



IN THE HIGH COURT OF ESWATINI
JUDGMENT

Case No. 432/2017

In the matter between:

SWAZILAND GOVERNMENT

Applicant

And

LUCKY MHLANGA

1st Respondent

PUBLIC SERVICE PENSION FUND

2nd Respondent

**FINANCIAL SERVICES REGULATORY
AUTHORITY**

3rd Respondent

Neutral citation: *Swaziland Government v Lucky Mhlanga & 2 Others*
(432/2017) [2018] SZHC 176 (01 August 2018)

Coram: **MAMBA J, M. DLAMINI J & NKOSI J**

Heard: **01 November 2017**

Delivered: **01 August 2018**

[1] *Civil law – School teacher dismissed following administrative disciplinary action by relevant Service Commission – Commission allows him to cash out his gratuities from Pension Fund. Government suing erstwhile teacher for damages in respect of funds allegedly embezzled by him and obtaining an interim Court Order for the attachment of his pensions benefit. Order contrary to Section 195 (6) of Constitution and accordingly discharged.*

- [2] *Constitutional law – Constitution is, per section 2 (1) thereof – the Supreme law of the land and any law that is inconsistent therewith shall, to the extent of such inconsistency be invalid or void.*
- [3] *Civil law – Statutory construction – First principle of interpretation is that words must be given their ordinary, natural, grammatical and plain meaning. The context in which the words are used would assist such interpretation or construction and eventually the intention of the lawgiver.*
- [4] *Constitutional law – Section 195 (6) of Constitution – Pension benefits of public officers shall not be the subject of attachment by order of Court for the satisfaction of any judgment or civil proceedings other than in respect of maintenance. Section 32 (2) of The Retirement Funds Act permits such attachment and therefore inconsistent with the constitutional provisions and therefore invalid.*
- [1] The Applicant is the Government of Eswatini and herein duly represented by the office of the Attorney General.
- [2] The First Respondent is Lucky Mhlanga, an adult Liswati male person. He was employed as a school teacher by the Teaching Services Commission (hereinafter referred to as the TSC). Following a disciplinary hearing by the TSC, he was relieved of his duties as a school teacher on 24 May 2016. This was after being found to have misconducted himself in the performance of his duties as a teacher.
- [3] It is not insignificant to note from the outset that, after being discharged as aforesaid, his employer, i.e. TSC, allowed Mr. Mhlanga to receive his gratuity from the Second Respondent.

- [4] The Second Respondent is the Public Service Pension Fund, a body Corporate and established in terms of the Public Service Pension Order of 1993. It has its principal place of business at Ingcamu Building, within the City of Mbabane.
- [5] The 3rd Respondent was joined as a party in these proceedings by order of this Court on 30 June 2017 and has not filed any papers for or against either of the applications and abides the decision of the Court.
- [6] Following the dismissal of the First Respondent by the TSC as aforesaid, the Applicant successfully moved an application against the First Respondent for, *inter alia*, interdicting and restraining the Second Respondent ‘from paying out any pension benefits to the First Respondent pending final determination of an action instituted by the Applicant against the First Respondent in High Court case 314/2017’.
- [7] The application is opposed by both respondents. The nub or crux of the opposition is that the proposed attachment or interdict against the first applicant’s pension benefit is unconstitutional inasmuch as it is contrary to the provisions of dictates of Section 195 (6) of the Constitution, which provision prohibits ‘the attachment by order of Court of pension benefits for the satisfaction of any judgment or pending the determination of civil

proceedings to which a person is a party, except where that judgment or civil proceedings are in respect of maintenance.’

[8] It is common cause that the attachment or civil proceedings instituted by the applicant are not in respect of maintenance. These proceedings are for the recovery of monies allegedly misappropriated by the First Respondent from the school funds whilst he was employed as a teacher.

[9] It is also recorded that after the dismissal of the First Respondent from his employment, the Applicant instructed the Second Respondent to deduct a sum of E114 333-75 from the First Respondent’s terminal or pension benefits. This was the total amount allegedly found to have been embezzled by the First Respondent as stated above. This was by letter dated 08 September 2016. The Second Respondent declined to accede to this request, saying that it had no right or obligation in law to effect the said deduction. Again Section 195 (6) of the Constitution was cited as the basis for such refusal.

[10] In filing its opposing affidavit, the Second Respondent also filed a Counter-claim where it seeks a declaratory order that save for tax and maintenance, pension benefits of a member cannot be attached in terms of Section 32 (2) of The Retirement Funds Act of 2005. Again reliance for

this proposition is Section 195 (6) of the Constitution. The Counter-claim is opposed by the Applicant who argues that the provisions of The Retirement Funds Act (*viz*, Section 32 (2) are not inconsistent with the provisions of Section 195 (6) of the Constitution. I examine these provisions hereunder.

[11] Section 32 (2) stipulates that:

‘(2) A retirement fund may deduct an amount from a member’s benefit in respect of:

(a) An amount representing the loss suffered by the employer due to any unlawful activity of the member and for which judgment has been obtained against the member in a Court or a written acknowledgment of culpability has been signed by the member and provided that the aforesaid written acknowledgment is witnessed by a person selected by the member and who has had no less than eight years of formal education;

(b) An amount for which the employee is liable under a guarantee issue by the employer for purposes of obtaining a housing loan:

Provided that an original notarised document exists which confirms that the guarantee was made’.

[12] It would seem that only 32 (2) (a) is relevant, for purposes of this application. But even then the scope of its application seems to be limited to a deduction for the loss suffered by the employer due to an unlawful act committed by an employee. The deduction must be in respect of or following a judgment of a Court or upon a written acknowledgement of debt duly signed by the employee and witnessed by a person selected by the employee. The witness must have had at least eight years of formal education. This is just a cursory observation by the Court as the main point for adjudication is whether this section is consonant or consistent with the provisions of Section 195 (6) of the Constitution. There is of course authority in South Africa that these provisions may be applied even before judgment is obtained as in the present matter.

[13] In terms of Section 2 (1) of the Constitution, the Constitution is the supreme law of the land and where or if any other law is inconsistent therewith, that other law shall, to the extent of such inconsistency, be

void. Therefore, what this means for example is that, where Section 32 (2) of

The Retirement Funds Act is found to be inconsistent with any provision of the Constitution, the said section must be declared null and void, to the extent to which it is inconsistent with the constitutional provisions. See in this regard *Nombuyiselo Sihlongonyane v Mhloli Joseph Sihlongonyane & Another (470/13A) [2013] SZHC 144 (18 July 2013)*.

[14] Section 195 (6) of the Constitution provides as follows:

‘(6) Pension benefits shall not be the subject of attachment by order of Court for the satisfaction of any judgment or pending the determination of civil proceedings to which a person is a party except where that judgment or civil proceedings are in respect of maintenance.’

And Section 195 (7) states that ‘--- “pension benefits” means any pensions, compensation, gratuities or other like allowances for persons in their service as public officers or for the widows, children, dependants or personal representatives of those persons in respect of that service.’ (The underlining is mine).

[15] As can be seen from above, Section 195 (6) prohibits in peremptory terms, the attachment by an order of Court of pension benefits of public

officers for the satisfaction of any judgment or pending civil proceedings, except where that judgment or proceedings are in respect of maintenance. “Pensions benefits”, includes gratuities or similar allowances accrued to a person in respect of his service as a public servant or officer. In the present matter, it is common cause that the TSC instructed the Second Respondent to pay to First Respondent his gratuities. These benefits had accrued to the First Respondent in his capacity as a public officer; as a school teacher.

[16] It is again common cause that the Applicant obtained the interim Court Order herein in order to interdict or attach or encumber the pensions benefits of the 1st Respondent in order to satisfy a claim for monies allegedly embezzled by the First Respondent from the school funds that were entrusted to him in his capacity as a public officer or school teacher. This claim by the Applicant is plainly not for maintenance. The Applicant has not suggested that this is a claim for maintenance either.

[17] The Applicant avers that there are no inconsistencies between Sections 32 (2) of The Retirement Funds Act and Section 195 (6) of the Constitution. The respondents say there are obvious clashes or inconsistencies in these sections.

[18] In *Brutus v Cozens* [1972] 2 ALL ER 1297 at 1299 Lord Reid stated that the meaning of ordinary words is a question of fact, whilst the meaning to be attributed to enacted words in a statute is a question of law, as it is a matter of statutory interpretation. The primary rule of statutory interpretation or construction is that words must be given their ordinary, natural, primary grammatical meaning unless this makes no meaning at all or results in some absurdity or anomaly or injustice. The meaning must, however, be in relation to a particular factual setting; not in vacuo. In *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) at para 28 the Court stated as follows:

‘A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

- (a) that statutory provisions should always be interpreted purposively;
- (b) the relevant statutory provision must be properly contextualised;
- (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible,

legislative provisions ought to be interpreted to preserve their Constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)'

See also *Provincial Minister for Local Government, Environmental Affairs and Development Planning, Western Cape v Municipal Council of the Oudtshoorn Municipality & Other* [2015] ZACC 24 at para 12.

[19] Again, Lord Reid eloquently expressed the same view in the following words:

'We often say that we are looking for the intention of parliament, but that is not quite accurate. We are seeking the meaning of the words which parliament used. We are seeking not what parliament meant but the true meaning of what they said'.

That was in *Black-Clawson International Ltd v Papierwerke Waldhof Aschaffenburg AG* [1975] AC 591 at 613.

This Court notes that law is made or enacted by the people and for the people. It is, or at least ought to be enacted or crafted in a language that is easily understandable to the ordinary man. That is a central component of the rule of law which is itself a facet of Democracy. As Lord Simon of Glaisdale said in *Stock v Frank Jones (Tipton) Ltd* [1978] ICR 347 at 354.

‘--- in a society living under the rule of law, citizens are entitled to regulate their conduct according to what a statute has said rather than by what it was meant to say or by what it would otherwise have said if a newly considered situation had been envisaged’.

[20] Therefore, where the words used in a statute are clear and unambiguous, it is the duty of the Court to give effect to that meaning. The other rules or principles of construction or interpretation such as reading words in and out of a statute, fringe, technical meaning and secondary meaning of words, take the back-burner, as it were. As stated above though, the context is always at the centre of such construction or interpretation.

[21] In the present matter I have stated what the two provisions of the two statutes mean. They are plainly inconsistent. The Constitutional provisions plainly state that pension benefits of public officers may only be the subject of an attachment by an order of the Court in respect of a claim for maintenance. There is no ambiguity in that. On the contrary, Section 32 (2) of The Retirement Funds Act allows or permits a deduction from a member’s benefit in respect of a loss suffered by the employer due to any unlawful activity of a member.’ That clearly goes beyond issues of maintenance. To that extent, the said provisions of Section 32 (2) of The Retirement Funds Act 2005 are inconsistent with

the provisions of Section 195 (6) of the Constitution and are therefore declared invalid (to the extent of such inconsistency).

[22] The cases relied upon by the Applicant in support of its case did not consider a similar constitutional provision as Section 195 (6) and therefore clearly distinguishable from the present matter. In particular, the South African cases, did not have to compare and contrast two pieces of legislation as this Court has had to do in this case. These cases are therefore unhelpful in this case. Additionally, Section 196 (1) of the Constitution is of general application whilst Section 195 specifically refers to pensions benefits of public officers or servants.

[23] It may be argued that there is an unexplained and unwarranted discrimination in the provisions of Section 195 (6) inasmuch as protection is only accorded to pensions benefits of public officers and not other pensioners. These provisions are not unique to Eswatini. (See the Namibian regulations quoted *infra* at para 28). But, is there a rational explanation or ground for this distinction between pensioners? I think so. Generally, Civil Servants are less paid and their pension packages are generally less favourable compared to their counter parts in the private sector. For this reason, amongst many others, Legislatures have found it prudent to offer some measure of protection on these meagre pension

benefits. It is therefore not an issue of discrimination but rather of differentiation. It is therefore logically and legally permissible.

[24] For the foregoing reasons, the rule nisi issued by this Court on 24 March 2017 (interdicting the Second Respondent from paying out any pension benefits to the First Respondent pending final determination of the action proceedings instituted by the Applicant against the First Respondent in High Court case 314/2017 is hereby discharged.

[25] The Second Respondent has, in its counter-application sought an order declaring that –

(a) “--- save for tax and maintenance, pension benefits of a member --- cannot be attached in terms of Section 32 (2) of The Retirement Funds Act of 2005 and

(b) --- the 2nd Respondent has got no discretion on whether or not to withhold, reduce or deduct pension benefits of a retired member --- other than for tax and maintenance.”

[26] Whilst the Court has hereinabove ruled or held that pension benefit may only be attached by a Court Order in respect of maintenance claims only; as per Section 195 (6) of the Constitution, there is no justification in law,

in my view why this should extend to tax. The said constitutional provision limits the attachment in respect of a judgment or civil proceedings in respect of maintenance. Tax is not included. To widen or extend the provisions to matters relating to tax would obviously do violence to these constitutional provisions.

[27] Tax or taxation legislation is in a way a somewhat not-so-ordinary field. For instance, a tax payer is expected to pay once a demand by the collector of taxes is made, and complain afterwards or later. Again, it may well be that the Second Respondent is expected to calculate and deduct whatever is due to the collector of taxes before actually declaring what constitutes pension benefits that are due to a member. That would, I would think, mean that a member's benefits properly so-called, are calculated after deduction of tax. (I have set out the definition of pensions benefit in para 14 above).

[28] As a comparative study, the Government Institutions Pension Fund Rules of Namibia, made under The Pension Funds Act 24 of 1956 (as amended) provides, as per rule 9.4 (1) '...that save to the extent permitted by the Act, The Income Tax Act and The Maintenance Act, no benefit or right thereto provided for in the Rules, or right in respect of contribution made to or by, or on behalf of a member, deferred pensioner or pensioner shall

be capable of being deducted, transferred, ceded, pledged or hypothecated or be liable to attachment or subject to any form of execution under a judgment or order of Court, or to the extent or not more than N\$3000 per annum, be capable of being taken into account in the determination of a judgment debtor's financial position ...' and sub rule (3) stipulates that:

'(3) If the Estate of a beneficiary is sequestrated or surrendered, the benefit shall, subject to the provisions of the Act, not be deemed to form part of the Assets of the insolvent estate of such beneficiary, and may not in any way be attached or appropriated by the curator of such beneficiary's insolvent estate or by his/her creditors, notwithstanding anything contrary in any law relating to insolvency.'

Thus, the limitation in Namibia excludes both tax and maintenance, whilst our legislation covers maintenance only.

[29] From the foregoing, it is my respectful view that Section 32 (2) of The Retirement Funds Act of 2005 needs to be amended to be in line with the provisions of Section 195 (6) of the Constitution. The section could be amended in the following terms:

'Notwithstanding the provisions of Section 32 (2) hereof, pensions benefits of public officers shall not be the subject of attachment by order of Court for the satisfaction of any judgment or pending the

determination of civil proceedings to which a person is a party except where that judgment or civil proceedings are in respect of maintenance’.

That, however, is a matter for the legislature to consider and not this Court.

[30] In *Rail Commuters Action Group v Transnet Ltd. t/a Metrorail* (CCT 56/03) [2004] ZACC 20, 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) (26 November 2004) the Court stated as follows:

‘[107] It is quite clear that before [a court] makes a declaratory order, [it] must consider all relevant circumstances. A declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our constitution and its values. Declaratory orders, of course, may be accompanied by other forms of relief such as mandatory or prohibitory orders, but they may also stand on their own. In considering whether it is desirable to order mandatory or prohibitory relief in addition to the declarator, a Court will consider all the relevant circumstances.’

I respectfully agree with and endorse these observations by the Learned Judge.

[31] It was submitted by Counsel for the 2nd Respondent ‘---that the declaration of the invalidity be suspended for a period of one year to enable parliament to remedy the constitutional breach created by Section [32 (2)] of the RFA’. Whilst I entirely agree that it would not be proper to order the declaration of invalidity to operate with immediate retrospective effect, I see no value or justification to postpone its effect. To delay or postpone it may cause further prejudice to public servants or officers who may find themselves in the same situation as the First Respondent herein. I shall therefore order that the order of invalidity shall operate with effect from the date of this judgment.

[32] Accordingly, I would make the following order:

- (a) The *Rule Nisi* issued by this Court on 24 March 2017 is hereby discharged.
- (b) The provisions of Section 32 (2) of The Retirement Funds Act of 2005 are to the extent that they permit or allow a retirement fund to deduct an amount from a public officer’s benefit in respect of any cause other than in respect of maintenance, are inconsistent with the provisions of Section 195 (6) of the Constitution and are to that extent invalid.

- (c) It is hereby declared that pension benefits of public officers shall not be the subject of attachment by order of Court for the satisfaction of any judgment or pending the determination of civil proceedings to which a person is a party except where that judgment or civil proceedings are in respect of maintenance.
- (d) The invalidity in (b) above shall come into effect from date of this judgment.
- (e) Each party is to pay its own costs of these proceedings.

MAMBA J

I agree

M DLAMINI J

I also agree

NKOSI J

FOR THE APPLICANT : N.G. DLAMINI & B. MKHONTA
FOR 1ST RESPONDENT : B. XABA
FOR 2ND RESPONDENT : K. MOTSA
FOR 3RD RESPONDENT : Z. MKHWANAZI