IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Civil Appeal Case No. 72/2018

In the matter between:

GOVERNMENT OF ESWATINI **Appellant**

And

LUCKY MHLANGA **1st Respondent**

PUBLIC SERVICE PENSION FUND **2nd Respondent**

FINANCIAL SERVICES REGULATORY AUTHORITY **3rd Respondent**

Neutral citation: *Government of Eswatini vs Lucky Mhlanga and Two Others (/72/2018 [SZSC] 69. [2019] (12th December, 2019)*

Coram: **M.C.B. MAPHALALA CJ**
S.P. DLAMINI JA
M.J. DLAMINI JA
R.J. CLOETE JA
S.B. MAPHALALA JA

Heard: 20th May, 2019

Delivered: 12th March, 2020

SUMMARY: *Constitutional law – the Full bench of the court* ***a quo*** *held that the provisions of section 32(2) of the Retirement Fund Act, 2005 ("The Act") are to the extent that they permit a retirement fund to deduct an amount from a public officer's benefit in respect of any cause other than in respect of maintenance, inconsistent with the provision of section 196(6) of the Constitution and invalid – this court hold, that only the first part of section 2(a) of the Retirement Fund Act should be struck down and the second part of the sub section should remain intact – no order as to costs*

JUDGMENT

S.B. MAPHALALA JA

Introduction

[1] This is an appeal against the judgment of the Full Bench of the High Court (court *a quo*) which held that the provisions of section 32(2) of the Retirement Funds Act (2005) ("The Act") are to the extent that they permit deduction from an officer's benefit in respect of any cause other than in respect of maintenance, inconsistent with the provisions of section 195(6) of the Constitution and invalid.

[2] The court *a quo* further declared that pension benefits of public officers shall not be the subject of attachment by order of Court for satisfaction of any judgment or pending the determination of civil proceedings to which a person is a party except where judgment or civil proceedings are in respect of maintenance.

The background

[3] The material facts of the dispute are outlined in brief in the Heads of Arguments of the Appellant to be the following:

> **6. The material facts of this matter are common cause:**
>
> **6.1 The Appellant employed Lucky Mhlanga ("the 1st Respondent") as a Head teacher until 24 may 2016 when he was dismissed for failing to account for funds in the amount of E114,333.75 (One Hundred and Fourteen Thousand Three Hundred and Thirty Three Emalangeni Seventy Five Cents).**
>
> **6.2 During the time the 1st Respondent was employed by the Appellant, he was a contributing member of the Public Service Pension Fund ("the 2nd Respondent").**
>
> **6.3 On 23 March, 2017 the Appellant initiated proceedings in the court *a quo* for an order interdicting the 2nd Respondent from paying out any pension benefits to the 1st Respondent pending the final determination of**

an action for damages instituted by the Appellant (as Plaintiff) against 1st Respondent (as Defendant) (see pages 1 – 19 of the record).

6.4 Both Respondents opposed the application for the interdict. The 2nd Respondent filed a counter application in which it, *inter alia,* challenged the Constitutionally of section 32(2) of the At (see pages 27 – 46 of the record).

6.5 Arguments were heard by Mamba J, M Dlamini J and Nkosi J on the 1st November 2017 to determine the constitutionality or otherwise of the said section 32(2) of the Act. Judgment was delivered on the 1st August 2018 wherein the court held as stated in paragraphs 1 and 2 above.

6.6 Appellants, being dissatisfied with the judgment of the court *a quo*, noted an appeal against same on the 29th August 2018 (see pages 89 – 90 of the record.

[4] The Full Bench of the High Court (per **Mamba J, M Dlamini J and S. Nkosi J**) heard the matter on the 1st November 2017 and delivered judgment on the 1st August, 2018 and gave orders in the following terms:

(a) The *Rule Nisi* issued by this Court on 24 March 2017 is hereby discharged.

(b) **the provision 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.**

The Appeal

[5] The Appellant, The Government of Eswatini, being aggrieved by the above orders then filed an appeal before this Court on the following grounds:

1. **The High Court erred in law in holding that section 196(1) of the Constitution is a provision of general application**

contrasted with section 195(6) of specific application to the Civil Service;

2. **The Learned Justices *a quo* erred in law in their determination that section 195 of the Constitution as confined to the civil service is not discriminatory against the private sector employees but is rather a case of differentiation;**

   2.1 **the Learned Justices wrongly gave precedence to section 195(6) as a general provision against section 20 of the Constitution which is a specially entrenched provision, when it ought to be vice versa, and;**

3. **The court *a quo* erred in law or in fact in holding that section 32(2) of the Retirement Funds Act 6/2005 is inconsistent with section 195(6) of the Constitution.**

The Arguments

[6] The attorneys for the parties appeared before this Court on the 20th May, 2019 advancing their arguments in this matter filing Heads of Arguments. I must put it on record that both parties had filed applications for condonation which were not opposed by either party. In the circumstances and in the interest of justice, this Court granted those Applications.

The analysis and conclusions thereof

[7] I must mention as a prelude to my analysis and conclusions in arguments before us that both Counsel in the dispute agreed with the Court that the court *a quo* was incorrect in declaring the whole section 32(2) of the Retirement Funds Act, 2005 to be invalid and in conflict with section 195 (2) (b) of the Constitution as canvased in ground 3 of the appeal. Therefore grounds 1 and 2 remain to be considered in this appeal.

[8] I shall address each ground of appeal *ad seriatim* as they appear at paragraph [5] of this judgment:

> **(i) The High Court erred in law in holding that section 196 (1) of the Constitution is a provision of general application contrasted with section 195(6) of specific application to the Civil Service.**

[9] The Appellant in this regard contends that the court *a quo* erred in law in holding that section 196(1) of the Constitution is of general application in contrast to section 196(6) which is of specific application to the Public Service. That both sections 195 and 196 of the Constitution fall under Chapter X which specifically is confined to the Public Service. Moreover, section 196(5) interprets pension benefits as benefits or pension in respect of their service **"as public officers"** and that this clearly excludes private sector employees.

[10] The Appellant further contends that the court *a quo* held that section 32(2) is inconsistent with section 195(6) of the Constitution because it allows for deductions other than for maintenance. The rationale for this conclusion was that the provisions of section 195(6) of the Constitution are clear and unambiguous; hence, they should be given their literal meaning. In support of this proposition the Appellant has cited a South African case **of S vs Makwanyane 1995 (3) 391 C at paragraph 10** to the following:

> **"The Constitution must not be interpreted in isolation but in its context which includes the history and background of the Constitution, other provisions of the Constitution itself and in particular, the provisions of Chapter 111 of which it is part"** (my emphasis)

[11] On the other hand the 3rd Respondent on the above argument of the Appellant contends that the court a quo correctly found that the general grammatical meaning of section 195(6) is that the court can only issue an order authorising the attachment of benefits only in respect of maintenance cases, and that a constitutional provision which has the effect of protecting public officers' pension from being attached by a court order is not unique to Eswatini.

[12] In this regard Counsel for the 3rd Respondent cited other jurisdictions such as India and the USA which retain similar provisions that benefits of public officials cannot be attached. Therefore, in fact that such a provision cited in the 1968 Constitution, is insufficient justification to permit attachment of public officers pension benefits in light of a clear constitutional provision.

[13] In support of these arguments the 3rd Respondent has cited from these countries the following cases that of **State of Jharkhand & Ors vs Jitendra Kumar Srivastava & Anr on 14 August 2013, Allen vs City of Long Beach (1955) 45 Cal. Ed 128 (Allen)** and **Alexander Volokh. The Constitutional Protection of Public Employees Pensioners, February 19, 2014.**

[14] It is trite that a contextual or purposive reading of a statute must remain faithful to the actual wording of the statute. When confronted with legislation which includes wording incapable of sustaining an interpretation that would render it constitutionally compliant courts are required, as discussed above, to declare the legislation unconstitutional and invalid. To this proposition the 3rd Respondent has cited the South African case of **Bertie Van Zyl (Pty Ltd and Another vs Minister of Safety and Security and Others 2010 (2) SA 181 (CC) at paragraph 20.**

[15] Further arguments under this head are canvassed by Respondents in the Heads of Arguments in paragraphs 3.3.2.1, 3.3.2.2, 3.3.3 and 3.3.1 thereof.

[16] Having considered the above arguments of both the Appellant and the Respondents it would appear to me that the Respondent is correct that the contextual and purposeful meaning which should be ascribed to section 195(6) is to protect the pension rights of the members of the fund. I also agree with the Respondent that it is borne out by the heading of section 195 of the Constitution which is headed *"pension laws and protection of pension rights"*, and as a result of the above constitutional protection, if the Appellant as employer is defrauded, it is entitled to make use of the normal court

processes and issue Summons and other civil remedies to recover any losses suffered.

[17] The Respondents are also correct that it is trite that while it is important to prefer an interpretation of a statutory provision that avoids any constitutional inconsistency, one must be careful not to choose any interpretation that cannot easily be inferred from the text of the provision. In this regard the Respondents have cited a plethora of cases in South Africa being that of **Provincial Minister for Local Government, Environmental Affairs and Development Planning, Western Cape vs Municipal Council of the Oudtshoorn O South Africa, case No. 05/2015, paragraph 23** and **Abahlali Basemjondolo Movement SA & Another vs Premier of the KwaZulu-Natal & Others [2009] ZACC 31; 2010 (2) BCLR 99 (CC) (Abahlali Basemjondolo) at paragraph 120.**

[18] It appears to me that in light of the above legal principle that the provisions of section 195(6) are clear that the only permissible deductions which can be made through a court order from the provision benefits of a public officer is that relating to maintenance. The suggestions advanced in paragraphs 15 to 18 of the Appellant's Heads of Argument cannot be readily inferred from the text of section 195(6) as it is incongruent with it. Finally, in light of the above there is no merit in this ground of appeal.

[19] I now proceed to the second ground of appeal which canvasses the following:

> **(ii) The Learned Justices *a quo* erred in law in their determination that section 195 of the Constitution is confined**

to the Civil Service is not discriminatory against the private sector employees but is rather a case of differentiation.

[20] In arguments before us both Counsel agreed that the court *a quo* was incorrect in declaring the whole of section 32(2) of the Retirement Funds Act, 2005 to be invalid and in conflict with section 195(6) or the Constitution. In fact the provisions of section 32(2)(b) are not in conflict with the Constitution and should not have been struck down.

[21] The kernel of this ground of appeal for the record is that the court *a quo* misdirected itself to hold that section 195(6) is confined to the Public Service and that is not discriminatory against the private sector but is rather a case of differentiation. The matter is legally permissible.

[22] The argument that leaving the private sector employees open to the full rigours of the application of the provisions of section 32 of the Retirement fund Act resulting in the sort of discrimination outlined by section 20 of the Constitution itself.

[23] Section 196(6) of the Constitution provides that *"pension benefits shall not be the subject of attachment by a court order for satisfaction of any judgment pending the determination or civil proceedings to which a provision is a party except whether judgment on civil proceedings are in respect of maintenance"*.

[24] Section 32(1) of the Retirement Funds Act 2005 provide as follows:

"A retirement fund may deduct an amount from the Members' benefit in terms of a debt arising from a housing loan or guarantee granted to or in respect of a member in terms of Section 19"

[25] In turn the relevant sub-sections of Section 19 provide as follows:

4. Notwithstanding the provisions of sub-section 3, a retirement fund may grant a loan to a member as an investment or issue a guarantee so that the member may obtain a loan to enable the member:

(a) To purchase a dwelling or to purchase land and erect a dwelling on it, for occupation by the member or a dependant of the member, provided that the aforementioned land and dwelling shall be registered in the name of the member or his spouse;

(b) To made additions or alterations to or to maintain or repair a dwelling which belong to the member or his spouse and which is occupied or will be occupied by the member or a dependant of the member.

(c) To erect a dwelling on land that the member or his spouse does not own but on which land the member or his spouse can exercise a

right or privilege in terms of any customary or statutory law to build a dwelling for his own occupation or for occupation by his dependants.

5. **If the loan or guarantee contemplated in subsection (4) is to be utilized for the purpose of building a dwelling on Swazi Nation land, then before granting the loan the fund shall ensure that the written permission of the official custodians of the land has been obtained.**

6. **A loan or guarantee contemplated in terms of subsection (4) and to which the provisions of subsection (5) do not apply shall be secured by a first mortgage on the property being financed.**

7. **A loan or guarantee contemplated in subsection (4) and to which the provisions of subsection (5) do not apply shall not exceed 90% of the market value of the property concerned.**

8. **A loan or guarantee contemplated in subsection (4) shall not exceed sixty percent of the value of the member's cash withdrawal benefit in the fund calculated as if the member has withdrawn on the date the loan was granted."**

[26] Accordingly it follows that in terms of section 32(1) read together with section 19, deduction from pension funds is permitted in the circumstances referred to in those sections. Further it is then clear that the only offending provision

is that which appears at section 32 (2) (a) which is in conflict with the provisions of the Constitution as set out above. Furthermore counsel for both parties conceded that only the first part of subsection 32 (2)(a) should be struck down.

[27] As regards the second part of section 32(2)(a), if a member of a fund acknowledges a debt in the circumstances provided for namely that the acknowledgement is written and is witnessed by a person selected by the said member and who has had not less than 8 years of formal education, then surely that member acknowledges that he is indebted to a creditor and that the sum concerned can be deducted from his pension benefits, always provided that the same restrictions found in section 19(8) being that the deduction cannot exceed 60 percent of the value of the member's cash withdrawal benefit in the fund calculated on the relevant date.

[28] Accordingly I am of the view that the provisions of section 32(2) of the retirement fund's Act should be amended by the Legislature taking all of the comments referred to above into consideration and the Registrar is directed to furnish the Attorney General with a copy of this Judgment to deal with the matter accordingly.

[29] Accordingly:

1. **The Appeal is dismissed with no order as to costs and the Judgment of the Court *a quo* is set aside and substituted with the following:**

1.1 The rule *nisi* issued by this Court on 24th March 2017 is hereby discharged.

1.2 It is hereby declared that the pension benefits of public officers shall not be a subject of the attachment by order of Court for the satisfaction of any Judgment or pending the determination of civil proceedings to which such persons are party except where that Judgment or civil proceedings are in respect of maintenance.

1.3 The provisions of Section 32(2) shall be read and interpreted as if without the existing wording "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 a member in a court or". The legislature is granted a period of 12 months from the date of this Judgment to amend the legislation accordingly. Otherwise the said portion of Section 32(2) (a) shall be deemed to be struck down.

S.B. MAPHALALA JA

I AGREE

M.C.B. MAPHALALA CJ

I AGREE

S.P. DLAMINI JA

I ALSO AGREE

R.J. CLOETE JA

For the Appellant: Mr. N. Dlamini
(Senior Crown Counsel)

For the Respondent: Mr K. Motsa
(from Robinson Bertram)

MINORITY JUDGMENT

M. J. Dlamini JA

[30] Whilst I agree with the final order of this Court in this matter, in effect disallowing the appeal, I consider it necessary to make some observations of my own to this very important case. I do not agree with some aspects of the judgment of the court a quo upheld by the majority in the judgment of this Court. I do not agree that the law relating to the payment of pension benefits need to be amended as proposed. In the result I do not agree with para [26] of the main judgment.

[31] On 8th September 2016, the Under-Secretary in the Ministry of Education, Ms M. C. Motsa, wrote to the Chief Executive Officer of the Second Respondent informing him that the First Respondent *"was found guilty of embezzling school funds amounting to E114,333.75"* and *"was dismissed from the Teaching Service, effectively from 24th May 2016"*. The office of the chief executive officer was accordingly requested *"to deduct the said amount from the headteacher's terminal benefits"*. Notwithstanding the foregoing plea, on the 20th February, 2017 the Executive Secretary of the Teaching Service Commission (TSC), (Mr. ME Nkambule), who must have known that the First Respondent had been dismissed, wrote to the Chief Executive Officer of the Second Respondent in the following terms: *"You are kindly requested to pay gratuity"* for the dismissed headteacher. Mr. Nkambule's letter was not copied to any other person within the teaching service or the public service such as the Principal Secretary or Under-Secretary, Ministry of Education or the Chairman of the Teaching Service Commission.

Secretary, Ministry of Education or the Chairman of the Teaching Service Commission.

[32] In denying the liability to repay the loss incurred by the appellant as employer, the First Respondent cited section 195(6) of the Constitution to the effect that pension benefits are not attachable for any cause except in the case of maintenance which is not the case *in casu*. But before First Respondent cited section 195 (6) he first sought refuge under the decision of the Teaching Service Commission (the TSC), the immediate employer, which had dismissed him and allowed his gratuity to be paid without any whimper. In this regard, First Respondent argued that the matter of any loss to the employer was *res judicata*. With respect to his dismissal, the First Respondent submitted in his answering affidavit as follows: *"5.2 It is worthy of mentioning that the TSC in its decision to dismiss me from the teaching service never stated that there were sums of monies (sic) totaling to E114,333-75 (...) that were not accounted for in my then school. It follows therefore that the TSC never ordered me to pay the [appellant] the aforesaid sum of money..."*

[33] The Second Respondent supported the case of the First Respondent by raising a counter application in which it sought a declaration to the effect that First Respondent's pension benefits *"cannot be attached in terms of section 32(2) of the Retirement Funds Act, 2005...vis-a-vis section 195 (6) of the Constitution..."* Second Respondent further submitted that it had *"no discretion on whether or not to withhold pension benefits of a retired member in view of the provisions of the Public Service Pensions Order of 1993"*[1] and

[1] **Two things I consider wrong here viz the reference to 'pension benefits' and to 'retired member'. The First Respondent was not a 'retired' member of the Fund; he was a 'dismissed' member. There is a difference.**

the regulations thereto. Section 32 of the said Act has been fingered as central to these proceedings. The section reads:

"(1) A retirement fund may deduct an amount from the member's benefit in respect of a debt arising from a housing loan or guarantee granted to or in respect of a member in terms of section 19.

"(2) A retirement fund may deduct an amount from the member's benefit in respect of:

(a) an amount representing the loss suffered by an employer due to any unlawful activity of the member and for which judgment has been obtained against the member in court or a written acknowledgment of culpability has been signed by the member and provided that the aforementioned written acknowledgment is witnessed by a person selected by the member and who has had not less than eight years of formal education;

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

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

"(3) If for any reason, except death, a member is unable or unwilling to acknowledge any debt contemplated in subsection (2) (a), then the employer hall apply to the court for an order authorizing him to make a deduction from the member's benefit up to an amount equal to the debt".

[xx] Accordingly, in short, subsection (2) of the section allows the Fund to deduct an amount from the member's pension benefit in respect of, *inter alia*, *"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 . . . "* It was in accordance with this subsection that the appellant applied to court in the endeavor to secure payment for the said loss.

[34] The Third Respondent also filed an affidavit in opposition to the application. Third Respondent averred that First Respondent's pension benefits may be deducted in certain circumstances where the member had been found to have acted unlawfully in causing the loss to the employer and that, however, that was not the case *in casu.* According to the deponent for Third Respondent, it was not enough that the member may have acted wrongfully or negligently: unlawfulness had to be established before deduction could be considered. Unless otherwise conceded, unlawfulness can only be proved by a court order. It is, however, not clear to me why deponent limits possible deduction under section 32(2)(a) to cases of proven unlawfulness and not proven wrongfulness or negligence. The subsection uses the expression *"unlawful activity of the member and for which judgment has been obtained..."*

[35] I find it difficult in the absence of any elaboration of the subsection that no matter how culpable the negligence or wrongfulness may be the member thereby causing loss to the employer should go scot-free, with his pension benefits intact. In my view, the subsection does not exclude cases of wrongfulness or negligence as Third Respondent's deponent would want us believe. Third Respondent's deponent further deposed: *"23 In casu, it cannot be said that the member acted unlawfully but it can safely be said he acted wrongfully and negligently".* It would be strange in my view to have a headteacher entrusted with the care, custody and proper use of school funds to misappropriate those funds and subsequently claim that though he wrongfully or negligently used those funds such misuse was not unlawful.

[36] Third Respondent's deponent finally submitted that without a court order *"no allowable deductions can be effected to [First Respondent's] retirement*

benefits" having regard to the provisions of section 32 (2) of the Act. I consider in some detail the section below. In general, the deponent was correct in paragraph 25 where he says: *"Further, the wording of section 32 (2) is not couched in a mandatory manner and form. It gives the retirement funds an election whether or not to make a deduction from a member's benefit..."* because of the word *'may'*. Third Respondent's deponent then moved to section 195(6) of the Constitution and observed that the Constitution allows deductions only in the cases of maintenance and housing loan debts or loan guarantees, and concluded: *"28 It is therefore incompetent for the [appellant] to seek and obtain the orders sought and for this reason the application ought to fail with costs"*.

[37] Third Respondent did not canvass the provisions of section 196(1) of the Constitution which vests commissions with power over pensions while section 195 is concerned with the protection of pension benefits. The subsection reads:

> *"(1) Where under any law any person or authority has a discretion -*
> *a) to decide whether or not any pensions benefits shall be granted; or*
> *b) to withhold, reduce in amount or suspend any such benefits that have been granted,*
>
> *those benefits shall be granted and may not be withheld, reduced in amount or suspended unless the appropriate commission concurs in the refusal to grant the benefits or, as the case may be, in the decision to withhold, reduce in amount or suspend those benefits".*[2]

[2] **A number of Commonwealth countries have provisions similar to sections 195 and 196 in their Constitutions,** for example **Botswana**, ss 115, 116; **Antigua** (1967) ss 92, 93; **Saint Vincent** (1979) ss 88, 89

[38] It will be noted that the opening words of the subsection speak to a person or authority having a discretion under any law to grant or not to grant any pension benefits. Pertinently, the subsection provides that if an authority, in the present case, the Teaching Service Commission, by its law, that is, section 32 (2) (a), has discretion to grant or withhold, reduce or suspend any pensions benefits "*those benefits shall be granted and may not be withheld, reduced in amount or suspended unless the appropriate commission*" [that is, the TSC, see section 196 (4)(b)] "*concurs in the refusal to grant the benefits or, as the case may be, in the decision to withhold, reduce in amount or suspend those benefits*". It is however not clear if the provisions of the Retirement Funds Act, the Public Service Pension Order and the Constitution were duly followed before the final position to deny requested attachment was taken by the TSC as per the letter of the Executive Secretary. This is not to say that the appellant's application would necessarily have been granted.

[39] But from the papers before Court it does not appear that the requisite provisions of the Acts and the Constitution were correctly interpreted and applied. The inquiry must begin with the Public Service Pension Order 1993. By the provisions of both section 2 and section 3 of the Order, the teaching service is a part of the public service. As such, both Services share the same Public Service Pensions Fund which became registered under the Retirement Funds Act, 2005, which is now the controlling Act in the administration of pensions and similar retirement funds.

[40] An historical recap may throw some light in this matter. Section 11 of the Pensions Proclamation (1947) Cap 57[3] provided that a pension, gratuity or other allowance granted under the said Proclamation shall not be assignable or transferable except for the purpose of satisfying a debt to the Government or an order of any court for the payment of periodical sums of money towards the maintenance of a wife or former wife or minor child of the officer to whom the pension, gratuity or other allowance has been granted, and shall not be liable to be attached, sequestered or levied upon for or in respect of any debt or claim whatever except a debt due to the Government. In principle, it is evident that section 11 of the Pensions Proclamation allowed the attachment of pensions benefits in the case of a debt to the Government supported by a court order and in the case of maintenance.

[41] The next development in the pensions law was captured in sections 123 and 124 of the 1968 Constitution. These two sections were again largely reproduced in sections 195 and 196 of the 2005 Constitution. Section 196(1) of the Constitution which reproduces section 124 (1) of the 1968 Constitution allows any person or authority, acting under any law which accords it discretion to so act, to decide whether or not any pensions benefits shall be granted or be withheld, reduced or suspended. Where that person or authority has exercised its discretion in terms of the subsection and granted the pension benefits, the said pension benefits shall be granted and may not be withheld, reduced in amount or suspended unless the appropriate commission concurs in the refusal to grant the benefits or, as the case may be, in the decision to withhold, reduce or suspend the said pension benefits.

[3] **Laws of Swaziland** (1959) Vol II

[42] Under the foregoing subsection (1) of section 196, the authority given discretion to grant or not to grant the said pensions benefits must look at the law which establishes it and any other law which confers it with the requisite discretion. *In casu,* the Second Respondent should have looked at the Public Service Pensions Order, 1993 to see whether that Order confers it with any discretion to decide one way or the other regarding First Respondent's terminal benefits. Beyond the Order there is the Retirement Funds Act which was signed into law in October 2005. Section 32 (2)(a) of that Act gives discretion to a retirement fund, if allowed by its law or any other law, to deduct from a member's benefits *"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 ..."*

[43] In my view, therefore, by this Act, the Public Service Pensions Fund 1993 is authorized, if the Public Service Pensions Order 1993 so allows, to effect the deductions in favour of the Government, as employer, based on a court order on condition the Teaching Service Commission as the appropriate commission concurs in the deduction. In the result, while section 195 protects the pensions benefits from invasion by creditors, section 196 vests appropriate commissions with power, as it were, to derogate from or override the protection provided by section 195. Thus, in my opinion, having regard to these provisions, it cannot be said that section 32(2)(a) is anywise inconsistent with the provisions of section 195(6). Section 32(2) is a law which in terms of section 196 (1) vests with discretion any person or authority to deal with the pensions benefits as therein provided.

[44] If section 32 (2)(a) is invalid because it is inconsistent with section 195 (6) then section 196 (1) is meaningless and ineffectual because it addresses a non-existent situation. Yet, to be sure, section 32 (2) does confer a discretionary power on the Fund, that is, Second Respondent, to deduct an amount from a member's pension benefits representing the loss suffered by an employer. All that is required to be done to give effect to the provisions of section 32(2)(a) is for the appropriate commission, *in casu*, the Teaching Service Commission, to concur in a proposed deduction by the Fund. Unfortunately, in the present matter the TSC acted rashly, in a manner that could encourage rampant misappropriation of school funds by head teachers secure that their pension benefits are protected from attachment by the employer. For how can it be that an amount of over E100,000-00 could have been misappropriated without any evidence of unlawfulness, even on a portion of that amount? Surely, unlawfulness could have been found if the TSC wanted it.

[45] The Third Respondent's deponent extended the inquiry to the cases covered by section 32(1) of the Act, that is, a housing loan or guarantee granted in terms of section 19 of the Act. Section 19 deals with investments of retirement funds. In section 19(4) the Act permits a retirement fund to grant a loan to a member as an investment or issue a guarantee so that the member may obtain a loan for a housing project. Third Respondent says that a loan so granted could be recovered from the pension benefits of the member. It is to be noted however that the said section 19 of the Act is by no means a superior provision to section 195(6) of the Constitution. It is not necessary to take any firm position here because the section is not implicated.

[46] The judgment *a quo* states that Second Respondent was instructed by the Applicant/Appellant to deduct from the First Respondent's pension payment the amount equal to the loss suffered by the appellant as employer. Second Respondent, however, declined the instruction, citing, *inter alia,* section 195(6) of the Constitution as basis for the refusal. Second Respondent stated that section 32 permitted deductions from terminal benefits where there is a court order or acknowledgment of indebtedness by the member; otherwise, any other deduction would be illegal. That, however, is not what section 195(6) provides. That sub-section reads: *"Pensions 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"*. The section accordingly protects pension benefits from attachment in satisfaction of a debt other than maintenance.

[47] The court *a quo* observed that section 32 (2)(a) was *"limited to a deduction for the loss suffered by the employer due to an unlawful act committed by the employee. The deduction must be in respect of or following a judgment of a court or upon a written acknowledgment of debt duly signed by the employee and witnessed by a person selected by the employee"* and that person "*must have had at least eight years of formal education"*. In the good old days, that would be a Standard Six graduate. The court, however, considered the main point for adjudication to be whether section 32(2)(a) was consistent with the

provisions of section 195(6) of the Constitution.[4] The court then referred to the case of **Mbuyiselo Sihlongonyane.**[5]

[48] The court *a quo* also considered section 195(7) in connection with "pensions benefits" as used in section 195(6), and underlined the expression *"for persons in their service as public officers"* appearing in the said subsection 195(7). The court then read section 195(6) as prohibiting *"the attachment by an order of court of pensions benefits of public officers.... except where that judgment ...[was] in respect of maintenance"*. The court also found as common cause that the 'gratuity' paid to First Respondent had accrued to him in his capacity as a public officer. Accordingly, none of it could be attached, the court *a quo* concluded. I may as well point out at this juncture that section 195(7), following as it does section 195(6), and read with section 196(5), underscores the fact that the two sections, that is, section 195 and 196 of the Constitution, both deal with public officers and their dependents. Both sections therefore are of specific application, and are to be contrasted with section 32(2) of the Act which is of general application. That is, section 32(2) is not limited to public officers in its application. To declare the subsection or any part of it invalid may very well amount to throwing out the baby with the bath water. At any rate, if there is any discrimination or, for that matter, differentiation, between private and public sector employees, it is a discrimination we can do nothing about. In my opinion, it is perfectly in order to hold a portion of section 32(2) as not applicable to public officers without

[4] The Full Bench in para [12] went on to observe as follows: ***"... There is of course authority in South Africa that these provisions may be applied even before judgement is obtained as in the present matter"***.
[5] **Mbuyiselo Sihlongonyane v Mhloli J. Sihlongonyane and Another** {2013] SZHC 144 (18 July 2013).

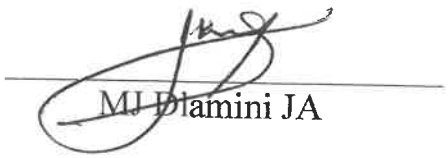
declaring it invalid because that same portion may be applicable to non-public employees. I would not therefore support the proposed amendment of the subsection. As already stated above, if section 32(2)(a) is declared invalid and removed from the section, there would be no need for section 196(1).

[49] The court *a quo* and the litigants seem to have been addressing a case affecting 'pension benefits' of a member, that is, the First Respondent, a dismissed headteacher. Section 9 of the Public Service Pensions Fund Order 1993 provides that *"(1) Pensions, gratuities and other allowance may be granted by the Fund to members in accordance with the Regulations in the Schedule to this Order"*. Regulation 13 to the Schedule concerns the issue of 'retirement or dismissal' from the Service and reads: *" If a member is dismissed from the Service or forced to retire in consequence of disciplinary procedures taken against him, he shall be entitled to a refund of his contributions with interest as accrued in terms of the provisions of regulation 3(4)"*. In the result, it would appear that First Respondent in fact never had any 'pension benefits' in terms of the Order and the Act since he left the Service following a dismissal. First Respondent was therefore not entitled to any pension benefits as defined under section 195(7) and section 196(5) of the Constitution. The letter of the executive secretary directed that First Respondent be paid his gratuity. But 'gratuities' are part of 'pension benefits' under both sub-sections. Unless I have somehow missed the point, if First Respondent was paid a 'pension benefit' in the form of a 'gratuity' instead of a return of his accumulated contributions with interest, then First Respondent was overpaid by the Teaching Service Commission, even in the face of the

loss he had caused his employer, the appellant. If I am correct, then somebody should be called to account for authorizing the overpayment.

[50] If First Respondent on dismissal was returned his contributions without the employer's contributions then the appellant has no case against the First Respondent in terms of section 32(2)(a) of the Retirement Funds Act as read with the relevant sub-sections of sections 195 and 196 of the Constitution. Even if First Respondent had not been dismissed and therefore entitled to a pension benefit the appellant would, in my opinion, still be without a case under section 32(2)(a) of the Act because section 196(1) of the Constitution was not employed giving rise to a possible decision concurred in by the Teaching Service Commission in its capacity as the appropriate commission to grant a pension benefit to the First Respondent payable with a reduction equivalent to the loss suffered by the appellant. It also follows that if the First Respondent was not entitled to any pension benefits the court *a quo* also misconstrued the proceedings with the result that the consistency or otherwise of section 32(2) (a) of the Act with section 195(6) of the Constitution did not arise for determination. Nor was section 20 of the Constitution in any way implicated. To the extent that the issue for determination was predicated on the possible attachment of pension benefits of the First Respondent, the entire proceedings was a misdirection and a nullity since First Respondent had no pension benefits to deal with.

[51] In the result and for the foregoing reasons, I would dismiss the appeal and make no order as to costs.



MJ Dlamini JA