concern is on the right of a retiree who has terminated his membership to the Fund as allowed under S. 6 to be paid the remaining asset which had by virtue of the previous contractual relationship between himself and the Respondent remained under the latter's management for the monthly generation of a monthly pension. In the other case the matter dealt with a serving officer who was under S. 5 of the PODPF Act **prohibited** from resigning from the membership of the *mutatis mutandis* similar Fund. The Applicant there was, in essence, challenging the constitutionality of a compulsory

deduction of his salary for a Pension Fund on the ground that it amounted to a violation of S. 150 (4) of the Constitution and asked for an order directing *inter alia* the 1st and the 2nd Respondents to refund him the deducted monies. The Court held that the compulsory deduction amounted to one of the exceptions contained under S. 17 (1) (b) and (4) of the Constitution in that it facilitated for a social pension benefit.

[28] There is an appreciation in the present case that the Fund has equally been introduced for a social benefit to provide pension to the scheduled officers. This notwithstanding, the S. 6 Scheme's inadvertence or deliberate omission to prohibit the retirees from terminating their membership to the Fund, accords with justice that they would upon doing so be entitled to the outstanding part of their Fund subject to the applicable conditions. A rather complementary reasoning would be that it would be a transgression of constitutional right to directly or covertly force a retiree who has lawfully terminated his membership to the Fund to continue with it. In any event, it does not rhyme with logical reasoning for the Applicants to acknowledge that S. 6 interpretationally permits a retiree to resign from the membership but be restrained from accessing all or the remaining part of the pension savings held by the 1st Applicant.

[29] Given S. 31's premised 75% benefit which the Respondent has dedicatedly endeavoured to access as a lump sum, the expectation is that he ought to have appreciated the indispensability of an accounting arithmetic formulation for the determination of the exact or a scientific estimation of the actual amount which represents the outstanding balance from the 75% standard benefit. The rational is

that there are obvious commercial dynamics which are involved in the investment and in the generation of the profit which ultimately facilitates for the sustenance of the monthly pension income for a member. Recognition should, seemingly, be attached to the fact that the investment under consideration involves a collectivity of the retained investment amounts of all the members for the creation of the profits which finally *inter alia* translates into the monthly annuity. The simplistic approach followed by the Respondent in the matter places the Court in a speculative situation in that it has not been provided with a requisite assistance for its assessment of the actual amount due to a retiree in the circumstances of the Respondent. Perhaps, the engagement of an actuary for the assessment of the amount could have led the Court to a scientific based conclusion on the amount

[30] In the foregoing factual and legal scenario, the Court finally decides as follows:

1. The declaration sought for by the 1st Applicant under prayer 1 is refused;

2. The declaration sought for by the 2nd Applicant under prayer 2 is also refused;

3. In the interest of reaching a finality in the matter the parties are necessarily and incidental encouraged to explore an out of court settlement through the identification of an appropriate formula for the determination of the exact or scientifically estimated amount due for payment to a retiree in the situation of the Respondent. Where there is a disagreement thereon the parties may re-approach the Court for its intervention on that specific question;

4. Costs should follow the event.

E.F.M. MAKARA
JUDGE

For Applicant : Adv. Pheko inst. by T. Maieane & Co.
For Respondent : Adv. Mocheko inst. by Mosuoe & Associates