IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/163/2021

In the matter between

PUBLIC OFFICERS DEFINED CONTRIBUTION PENSION ASSOCIATION	**1ST APPLICANT**
AGGRIEVED PENSIONERS LISTED IN ANNEXURE "A"	**2ND APPLICANT**
AND	
PUBLIC OFFICERS DEFINED CONTRIBUTION PENSION FUND	**1ST RESPONDENT**
BOARD OF TRUSTEES OF PUBLIC OFFICERS'S DEFINED CONTRIBUTION PENSION FUND	**2ND RESPONDENT**
THE GOVERNMENT OF THE KINGDOM OF LESOTHO	**3RD RESPONDENT**

THE ATTORNEY GENERAL **4TH RESPONDENT**

Neutral citation: Public Officers Defined Contribution Pension Association and another v Public Officers Defined Contribution Pension Fund and 3 Others [2024] LSHC Civ 181 (22 March 2024)

CORAM : BANYANE J

HEARD : 22 AUGUST 2023

DELIVERED : 22 MARCH 2024

Summary

Interpretation of statutes-effect of a qualifying proviso-whether the proviso in section 27 of the PODCPF Act, 2008, introduced by the Court of Appeal in **Bulane Sechele v Pension Fund** permits the Fund to compare benefits a member would get under the member's previous pension scheme with benefits payable under PODCP Fund and pay the greater of the two amounts - held that it does-application dismissed.

ANNOTATIONS

Legislation

1. Public officers Defined contribution Pension Fund Act, 2008
2. The Pension Proclamation of 1964

3. The Pensions (Amendment) Regulations 141 of 2011
4. The Defence Force Act 1996
5. The Defence Force Regulations 1998

Cited Cases

Lesotho:

1. Bataung Chabeli Construction (PTY) Ltd v Road Fund and others C of A (Civ) 34 (2020)
2. Sechele v Public Officers Defined Contribution Pension Fund C of A (CIV) No 43B/2010

South Africa:

3. Mphosi v Central Board for Co-operative Insurance 1974(4) SA 633

JUDGMENT

BANYANE J

Introduction

[1] The applicants are retired employees of the Government of Lesotho. They were employed on permanent and pensionable terms and served in various Government Departments including the Lesotho Defence Force (LDF). Before the year 2008, their retirement benefits were pre-determined by either the Pensions Proclamation, 1964 and Regulations made thereunder or the Lesotho Defence Force Regulations 1998 in case of officers serving in the military. In 2008, the Government of Lesotho introduced a new pension system for public officers through the Public Officers Defined Contribution Pension Fund Act 2008 (hereinafter PODCPF Act). On the establishment of this Fund, all applicants compulsorily became its members.

[2] On retirement, the applicants received payments of their pension benefits. They are, however, disgruntled with the method by which their benefits were assessed and computed. The nub of their case is that the computation of their pension benefits is unlawful for inconsistency with the PODCPF Act. According to them, the computation is based on an erroneous

interpretation of the Court of Appeal decision in **Sechele v Public Officers Defined Contribution Pension Fund** C of A (CIV) No 43B/2010[1].

[3] In the alternative they assert that the incorrect fraction of 1/600 was used to calculate their benefits under the Pensions Proclamation 1964 and Regulations made thereunder whereas the correct formula is 1/540 introduced in 2011 by Pensions (Amendment)Regulations 2011.

Relief sought

[4] Based on the above complaints, they seek the correct re-computation of their benefits. The reliefs sought are couched as follows:

"1. Reviewing correcting and setting aside the decision of the 1st Respondent to assess and compute the retiring members (now pensioners) of the Fund's pension benefits (lump sum cash benefits and annuity) contrary to the provisions provided by the Public Officer's Defined Contribution Pension Fund Act 2008 and the Public Officers' Defined Contribution Pension Fund Rules 2010 as illegal and therefore unlawful, null and void.

[1] Sechele v Public Officers Defined Contribution Pension Fund C of A (CIV) No 43B/2010

2. Declaring that the assessment and computation of the retiring members (now pensioners) of the fund's lump sum cash benefit and monthly pension (annuity) is inconsistent with the Public Officers' Defined Contribution Pension Fund Act and the Public Officers' Defined Contribution Pension Fund Rules and therefore is unlawful.

3. Directing the 1st and /or 2nd Respondent to correctly re-assess and re-compute the 2nd Applicants' lump sum cash benefit and annuity on the correct position of the law as prescribed in Public Officers' Defined Contribution Pension Fund Act and the Public Officers' Defined Contribution Pension Fund Rules.

4. Directing the 1st and /or 2nd Respondent to pay the 2nd Applicants the deficit and discrepancy between the lump sum cash benefit as actually assessed and computed and paid by the 1st Respondent, on the one side, and as it ought to be assessed and computed under the law, with **8.9%** per annum current prime lending rate of the Central Bank of Lesotho from the Applicants' respective retirement dates to the date of final payment thereof.

5. Directing the 1st and/or 2nd Respondent to facilitate the payment to the 2nd Applicants the deficit and discrepancy between their respective monthly annuity as actually assessed, computed and paid to 2nd Applicants, on the one side, and as it ought to be assessed, computed and paid under the law, with **8.9%** current prime lending rate of the Central Bank of Lesotho, from the 2nd Applicants' respective retirement dates to the date of final payment thereof.

6. Directing the 1st and/or 2nd Respondent to facilitate the payment to the 2nd Applicants of their monthly annuity, respectively, based on the correct and lawful assessment and computation as envisaged in prayer 5 above.

7. **ALTERNATIVELY,** to 1 - 6 above (inclusive), reviewing, correcting and setting aside the decision of the 1st Respondent to assess and compute the retiring members (now pensioners) of the Fund's pension benefits (lump sum cash benefit and annuity) under the **Pension Proclamation** 1964 scheme contrary to the operative statutory formula of 1/540, as illegal and therefore unlawful and null and void.

8. As a further alternative, declaring that the failure by 1st Respondent to assess and compute the retiring members (now pensioners) of the Fund's monthly annuity on the basis of the formula prescribed under **Pensions (Amendment) Regulations** 2011 was illegal, unlawful and null and void.

9. As a consequence of Orders granted under prayers 7 and 8 above:

9. 1 Directing the 1st and/or 2nd Respondent to correctly re-assess and re-compute the 2nd Applicants' lump sum cash benefit and annuity on the Correct position of the law as prescribed in **Pensions (Amendment**) **Regulations** 2011.

9.2 Directing the 1st and/or 2nd Respondent to pay the 2nd Applicants the deficit and discrepancy between the lump sum cash benefit as actually assessed and computed and paid to 2nd Applicants, on the one side, and as it ought to be assessed and computed under the **Pensions (Amendment) Regulations** 2011, with 8.9% current prime lending rate of the Central Bank of Lesotho from the 2nd Applicants' respective retirement dates to the date of final payment thereof.

9.3 Directing the 1st and/or 2nd Respondent to facilitate the payment to the 2nd Applicants the deficit and discrepancy between their respective monthly annuity as actually assessed, computed and paid to 2nd Applicants, on the one side, and as it ought to be assessed, computed and paid under the **Pensions (Amendment) Regulations** 2011, with **8.9%** current prime lending rate of the Central Bank of Lesotho from the 2nd Applicants' respective retirement dates to the date of final payment thereof.

9.4 Directing the 1st and/or 2nd Respondent to facilitate the payment to the 2nd Applicants of their monthly annuity, respectively, based on the correct and lawful assessment and computation as envisaged in prayer 9.3 above.

10. Further and/or alternative relief this Honourable Court deems fit.

11. Costs of this application against the Respondents.

The respondents' case

[5] The 1st and 2nd respondents strenuously oppose the application. They defend the method employed to calculate the benefits due to individual applicants. According to the respondents, the impugned method is correct and lawful because it is harmonious with the wording of section 27 of the PODCPF Act following Sechele Judgment. They further assert that the calculations were made within the parameters of the Act and its Rules, the Provisions of the 1964 Pension Proclamation and Regulations made thereunder as well as the Defence Force Regulations, 1998.

[6] Regarding the fraction used in the computation, the Fund asserts that the 1/600th formula is correctly applied to the applicants because the 1/540th is inapplicable to the members of the Fund.

[7] On 22 March 2024, I issued an order dismissing the application with no order as to costs. Reasons for this order are as follows.

Lack of jurisdiction

[8] It is appropriate to first deal with the preliminary issue raised by the Fund in its opposing affidavit. The Fund contends that the applicants cannot approach the Court for the relief claimed until they have exhausted the available remedies set out in Rule 32 of the Fund Rules.

[9] Rule 32 provides that:

> "32.1 any question which may arise with regard to a claim by any person under these Rules shall be decided by the Board.
>
> 32.2 if any person affected by a decision of the Board in terms of Rule 32.1 is dissatisfied with the decision, he or she shall have the right to refer the matter to mediation, conciliation, or arbitration."

[10] The Fund contends that the availability of the internal remedy is a bar that prevents the High Court from exercising jurisdiction over the matter. According to the Fund, the procedures set out in the rule must be followed first, so the applicants are not entitled to bypass or ignore those procedures by coming to Court straightaway. It relied on **Bataung Chabeli Construction (PTY) Ltd v Road Fund and others** [2] to submit that the Court must refuse to entertain this application and direct the applicants to seek remedies prescribed in rule 32.

[11] The applicants conversely advanced a two-legged argument. The first is that exhaustion of the Rule 32 procedure is wasteful and undesirable because the Board has already pronounced itself in a substantially similar matter.

[12] The Second leg of their argument is that the dispute before the court pertains to the legality of the assessment method adopted by the Fund in effecting the applicants' payments and thus falls outside the scope of Rule 32. Based on this understanding, the **Chabeli** decision does not, in their view, advance the respondents' argument because the applicants' grievances cannot be resolved through arbitration. Moreover, the availability of arbitration procedure is not a bar in matters such as this, where the applicants have approached the court to challenge the legality of the computation.

[2] C of A(CIV) 34/2020

[13] Indeed Rule 32 of the Fund Rules endows the Board of Trustees with powers to enquire into, examine, and decide any question which may arise concerning a claim by any person under these Rules. To my mind, the object of the rule was to give aggrieved members the benefit of having their claims fully investigated inexpensively, by the Board. In case of dissatisfaction arising from the Board's decision, mediation and arbitration be resorted to.

[14] The question to be decided is whether the applicants' claim is ripe for the court's intervention before the exhaustion of the Rule 32 remedies. To answer this, the applicants' case must be properly understood.

The summary of the applicants' case

[15] The nub of the applicants' case is that the Fund must calculate their pension benefits in terms of the PODCPF Act and rules made thereunder. It is captured under paragraph 4.4 and paragraph 5 of the founding affidavit as follows:

> a) The Fund is not empowered to use or apply the Pension Proclamation 1964 and its scheme or methodology of assessment and computation of pension entitlements or benefits, but the Fund is bound to act and enforce the framework established under the Fund Act 2008 and Fund Rules.

b) **Sechele** judgment was not a judicial imprimatur for the Fund to employ or apply the Pensions Proclamation 1964 and its scheme of calculation and computation of pension entitlements.

c) **Sechele** judgment merely ensures that the members of the Fund are guaranteed that they would not be worse off in terms of retirement benefits by joining the Fund than they would have been had they not joined.

d) The Fund is enjoined by section 27 of the Act and Rules made thereunder to pay a member on retirement, up to 25% of the member's fund credit as cash benefit (being cash lump sum benefit or take home) whilst the remaining percentage of the Fund Credit should be used to purchase annuity for the member.

e) The Fund erroneously employed and applied the methodology, assessment and computation of the gratuity and monthly annuity based on Pensions Proclamation 1964 scheme contrary to the prescripts of section 27 of the PODCPF Act, 2008.

f) As a consequence of the illegal and unlawful application of the Pensions Proclamation 1964 scheme, the Fund applied the 1/600 assessment criteria prescribed by the Proclamation and Pensions Regulations to determine gratuity and

annuity payable thereunder, compared same with their entitlement under the PODCPF Act 2008, and paid the gratuity and Annuity under the Proclamation 1964.

15. 1 In paragraph 5, they assert that the Fund, being a creature of statute has only the power to employ the methodology prescribed in the PODCPF Act 2008. By applying the methodology under the Pensions Proclamation, the Fund exceeded the bounds of its authority under the Act.

15.2 They further assert under paragraph 5.2 that even assuming that the Fund was correct by comparing the benefits and paying in terms of the Pensions Regulations 1964, the correct fraction of computation for those officers who retired after 2011, should not have been 1/600 as stipulated in the Pensions Regulations 1964 but 1/540, a fraction introduced by the Pensions (Amendment)Regulations 2011.

[16] From this summary, it seems that the determination of the applicants' case depends, predominantly, upon the proper interpretation of section 27 of the PODCPF Act. The crisp question that needs to be answered is whether the provision permits the Fund to compare benefits under the old pension scheme and the PODCPF before effecting payment. Depending on the proper interpretation of section 27, the next question is whether the fraction of 1/540 set out in the Pensions (Amendment)

Regulations of 2011 should apply to the applicants. These questions are ones of interpretation and must be determined by the Court. In the circumstances, the rule 32 procedure cannot by itself be held to imply that the Board can decide matters that must be properly decided by the Court.

Merits of the matter

[17] Based on the decision above, I now turn to consider the merits and shall commence by summarising the impugned method of computation. The method, as described by the Fund in its opposing affidavit may be summarised as follows. The calculations of the individual benefits were determined by taking into account the contribution made by the member and the employer, the opening Transfer Credit- being the amount due as at the date of transfer, as well as interest.

[18] Based on the proviso inserted in section 27 by the Court of Appeal in **Sechele**, the computations factored the Benefits payable under the previous pension schemes, namely, the 1964 Pension Proclamation and Defence Force Regulations, 1998 respectively. The Fund engaged independent actuaries to not only calculate the benefits of individual applicants under the

PODCP Fund, but also to determine whether each applicant was entitled to more under the previous scheme to which he/she belonged in which case, the applicant was awarded a greater benefit.

[19] The Fund asserts that in the case of some of the applicants, the actuaries determined that their entitlement under the Pension Proclamation 1964 or the Lesotho Defence Force Regulations of 1998 was greater than the amount due in terms of the PODCPF Act. For some applicants, the benefit under the Act was greater so they were paid the greater amount.

19.1 Citing Nkoebe as an illustration, the Fund shows that he was a member of LDF. The Defence Force Regulations 1998 provides that the benefit is to be calculated at the rate of 1/600th of the pensionable enrolments in respect of each completed year of service. So, the entitlement of any applicant whose previous scheme is the Defence Force Regulations 1998, is a pension amounting to 1/600th of his retiring pensionable emoluments for each completed year of service. If cash gratuity is chosen, as was the case of all the applicants, he is entitled to completed years of service multiplied by annual salary then multiplied by 25% and then by 1/12 – the factor. The calculation is then as follows:

a) 233 months served × 55 584 annual Salary × 1× 600th = 20 658.72 pension per year or M1722.00 per month.

b) 18 years' service × 55 584 annual salary × 1/12 being the factor which equals M83 376 00 gratuity.

19.2 Under the PODCPF Act, his pension per month would be 2 012.00 and the cash benefit is M100,200.00. Because this is far more than the previous Fund benefit, he was paid a greater benefit.

[20] The real issue between the parties is whether the section 27 proviso inserted by the Court of Appeal in Sechele permitted the comparison of benefits under the old pension schemes and the PODCPF Act.

Brief facts in Sechele

[21] This judgment doesn't need to embark on a detailed analysis of the judgment. The following summary suffices for the purposes of the ensuing discussion.

[22] The applicant in the matter Bulane Sechele, then a member of the Lesotho Defence Force, approached the High Court challenging the constitutional validity of sections 3, 4, and 27 of the PODCPF Act, 2008. Sechele's complaint was three-legged. The first leg was that the establishment of the Fund was unconstitutional. The second was that the mandatory membership and compulsory contribution authorized by sections 4 and 5 of the Act, amount to compulsory acquisition of his property, and thus violative of section 17 of the constitution. The third leg was that section 27 is violative of sections 150

(1), (2), and (3) of the Constitution because it provides him with far less favourable pension benefits compared to the amount of his retirement benefits under the Defence Force Regulations, 1998. Under the latter, he would "go home with 75% cash benefit."

[23] The High Court dismissed the claim. On Appeal, the Court of Appeal framed the main issues as follows.

a) Whether compulsory contribution for purposes of pension benefits under Section 3 (1) of the Act violates Section 100 (4) of the constitution.

b) Whether such compulsory contribution and mandatory membership under sections 4 and 5 of the Act respectively violates Section 17 (1) of the constitution.

c) Whether section 27 of the Act violates section 150 (1) and (2) of the Constitution.

[24] The Court decided the first two questions in favour of the respondents by holding that the establishment of the PODCP Fund is not inconsistent with section 150 (4) of the Constitution because the provision does not prohibit the establishment of

an alternative pension Fund. The Court further held that the impugned Act was enacted as a form of social security in favour of and for the benefit of public officers, hence the impugned provisions do not violate section 17 of the Constitution.

[25] Concerning the third issue of whether section 27 is violative of section 150 (1)(2) and (3) of the Constitution, the Court held that before the exit of Sechele from the service, it was premature and impossible to determine with certainty whether the pension benefits he would receive under the Defence Regulations would be more favourable than those receivable under the impugned Act. The Court said:

> "..This is so because the Act provides for the investment of monies of the Contribution Pension Fund. It stands to reason, therefore, that the Contribution Pension Fund has the potential for growth".[3]

25.1 The Court concluded that:

> "Notwithstanding the foregoing considerations I have come to the conclusion that it is not possible to say with certainty that when the appellant retires the pension benefits, what he will receive will definitely be more favourable than they would have been if the Act had not been passed. This is because it is possible that the Contributory Pension Fund may not do as well as is hoped. If that happens and the appellant receives less than he would have

[3] Para 26 of the judgment

received under the Defence Regulations, it will mean that the Act will prove to have violated section 150 (1) and (2) of the constitution. The only way to remove that risk is to read into section 27 of the Act the words which appear in the order proposed below…"[4]

25.2 The Court ordered thus:

(2) The following words shall be read in at the end of section 27 of Act No. 8 of 2008: -

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

Discussion

[4] Para of the Judgment

[26] Sechele approached the Court challenging the constitutional validity of the highlighted provisions of the PODCPF Act, 2008. The provision relevant in the present matter is section 27.

[27] The way I see it, the Court of Appeal interpreted the relevant Constitutional provisions to determine their meaning and thereafter interpreted or examined the challenged provisions of the PODCPF (in particular section 27) to decide whether it can be interpreted to fit into the ambit of the Constitution. The Court held that to be compliant with the Constitution, any law or Act governing pension benefits must not be less favourable to the person concerned.

[28] Although the provision was not found to be constitutionally invalid, the Court concluded that if the provision is left unaltered, its application would be unconstitutional in instances where the Fund underperforms in its investments. To cushion against this undesired result, the Court therefore read in or introduced the proviso to give section 27, a meaning which places it within constitutional bounds. To put it another way, the Court adopted a construction that gives section 27 a constitutionally compliant or consistent interpretation.

The function and effect of a proviso

[29] Having concluded that the insertion of the proviso ensures that section 27 conforms with the constitution, the next question is whether the comparison method employed by the Fund is legally supportable. The answer lies in the proper interpretation of section 27 of the PODCPF Act after the insertion of the proviso.

[30] Following the decision in Sechele, section 27 of the Act now reads as follows:

> "27 On retirement, a member shall be entitled to a portion of his or her fund credit to the maximum of 25% as cash benefit. The remaining percentage shall be used to purchase annuity for him or her.
>
> Provided that the retirement benefit payable to a member shall not be less than the benefit such member would have received under the law with respect to pension benefits which would have applied if this Act had not been passed."

[31] In **Mphosi v Central Board for Co-operative Insurance**[5] Botha JA quoting from Craies, Statute Law, 7th ed. At p 218 dealing with the effect of a proviso, said-

> "The effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out of the preceding portion of the amendment, or to qualify something emanated therein, which but for the proviso cannot be construed as enlarging the scope of an enactment when it can be fairly and properly construed without attributing to it that effect."

[5] 1974(4) SA 633

In R v Dibdin, 1910 P 57, Lord Fletcher Moulton at p 125, in the Court of Appeal, said –

> "The fallacy of the proposed method of interpreting (i.e to treat a proviso as an independent enacting clause) is not far to seek. It sins against the fundamental rule of construction that a proviso must be considered in relation to the principal matter to which it stands as a proviso. It treats it as if it is mere an independent enacting clause instead of being dependent on the main enactment…."

[32] Applying these rules of construction to the matter before me, it is clear in my view that the effect of the proviso in section 27 is to qualify or limit the application of the first part of the provision, that is, payment of 25 percent of the fund credit. Section 27 as it now reads provides a condition before payment of these benefits. It seems to me that the proviso in section 27 is intended to give effect to the constitutional provisions and provide a safeguard protecting the rights of members to receive favourable pension benefits.

[33] Because the practical effect of the proviso is to give the members of the Fund a right to get greater benefits, the Fund must therefore have regard to benefits that a member would receive if the PODCP Fund had not been established. This means therefore that if a member's benefits would be greater under the old scheme but lesser under the PODCF Act, then he is entitled to the amount under the old scheme. It follows, in my opinion, that the amount of benefits would only be ascertained

by comparing the benefits they would get under the old scheme. In my judgment, the proviso includes, rather than precludes a comparison of benefits between the previous pension schemes and the PODCF Act.

The 1/540 formula

[34] Having decided that the proviso ensures that payment of benefits is carried out according to the provisions of the Constitution and thus permits comparison, I turn to address the applicants' alternative argument relating to the fraction for computation of benefits under the Proclamation. According to them the correct fraction that ought to have been applied in computing the benefits is 1/540 and not 1/600 because of the 2011 amendment.

[35] Concerning this amended formula of 1/540th, the Fund asserts that the formula is inapplicable to the applicants because; a) some of the applicants were members of the LDF and for this reason their benefits were not determinable under the Pension Proclamation and its Regulations. They are Kilane, Tleketle, Nkoebe, Linake, Ramape, Masita, Leuta, Thoola and Lesia. b) As for those members whose benefits were governed by the Pension Proclamation 1964, the amendment came into force after the applicants became members or joined the Fund in 2008. According to the Fund, its members are excluded from the application of the amendment.

[36] The starting point of this inquiry is Section 3 of Pensions Proclamation 1964. It reads as follows:

> '3(1) Pensions, gratuities and other allowances may be granted by the Resident Commissioner in accordance with the Regulations contained in the schedule to this proclamation in respect of officers who have been in the public Service under the government of Basutoland."

[37] Regulation 4 of the Pensions Regulations 1964 reads as follows:

> "4 Subject to the Provisions of the Proclamation and of these regulations, every public officer holding a pensionable office under the government of Basutoland who has been in the public service under the Government of Basutoland for ten years or more may be granted on his retirement a pension at the rate of one six-hundredth of his pensionable emoluments in respect of each month of pensionable service."

[38] Regulation 4 was amended by the Pension Regulations 2011 to delete the words 'one six-hundredth' and substituted with the words 'one-five hundred and fortieth'.

[39] The explanatory note in the amendment states that the reason for the amendment *is to increase the fraction used in calculating pension under the Pensions Proclamation 1964 in order to increase the pension benefits for those officers who do not qualify for pension benefits under the Public Officers defined Contribution Penson Fund Act 2008*.

[40] To consider the meaning of the phrase 'officers who do not qualify' for pension benefits under the PODCPA, the starting point of the inquiry should be the date of the amendment.

[41] The amendment is contained in legal notice No 141 2011. On the face of the Regulations, it is written '*supplement No. 1 to gazette No.66 of 30 September 2011'*. It was passed after Sechele Judgment was delivered in April 2011.

[42] Presumably, when the Regulations were amended, the legislature was aware of the insertion of the provision in section 27 of the PODPCF Act. The amended Regulation must therefore be read harmoniously with section 27(as amended).

[43] Based on this understanding, the next question to consider is whether the amended Regulations apply to the applicants before court. The Fund asserts that the amended Regulations do not apply to members of the Fund. In its answering affidavit, the Fund classifies applicants into two categories depending on the pension scheme to which they belonged prior to the PODCPF Act. Some applicants are retired members of the LDF, to which the Lesotho Defence Regulations of 1998 applied. The second is officers who belonged to the Pensions Proclamation, 1964 scheme. Regarding the second category of officers, they are further separated into two classes, namely, officers whose benefits are greater under the PODCPF Act and those

whose benefits were greater under the Pension Proclamation. To my mind, the category to which they belong should be used as a qualifying factor.

[44] It follows in my view that the new formulae is not applicable to former LDF officers because the Pension Regulations 1964 ceased to apply to them upon promulgation of Lesotho Defence Force Act 1996. [6] Concerning officers whose benefits were determinable under the 1964 Proclamation, I am of the view that officers whose benefits are greater under the PODCPF Act are excluded from the application of the Regulations because they fall under the category of officers officers who qualify to receive benefits under the Act. I therefore accept the Fund's argument that the fraction is inapplicable to the applicants who were LDF members whose benefits were governed by the relevant LDF Regulations. Similarly, for those members who received benefits under the Act, it does not apply.

[45] The only applicants who could arguably benefit under the amended fraction are members who received benefits under the Proclamation, because due to the proviso, they are disqualified from receiving benefits under the Act PODCPF. The fact

[6] section 192 empowers the Minister to make Regulations on numerous matters including the pay, allowances, pensions and gratuities of soldiers…. The 1998 Regulations were made in the exercise of powers conferred by section 192.

that they are members of the Fund cannot justifiably operate to their prejudice yet their benefits are received under the Proclamation.

[46] Based on this understanding, the question is whether prayer 6 should be granted. The applicants' averment are generalised and do not classify the applicants according to the scheme to which they belonged prior to the introduction of the PODCP Fund. It would be undesirable to issue an order in the circumstances. However, I must hasten to indicate that the correctness of the amounts received by officers in this category falls within the powers of the Board to decide. The refusal of this prayer does not therefore preclude them from pursuing the Rule 32 procedure.

Disposal

[47] For reasons given in this judgment, I conclude that the inserted words in section 27 PODCPF Act cater for comparison by the Fund to ascertain amounts receivable under the old scheme under which a member's benefits were governed before the introduction of the PODCPF Act. I am therefore persuaded that the proper interpretation of section 27 permits the Fund

to compare and satisfy itself that the claimant is to receive a greater of the two amounts of the schemes. It follows that the legality of the method employed by the Fund is unimpeachable.

[48] Moreover, the 1/540 is not applicable to all applicants as stated above.

Order

[49] In the result, the following order is made:

a) The application is dismissed

b) Each party to bear its costs.

P. BANYANE
JUDGE

For the applicant : Advocate Maqakachane

For 2nd respondent : Advocate Cronje