IN THE HIGH COURT OF LESOTHO

Held at Maseru

CONSTITUTIONAL CASE NO.10/2015

In the matter between:

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

And

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

CORAM:	**J.T.M. MOILOA, E.F.M. MAKARA J AND S.P. SAKOANE AJ**
HEARD:	**26and27 JUNE, 2016**
DELIVERED:	**26JULY, 2016**

SUMMARY

Constitution – pension rights of Members of Parliament – whether such rights have been violated by retrospective operation of an amendment legislation – purpose of pension benefit and whether it can be accessed as a lump-sum cash payment – sections 17, 18 and 19 of the Constitution – whether violated by section 6(2) of the Specified Offices Defined Contribution Pension Fund (Amendment) Act 3 of 2014

ANNOTATIONS

CITED CASES:
LESOTHO
Attorney-General And Another v. Swissbourgh Diamond Mines (Pty) Ltd And Others (No.2) LAC (1995-99) 214

Attorney-General v. 'Mopa LAC (2000-2004) 427

Lesotho National General Insurance Co. Ltd v. Nkuebe LAC (2000-2004) 877

Masupha v. Senior Resident Magistrate for the Subordinate Court of Berea and Others [2014] LSCA 22

Ramoholi v. Principal Secretary for the Ministry of Education And Another 1991-1996(2) LLR 916 (HC)

Road Transport Board And Others v. Northern Venture Association LAC (2005-2006)64

Sekoati And Others v. President Of The Court-Martial And Others LAC (1995-99) 812

Specified Offices Defined Contribution Pension Fund and another v. Tšehlana [2015] LSCA 22

Tšepe v. Independent Electoral Commission And Others LAC (2005-2006) 169

Swissbourgh Diamond Mines (Pty) Ltd and others v. The Military Council of Lesotho and others 1991-1996 (2) LLR 1481 (HC)

INDIA
D.S. Nakara & Others v. Union of India [1983]2 S.C.R. 165

Salabuddin Mohamed Yunnus v. State of Andra Pradesh [1985]1 S.C.R. 930

SOUTH AFRICA
National Director of Public Prosecutions v. Mohamed NO 2003(4) SA 1 (CC)

Teddy Bear Clinic For Abused Children v. Minister of Justice & Constitutional Development and Another (Justice Alliance of South Africa and Others as amici curiae) 2013 BCLR 1429 (CC)

EUROPEAN COURT OF HUMAN RIGHTS
Carson and others v. United Kingdom (2010) 29 BHRC 22

UN HUMAN RIGHTS COMMITTEE
Wackenheim v. France Communication No. 854/1999

STATUTES:
Constitution of Lesotho, 1993

High Court (Amendment) Act No.34 of 1984

Specified Offices Defined Contribution Pension Fund Act No.19 of 2011

Specified Offices Defined Contribution Pension Fund (Amendment) Act No.3 of 2014

TREATIES:
African Charter on Human and Peoples Rights, 1981

International Covenant on Civil and Political Rights, 1966

BOOKS:
Basu's Commentary On The Constitution Of India (1985) Volume E/1 7th Edition (Calcutta: S.C Sakar& Sons)

Palmer V and Poulter 5 (1972) *The Legal System of Lesotho* (Charlottesville: Mitchie)

Walker G. de Q (1988) *The Rule of Law: Foundation of Constitutional Democracy* (Melbourne University Press)

JUDGMENT

SAKOANE AJ:

I. INTRODUCTION

[**1**] The applicants in this matter are former members of the 7th Parliament. During their parliamentary service, they became members of the 1st respondent by virtue of the **Specified Offices Defined Contribution Pension Fund Act No.19 of 2011**. As such, they joined a compulsory defined contribution pension fund scheme created under the **Pension Fund Act No.19 of 2011**.

The relief sought

[**2**] The applicants'constitutional motion seeks the following relief:

> *"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 (sic) 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 first 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 this application and the other respondents only in the event of opposition;

7. Further and/or alternative relief."

II. MERITS

Factual background

[**3**] The substrata of the applicants' case consists of the following facts:

3.1 In 2011 the Government of Lesotho introduced a social security system for members of parliament and other defined statutory office-bearers by creating a pension fund through enactment of the **Specified Offices Defined Contribution Pension Fund Act of 2011** (hereinafter referred to as the 2011 Act).

3.2 Contributions to the pension fund scheme are five percent (5%) of each member's salary and ten percent (10%) by the Government. In addition to this, the Government is also obliged to contribute another ten percent (10%) towards the gratuity of the members.

3.3 When the Fund was established, it is alleged that "it was contemplated that when a member terminated their employment for whatever reason including but not limited to dismissal, resignation or retrenchment or in the case of members of parliament early dissolution of parliament, such a member would be entitled to withdraw from the fund and be paid all the cash standing to their credit in the Fund".

3.4 The contemplated above position has been endorsed by the Court of Appeal's interpretation of sections 6 and 31 of the 2011 Act in **Specified Offices Defined Contribution Pension Fund and another v. Tšehlana** [2015] LSCA 22 (7 August, 2015).

3.5 Following the **Tšehlana** judgment, the applicants approached the 1st respondent and demanded payment of their 75% of their contributions standing to their credit in the Fund. The 1st respondent demurred on the ground that the 2011 Act had since been amended per the **Specified Offices Defined Contribution Pension Fund (Amendment) Act No.3 of 2014** (hereinafter referred to as the 2014 Amendment Act). This meant that "retirees are not entitled to withdraw from the Fund".

[**4**] It is following this deadlock that the applicants launched these proceedings seeking the relief in para [2].

The impugned provisions

[**5**] The sections of the 2011 Act and 2014 Amendment Act, which the applicants complain about their alleged unconstitutionality, are sections 6(2) and 32. Section 6(2) of the 2011 Act provided as follows:

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

Section 6(2) as amended now reads:

(2) A member shall not terminate his or her membership of the Fund."

[**6**] Section 32 of the 2011 Act decreed that:

"**Resignation**

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

(a) 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;

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

As amended, this section, in relevant parts, now reads:

"**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."

[**7**] As adverted toearlier, these amendments are "deemed to have come into operation on 31st October, 2011". In short, they have retrospective effect.

Bases of constitutional attack

[**8**] These sections are attacked on two bases:

8.1 Section 6(2) disallows termination of membership of the Fund by retirees but allows termination of membership by resigners. The latter are entitled to receive cash benefits with investment return whereas the former are not so entitled. This constitutes unjustified discrimination and perpetuates unequal protection of law in contravention of sections 18 and 19 of the Constitution.

8.2 The 2014 Amendment Act is unconstitutional in its entirety as its application has retrospective effect. This retrospective application deprives applicants of their entitlement to withdraw from the Fund and to terminate their membership, thereby taking away their property rights under section 17 of the Constitution.

The parties' contentions

[**9**] *Mr.Letsika* for the applicants, contends that the law should treat retirees in the same manner that it treats resigners, because all are former members of Parliament who made same contributions to the Fund. By

allowing resigners under section 32 to have access to all the money by way of cash payment but to confine retirees to only a quarter of theirs is to unfairly advantage resigners over retirees. This constitutes prohibited discrimination under section 18(3) and unequal protection of the law contrary to section 19 of the Constitution.

[**10**] It is further submitted, on behalf of the applicants, that they have a right to terminate their membership of the Fund and to forgo receipt of any pension annuity under section 31 in favour of cash payment of the balance of 75% that stands to their credit in the Fund.

[**11**] By amending the 2011 Act so as to operate retrospectively, the amendments deprive the applicants of their vested rights to terminate their membership in the Fund and to freely access their contributions which form property rights under section 17 of the Constitution.

[**12**] *Mr. Farlam,* for the 1st respondent, counters by contending that the 2011 Act differentiates betweenand retirees under section 31 and resigners under section 32 and does not discriminate. Retirees enjoy a pension on a continuing basis, which is more than merely contributions plus investment returns. This is in accordance with the socially desirable objective of providing retirees with security of income in old age and to

prevent them from being destitute at the end of their working lives. Therefore, prohibition of termination of membership of the Fund by retirees under section 6(2) is justified by the social security need for a provision for retirement.

[**13**] It is contended further that the differentiation between retirees and resigners does not prejudice the applicants but affords them with more benefits and advantage. They have the continuing benefit of the investment advantages associated with the membership of the Fund.

[**14**] Therefore, section 18(3) does not prohibit special protection in the form of social security legislation. Neither does section 19 prohibit making of classifications which treat and impact on persons differently as long as the classification is rationally related to a legitimate governmental purpose.

III. ANALYSIS

The issues

[**15**] The following issues fall for determination:

(a) Do the applicants have the right to terminate their membership in Fund?

(b) Do the applicants have the right to receive 75% of their fund credits in cash?

(c) If there are such rights in (a) and (b), are they violated by the amendment to section 6(2) contrary to sections 17, 18 and 19 of the Constitution?

[**16**] The pillar of the applicants' case is that section 6(2),in its original form, granted them a right to terminate their membership of the Fund and to access their pension annuity in the form of cash. They contend that this follows from the interpretation of that section by the Court of Appeal in the **Tšehlana** judgment. The gravamen of their argument is that by amending section 6(2) in the manner it has done, Parliament impermissibly took away a vested right, thereby violating their freedom from arbitrary seizure of property protected under section 17 and subjects them to discriminatory treatment and unequal protection of the law contrary to sections 18(3) and 19 of the Constitution.

Is <u>Tšehlana</u> a precedent?

[**17**] The **Tšehlana** judgment is invoked to as a binding precedent. The question that confronts us is whether **Tšehlana** is a binding precedent that

compels this Court to give the same interpretation. In my opinion I think not, for the following reasons:

17.1 The **Tšehlana** case was about a conventional declaration. Such a declaration is provided for as a discretionary remedy under section 2(c) of the **High Court (Amendment) Act No.34 of 1984**. It is a remedy whose grant avails only the parties to the case. In that sense,is a conventional declaratory order which binds only the litigants and is *res judicata* between them.

17.2 *In casu*, we are called upon to grant a constitutional declaration of invalidity of an Act of Parliament for alleged inconsistency with the provisions of the Constitution. A constitutional declaration issues on a mandatory basis in terms of section 2 (the Supremacy Clause) of the Constitution. Once such a declaration is issued, it binds not only the parties but the whole world. This difference between the purposes and effect of conventional and constitutional declarators is highlighted in **National Director of Public Prosecutions v. Mohamed** NO. 2003 (4) SA 1 (CC) paras [54]-[58]. The dicta therein is that reasons for the granting or refusal of a constitutional

declaration are binding on other courts as dictated by the principles of *stare decisis* and the superior status of the court delivering the judgment. Non-constant reasons for refusal or grant of a conventional declaration.

17.3 Parliament has since amended section 6(2) to say that a member shall not terminate his/her membership of the Fund. This opens the door for this Court to revisit the issues on the basis of the amended section and make a fresh interpretation.

[**18**] The amendment of section 6(2) and its retrospective effect is that the applicants have no right to terminate their membership in the Fund and cannot receive in cash 75% of their contribution. In short, Parliament has removed the effect of the **Tšehlana** judgment. This is permissible for Parliament to do. As put by Cullinan CJ in **Swissbourgh Diamond Mines (Pty) Ltd and Others v. The Military Council of Lesotho And Others** 1991-1996 (2) LLR 1481 (HC) at 1637:

> "There are cases of course where the legislature passes legislation to counter a judgment given by the courts. That regrettably is sometimes the case, but there is no usurpation of judicial power: the court gives its decision and the legislature has full freedom of reaction thereto. It is altogether a different matter when the legislature itself exercises the judicial power or prevents the court from doing so."

[**19**] But even then, there are constitutional boundaries for the exercise of legislative powers to override judicial decisions. Those boundaries are summarized in **Basu's Commentary On The Constitution of India** (1985) 7th Ed. Vol E/1 p.23 as follows:

> "(a) A Legislature cannot *directly* override or declare void a judgment of court, because that would be exercising judicial power, and also because a law implies a generality or general application. The decision of a particular case by a Legislature would have the vice of a Bill of Attainder.
>
> (b) But it does not constitute an encroachment on the judicial power if the Legislature –
>
> (i) renders ineffective a judgment by changing the basis of the judgment by changing the law retrospectively, - which is known as a validating laws, unless Art. 13 (or Art. 20) stands in the way;
> (ii) enacts a conclusive evidence clause.
>
> (c) But without resorting to a validating enactment as above, the Legislature cannot nullify the effect of a final judgment (e.g. an order of mandamus), by merely declaring the law."

[**20**] Articles 13 and 20 of the Constitution of India, which it is suggested would stand in the way of retrospective change of the law so as to render a judgment ineffective, mirror sections 2 and 12(4) of the Constitution of Lesotho. Section 2 is the supremacy clause which voids laws inconsistent with the Constitution while section 12(4) prohibits enactment of *ex post facto* criminal laws and any prosecution and punishment on the basis of same.

[**21**] Thus, the power given to Parliament by section 78(6) of the Constitution to "make laws with retrospective effect" is hedged around with the restrictions provided for by sections 2 and 12(4) of the Constitution. This means that any law that Parliament enacts which has retrospective effect can be struck down if it violates fundamental human rights and freedoms protected under Chapter II of the Constitution or trenches on the exercise of judicial power which is vested in courts by section 118 of the Constitution.

[**22**] *Mr. Letsika* contends that the 2014 Amendment Act deprives the applicants of their entitlement to withdraw from the Fund and to terminate their membership – which entitlement and right to terminate membership vested in them on the dissolution of Parliament in 2012. Consequently, there is a violation of their enjoyment of their property under section 17 of the Constitution.

[**23**] The parties are on common ground that thelegislation before us is a social security measure enacted "for the purpose of providing pension benefits". This appears in section 4(1) of the principal Act. That purpose still stands. A pensioner is defined as "any retired member who is in receipt of a pension in terms of this Act". Entitlement to pension only exists on retirement according to section 31(1).

[**24**] If the applicants ceased to be public-office bearers upon dissolution of Parliament in 2012, then that cessation and dissolution meant that public-office bearers who qualified for pension remained as members for purposes of payment of annuity on fixed periods. For public-office bearers who failed to qualify for pension the umbilical cord was cut, the mandatory membership ceased and the 1st respondent became legally obliged to server links with them upon payment of their benefits as defined.Following the dissolution of Parliament, the Government's obligations and those of the applicants to make contributions came to an end. But that does not lead inexorably to the conclusion that members who are on pension have the right to terminate their membership and get all their contributions to the pension scheme. That would undercut the *raison d'etre* of the Act as explained hereinafter.

Do applicants have a right to receive 75% of their fund credits in casu?

[**25**] All are agreed that they have since been receiving an annuity in the form of pension. But following the **Tšehlana** judgment, the applicants no more want a pension annuity. They want a once-off payment in cash of every loti in the 75% of their contributions that stands to their credit in the Fund. Thefore, real question that needs to be answered is whether a

pensioner is entitled to receive pension benefits as a lump sum in cash. To answer it, we must first find out what the purpose of pension is.

What is pension?

[**26**] A thoroughgoing exposition of the meaning and purpose of pension is rendered by the Supreme Court of India in **D.S. Nakara & Others v. Union of India** [1983] 2 S.C.R 165 @ 185 C-Hthus:

> "…pension is not only compensation for loyal service rendered in the past, but pension also has a broader significance, in that it is a measure of socio-economic justice which inheres economic security in the fall of life when physical and mental prowess is ebbing corresponding toaging process and therefore, one is required to fall back on savings. One such saving in kind is when you gave your best in the hey-day of life to your
> employer, in days of invalidity, economic security by way of periodical payment is assured. The term has been judicially defined a stated allowance or stipend made in consideration of past service or a surrender of rights or emoluments to one retired from service. Thus the pension payable to a Government employee is earned by rendering long and efficient service and therefore can be said to be a deferred portion of the compensation or for service rendered. In one sentence one can say that the most practical raison d'etre for pension is the inability to provide for oneself due to old age. One may live and avoid unemployment but not senility and penury if there is nothing to fall back upon.
>
> The discernible purpose thus underlying pension scheme or a statute introducing the pension scheme must inform interpretative process and accordingly it should receive a liberal construction and the court may not so interpret such statute as to render them inane."

[**27**] As regards the mode of payment of pension, the Court says at p. 184 D-F:

> "The law is one of the chief instruments whereby the social policies are implemented and 'pension is paid accordingly to rules which can be said to provide social security law by which it is meant those legal

> mechanisms primarily concerned to ensure the provision for the individual of a cash income adequate, when taken along with the benefits in kind provided by other social services (such as free medical aid) to ensure for him a culturally acceptable minimum standard of living when normal means of doing so failed'.
>
> Viewed in the light of the present day notions pension is a term applied to periodic money payments to a person who retires at a certain age considered age of disability; payments usually continue for the rest of the natural life of the recipient."

[**28**] I find this analysis and exposition of the principles of pension persuasive and relevant. This, I consider, is the approach that should guide us in interpreting the provisions of the Acts of Parliament before us.

[**29**] I consider it to bein 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 to benefit both the applicants and their families. It caters for their personal and 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 take special measures to assist the family and protect the aged and disabled.

[**30**] It, therefore, stands to reason that the only interpretation of section 31 of the Act that is consistent with Lesotho's international and national human rights obligations and that leads to practical, businesslike and unoppressive consequences and does not even stultify the broader operation of the Actis that which says pensioners have no right to be paid in cash the remainder of the 75% of their contribution standing to their credit in the Fund. What right they do have is to receive pension annuity on a periodical basis to cushion them against the hardships of loss of income by virtue of old-age or disability.

[**31**] Thus, the answer to the question posed earlier on whether the applicants have the right to be paid in cash the 75% of the amount standing as a credit of their contributions to the Fund should be answered in the negative.

Does section 6(2) violate any constitutional rights or freedoms?

[**32**] The constitutional attack on section 6(2) is three-pronged:

32.1 Its retrospective effect violates the applicants' freedom against arbitrary deprivation of property under section 17 of the Constitution.

32.2 By disallowing applicants from withdrawing from the Fund andaccessing 75% of their credit in cash, it subjects them to disabilities and restrictions to which their counterparts who have resigned are not subjected to under section 32 and, thereby, unfairly discriminates contrary to section 18(3) of the Constitution.

32.3 It fails to accord applicant's equality before the law and equal protection of the law by not imposing similar restrictions and disabilities to resigners and, thereby, violates section 19 of the Constitution.

Principles of constitutional interpretation

[**33**] The issues raised cry for the testing of the validity of the 2014 Amendment Act on the template of the Constitution. This requires of us to work on the basis of the following principles:

33.1 An enquiry into the constitutionality of a law is an objective one. The subjective positions of the parties do not have a bearing on the status of the law under attack.

33.2 Where the validity of a law is attacked and there are two interpretations – one which would make the law valid and the other render it void – the former must be preferred and the validity of the law upheld.

33.3 Constitutional rights and freedoms should be given a generous and not legalistic interpretation with the aim of fulfilling their purpose and securing for the individual their full benefit. What this calls for is an interpretative approach that is broadly purposive or teleological, involving the recognition and application of constitutional values and not to search to find the literal meaning.

33.4 A limitation of a right or freedom passes constitutional muster only if it is necessary in a practical sense and is reasonable and justified in a democratic society in the following sense:

(a) the tests of necessity and reasonableness are met if the purpose of the limitation is sufficiently substantial and important as to warrant the limitation;

(b) reasonableness is context specific i.e. the particular circumstances relating to the limitation play a critical role in determining the reasonableness of the limitation;

(c) the test of justifiability of the limitation is passed if there is a proportionality between the means chosen and the goal/end to be achieved.

33.5 Where a justification analysis rests on factual or policy considerations, the party seeking to justify the impugned law or conduct must put before the court material regarding such consideration. If such party fails to produce any material/evidence and there are objective factors pointing in the opposite direction, it will have failed to show that the limitation is necessary in a practical sense, reasonable and justified in a democratic society.

33.6 The Constitution does not prohibit outright measures which confer advantage on some groups of persons over others. In the language of section 18(4) (e), the test is whether the

nature of the restriction, disability or privilege, advantage and special circumstances pertaining to the preferred group of persons is reasonably justifiable in a democratic society.

33.7 In determining whether a law fails to provide equality before the law and equal protection of the law, a distinction must be drawn between a classification which is rationally necessary to regulate community affairs (which is often unobjectionable and unavoidable) on the one hand, and that which has no rational connection with the purpose and is unfair on the other hand.see: **Attorney-General And Another v. Swissbourgh Diamond Mines (Pty) Ltd And Others(No.2)** LAC (1995-99) 214 @ 228D and 229 G-J; **Sekoati And Others v. President Of The Court-Martial And Others** LAC (1995-99) 812 from 820F-821H; **Attorney-General v. 'Mopa** LAC (2000-2004) 427 paras [33]-[34]; **Lesotho National General Insurance Co. Ltd v. Nkuebe** LAC (2000-2004) 877 paras [17]-[18]; **Tšepe v. Independent Electoral Commission And Others** LAC (2005-2006) 169 para [14]; **Road Transport Board And Others v. Northern Venture Association** LAC (2005-2006) 64 para [14]; **Masupha v. Senior Resident**

Magistrate for the Subordinate Court of Berea and Others [2014] LSCA (17 April, 2014); **Teddy Bear Clinic For Abused Children v. Minister of Justice & Constitutional Development and Another(Justice Alliance of South Africa and Others as amici curiae)** 2013 (12) BCLR 1429 (CC) para [84]; **D.S. Nakara & Others v. Union of India** [1983] (2) S.C.R. 165 from 175F-180C

Section 6(2) versus section 17

[34] Like salary, pension constitutes the property of a retired employee: see **Ramoholi v. Principal Secretary for the Ministry of Education And Another** 1991-1996 (2) LLR 916 (HC) at 923. The right to pension vests on retirement and becomes constitutionally protectable from the date of retirement. This means that the Crown does not only have a statutory duty to pay, but it is also constitutionally barred from arbitrarily interfering with a pensioner's enjoyment and use of pension. Thus, any retrospective legal measure inconsistent with the duty to pay or to enjoy pension would be violative of the rights of the pensioner. In **Salabuddin Mohamed Yunus v. State of Andra Pradesh** [1985]1 S.C.R 930, the Supreme Court of India grappled with a retrospective amendment of pension rules whose effect was to revise the amount of pension annuity

downwards. The Court struck down the amendment. The reason for doing so is stated at pages 938D-939A as follows:

> "Pension being thus a fundamental right, it could only be taken away or curtailed in the manner provided in the Constitution. So far as Article 31(1) [our section 17] is concerned, it may be said that the Appellant was deprived of his property by authority of law but this could not be said to have been done for a public purpose nor was any compensation given to the Appellant for deprivation of his property… The fundamental right to receive pension according to the rules in force on the date of his retirement accrued to the Appellant when he retired from service. By making a retrospective amendment to the said Rule 299(1) (b) more than fifteen years after that right had accrued to him,what was done was to take away the Appellant's right to receive pension according to the rules in force at the date of his retirement or in any event to curtail and abridge that right. To that extent, the said amendment was void."

[**35**] *In casu*, the parties are on common ground that the principal Act's purpose is to create a pension fund for Members of Parliament as stated in the preamble of that Act. During their parliamentary service, members are locked into the Fund as they are not allowed to terminate their membership. The purpose for this is to make them to make contributions, as Government does, to the Fund.

[**36**] Membership and pension are lost in the eventualities stipulated under sections 32, 34, 37 and 38 which, respectively, are resignation from office, death in service, permanent disability and termination of service prior to eligibility period for any other reason other than death or dismissal. Termination of membership under these sections goes with benefits stipulated thereunder. What,in my judgment,is important is that

none of those benefits includes entitlement to a pension. Entitlement to a pension as a benefit is provided for under section 31 and is only for members whose period of service qualifies them for pension as stipulated under section 7 as follows:

> *"**Eligibility for pension***
>
> *7. A member –*
> *(a) …….*
>
> *(b) who is employed on non-permanent terms is only eligible to a pension under this Act upon completion of 2 consecutive terms whose aggregate is not less than 5 years;*
>
> *(c) ……"*

[**37**] From the aforegoing, it is clear that while the intention of Parliament is to provide a social security scheme for parliamentarians, the rough and tumble of politics is such that not all members are likely to complete the required prescribed minimum period of service. In the event that a member is unable to serve the prescribed period, he/she will still get other benefits.

[**38**] The amendment to section 31(1) of the principal Act by section 7 of the **Amendment Act, 2014** reads thus:

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

There is no amendment to section 31(2) which provides for payment of "the balance of 75% in the form of an annuity". Thus, the definition of "annuity" in the principal Act still "means a contract or policy issued by the government's pension pool designed to provide payments to the holder at specified intervals after retirement." In my judgment, the amendment of section 31(1) is not a material one in the sense that it has only deleted the words "by the Fund credit". This has also not brought a material textual change to "pension pool" as defined by the principal Act.

[**39**] I, therefore, reject the applicants' contention that the amendment constitutes an interference with the enjoyment of their vested rights to property under section 17 of the Constitution. Accepting this contention would be to re-configure the concept of pension and its purpose to be a lump-sum cash payment on retirement and, thereby, defeat the stated purpose of the Act under section 4(1). Courts have to give an interpretation to the provisions and not to drive a coach and four through an Act of Parliament. It has to be remembered that the families of the applicants stand to benefit from that 75% upon their deaths.

Does the amendment to section 6(2) have the effect of discriminating against applicants contrary to section 18(3)?

[**40**] The complaint of the applicants is that bybeing disallowed from terminating their membership in the Fund and accessing 75% of their pension credit in cash, they are subjected to a disability which parliamentarians who have resigned do not have. They also say they are denied the advantage of cash payment which resigners have under section 32. This, they contend, constitutes discrimination which is prohibited under section 18(3) of the Constitution.

[**41**] Section 18 guarantees freedom from discrimination by providing as follows in parts relevant to this case:

> *"(1) Subject to provision of subsections (4) and (5) no law shall make any provision that is discriminatory either of itself or in its effect.*
>
> *(2) …….*
>
> *(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.*
>
> (4) Subsection (1) shall not apply to any law to the extent that that law makes provision –
>
> (a) ……
>
> (b) ……
>
> (c) …….
>
> (d) …….

(e) whereby persons of any such description as is mentioned in subsection (3) may be made subject to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society."

[**42**] Grounds for prohibited differentiation listed under section 18(3) are the same with those under Article 14 of the **European Convention on Human Rights** which provides that:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

[**43**] The jurisprudence of the European Court of Human Rights on the compatibility of welfare schemes with Article 14, which I consider relevant and persuasive, is articulated in **Carson and others v. United Kingdom** (2010) 29 BHRC 22 as follows:

> "61. The court has established in its case law that only differences in treatment based on an identifiable characteristic, or 'status', are capable of amounting to discrimination within the meaning of art 14 (**Kjeldsen v Denmark** [1976] ECHR 5095/71 at para 56). Moreover, in order for an issue to arise under art 14 there must a difference in the treatment of persons in analogous, or relevantly similar situations (**DH v Czech Republic** (2007) 23 BHRC 526 at para 175; **Burden v UK** (2008) 24 BHRC 709 at para 60). Such a difference of treatment is discriminatory if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized.
>
> 62. The court observes at the outset that, as with all complaints of alleged discrimination in welfare of pension system, it is concerned with the compatibility with art 14 of the system, not

> with the individual facts or circumstances of the particular applicants or of others who are or might be affected by the legislation (see, for example, **Stec v UK** (2006) 20 BHRC 348 at paras 50-67; **Burden v UK** (2008) 24 BHRC 709 at paras 58-66; **Andrejeva v Latvia** [2009] ECHR 55707/100 at paras 74-92)…."

[**44**] What section 18 prohibits is subjecting persons who are similarly circumstanced to different disabilities and restrictions or according them different privileges or advantages. The base-line is that the persons should be similarly circumstanced or be part of a group whose characteristics are as described or mentioned in section 18(3). In short, the constitutional command is that the like should be treated alike. The converse command should then be that unlike should not be treated alike. As put by **Moiloa J** during oral argument apples should be compared with apples and peaches with peaches and not mixed on the basis that they are afterallfruits.

[**45**] The challenge facing the applicants is to find comparators. They contend that those comparators are their esterwhile colleagues who resigned from Parliament and got their section 32 benefits in cash. Have they found comparators? I think not, if regard is had to the scheme of the principal Act before us. The scheme of the Act is to differentiate between those members who have reached the prescribed eligibility period for pension and those who fail to do so. Pension benefit is the first prize of those who

succeed and refund of pension contributions is the second prize for those who fail.

[**46**] The test of whether the subjection of such persons to any disability or restriction or affording them privilege or advantage constitutes discrimination is whether such subjection or affording of privilege is based on objective and reasonable grounds. As put by the UN Human Rights Committee in **Wackenheim v. France** Communication No.854/1999 (19 July 2002) at para 7.3:

> "The Committee recalls its jurisprudence whereby not every differentiation of treatment of persons will necessarily constitute discrimination, which is prohibited under Article 26 of the Covenant. Differentiation constitutes discrimination when it is not based on objective and reasonable grounds."

[**47**] All Members of Parliament are given the same opportunity or accorded same advantage of being a member of the Fund in which Government supplements their contributions, provided they remain in service. The ultimate goal is that all of them will get pension benefits upon qualifying for it on the basis of the eligibility period under section 7(b). In the event that any fails to satisfy the qualification criteria, he/she does not go home empty-handed. The disadvantage for those who do not qualify is loss of a life-time benefit of annuity paid at specified intervals and family pension for his/her spouse or dependents after death. Viewed from the vantage-point of the cushion of social security, the disadvantaged should rather be

the resigners under section 32 and not the retirees under section 31. This is a disadvantage which arises on the failure to serve for the eligibility period of pension prescribed under section 7(b). There is nothing arbitrary or unreasonable in the prescribed eligibility period.

[**48**] In my opinion, the differentiation between the applicants and their counter-parts 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. I accept the 1st respondent's contention that 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. I hold that section 6(2) does not have the effect contended for by the applicants and is, therefore, not hit by the provisions of section 18(1).

Does section 6(2) deny applicants equality before the law and equal protection of the law contrary to section 19?

[**49**] Section 18(8) provides that:

> *"The provisions of this section shall not be without prejudice to the generality of section 19 of the Constitution."*

Section 19 reads thus:

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

[**50**] In **Masupha** case (cited at para [34]), the full bench of the Court of Appeal judged that if a challenge flounders on section 18, it can be pursued under section 19. This is because section 18(8) says it not without prejudice to the generality of section 19. This view is shared by Palmer and Poulter in their works **The Legal System of Lesotho** (Virginia) at pages 415-418 where they expound on the comparison between sections 18 and 19 as follows:

> "That the law must not discriminate nor deny the equal protection of the laws are companion precepts. Each is concerned to ensure that persons indistinguishably situated do not receive distinguishable treatment under the law. The constitutional command that the law cannot disable some and privilege others sheerly on the basis of 'description' merely illustrates the wider principle that equal protection of the laws requires the same treatment for everyone unless there is some good reason to the contrary….
>
> The concept of equal protection of the law has not the same meaning as the concept of equality before the law. The latter derives from the English doctrine of the rule of law that Dicey said meant that…. every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.
>
> This means that there is fair and equal administration and universal subjection to law from king down to peasant. It does not guarantee 'the equal protection of equal laws', for as Lord Wright has said, 'All are equally subject to the law, though the law as to which some are subject may be different from the law to which others are subject.'
>
> Because the concept of equal protection of laws is a broader formulation of the principle that underlies the Freedom from Discrimination, it would seem to follow that every contravention of section 17 [18 now] will be a violation of section 18 [19 now], though every violation of section [19] need not necessarily violate section [18].
>
> This essential difference lies in the phraseology and formulation. The negative command to Parliament and the Executive, that

> discrimination cannot be instituted, complements and also contrasts with the positive right of every person that the laws shall be equal. Furthermore apart from its negative formulation, section [18] restrictively defines discrimination in relation to a set number of categories, to wit: race, tribe, place of origin or residence, sex, political opinions, colour, or creed. Thus if an applicant to the High Court alleges that a certain statute imposes a capricious classification, discriminatory to him on the basis of his *vocation* in life or his ownership of immovable property or his amount of yearly income, the attack cannot proceed under section [18] but must be brought as a question of the equal protection of the laws because such 'descriptions' are not strictly to be found in section [18]. On the other hand section [18], while it places a broad ban on discrimination, also preserves a certain amount of it through its saving clauses. No such saving clause attaches to section [19], however, and if, as section [18(8)] declares, the generality of section [19] is not prejudiced by the specificity of section [18], it would follow that an unsuccessful application under section [18] against a law expressly saved or judicially approved as 'reasonably justifiable' could succeed under section [19. Section [18(8)], were it to have intended any other result, would have decreed that the generality of section [19] **was limited** by the provisions of section [18]. Phrased in a different fashion, it could have declared that a law that is non-discriminatory could, despite this fact, be a denial of the equal protection of the laws… In sum, the scope of section [18] should be **subtracted** from that of section [19]. Thus to the extent that 'saved' discrimination would ordinarily be an unjustifiable encroachment upon the principle of equal protection, that discrimination is in effect saved under section [19] as well."

[51] Professor Geoffrey de Q. Walker in his works **The Rule of Law: Foundation of Constitutional Democracy (Melbourne)**illuminates further on the dynamics of the functional relationship between the principles of equality and equal protection of the law at pages 25-26 as follows:

> "The equality principle is the main basis for protecting the general interest against inroads by pressure groups and other special interests. It restrains, or should restrain, a legislature from enacting bills of attainder or other laws which unilaterally benefit or injure particular individuals or groups. This is particularly important in view of the current role of government as a dispenser of favours and redistributed wealth. The normativism principles is also an important condition that must be satisfied if the public are to respect the laws of the land.

> People are much more likely to comply with a legal precept if they know it is the same for everybody.
>
> But while the principles of equality, generality and certainty are the opposite of arbitrariness, they are nevertheless relative concepts in the legal context. Certainty must be weighed against the need for flexibility, otherwise there will be a danger that the law will move too far out of line with public opinion and that it will become a barrier to progress. Rules have their limits; complete predictability equals stagnation. Equality before the law cannot be a purely formal principle of treating as equal those whom the law regards as equal, but should mean that the law treats people as equal in respect to the qualities in relation to which it is appropriate so to regard them. To treat people in relatively different positions equally is as arbitrary as treating equally placed people differently. What is 'appropriate', and what situations are 'different' for these purposes are question to be answered by values that lie outside the realm of law. The usefulness of the equality principle is as a means of identifying and extirpating areas of unequal treatment that might generate resentments that undermine public acceptance of the law. As the International Commission of Jurists concludes, 'The essential value, however, of insisting on equality before the law lies in the necessity that it places on the legislature to justify its discriminatory measures by reference to a general scale of moral values. Equality before the law is thus opposite to arbitrariness, and in spite of the difficulty of its interpretation, lies at the root of the Rule of Law".

[**52**] *In casu*, we are concerned with unequal treatment. It is settled law that equal treatment does not entail prohibition of legislative classification and differentiation as long as classifications or differentiation is rationally connected to a legitimate governmental purpose. That is the principle propounded in the jurisprudence of the Court of Appeal in cases of **Nkuebe**, and **Road Transport Board** referred to in para [31] as well as the jurisprudence of the UN Human Rights Committee on Article 26 of the 1966 **International Covenant On Civil And Political Rights** as show in **Wackenheim**referred to in para [44].

[**53**] *Mr. Letsika* submitted that the option to resign was available to a public-office bearer to exercise up to the last day of the life of Parliament. This, he contended, exposes a fault-line in the viability of the social security measure. That may be so. But, I am of the view that such occurrences will be few and far between. It would not make political sense for a Member of Parliament to resign on the eve of the end of life of Parliament merely to take advantage of cash payment of what would otherwise benefit him for life and his family after death. Such conduct would purely be driven by mercenary motives unbecoming of public representatives. It is inconceivable that one would put his/her political career on the line by dabbling in such behavior.

[**54**] The legitimate governmental purpose of the principal Act is to provide for pension as social security measure for holders of public office. This is done through contributions by the Government and these holders of public-office bearers. Office-bearers who complete the stipulated period of service receive pension. Those who do not complete the period receive all the contributions plus net investments. There is plainly a rational connection between that governmental purpose and the differentiation in benefits for public-office bearers with differing periods of service. After all, any public-office bearer who is not interested in receiving pension is free to resign before completion of the eligibility

period if he/she wants to receive benefits accorded under section 32. It is a matter of choice and not compulsion.

[**55**] I, therefore, do not accept the applicants' contention that section 6(2) denies them equality under the law or that the law does not protect them equally with their colleagues who made the choice to resign from Parliament.

IV. CONCLUSION

[**56**] In summation, I find that the **Amendment Act of 2014** does not, either of itself or in its effect, contravene the applicants' freedoms from arbitrary seizure of property and discrimination under sections 17 and 18 of the Constitution. Neither does the **Amendment Act** violate their right to equality before the law and equal protection of the law under section 19. This being a matter in which large issues of constitutional importance are at stake, a costs order against the applicants would not be appropriate.

The Order

[**57**] In the result, the following order is made:

1. The application is dismissed.
2. There shall be no order as to costs.

_____

S.P. SAKOANE
JUDGE

I agree: _____
J.T.M. MOILOA
JUDGE

I agree: _____
E.M. MAKARA
JUDGE

For the applicants: Q. Letsika of Mei & Mei Attorneys Inc., Maseru

For the 1st respondent: P.B.J. Farlam SC (with P.J. Loubser) instructed by Webber Newdigate, Maseru