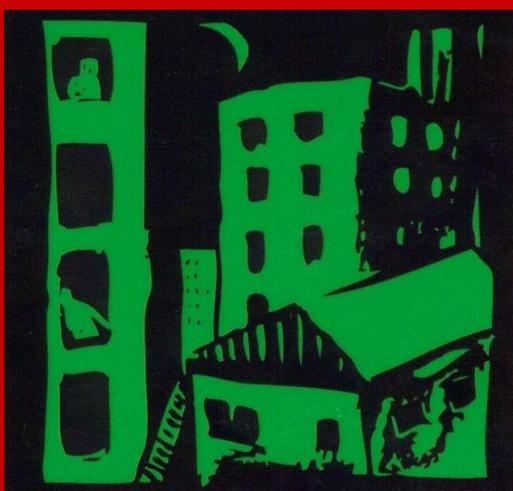


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**The constitutional  
implications of  
pension  
deductions under  
the Pension Funds  
Act of Lesotho: A  
comparative  
analysis\***

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**ABSTRACT**

*This article discusses the constitutional implications of pension deductions in the kingdoms of Eswatini and Lesotho. The article is based on a constitutional problem that arose in Government of Eswatini v Mhlanga, where the Supreme Court declared section 32(2) of the Retirement Funds Act 2005 unconstitutional on the grounds that it conflicted with the Constitution. Two decisions in the case – a majority and a minority decision – will be discussed for the purposes of applying them to Lesotho. The article considers comparative questions, including whether the newly enacted section 33(d) of Lesotho’s Pension Funds Act 5 of 2019 potentially offends the Constitution of Lesotho in the same way as the majority judgment found in Mhlanga. The article recommends that, when called upon, the judiciary in Lesotho should interpret section 33(d) of the Pension Funds Act in line with the minority judgment in Mhlanga.*

**Keywords:** Pension Funds Act; pension deductions; separation of powers; policy development.

**1 INTRODUCTION**

In August 2008, Lesotho adopted major pension reforms by passing the Public Officers’ Defined Contribution Pension Fund Act 8 of 2008. In the main, this Act converted the public officers’ pension fund from a defined benefit fund into a defined contribution fund.<sup>1</sup> These reforms were challenged on constitutional grounds in *Sechele v Public Officers’ Defined Contribution Pension Fund and Others*,<sup>2</sup> a case in which the Court of Appeal upheld the constitutionality of the reforms. In resolving the challenge in *Sechele*, the court cited with approval, among other authorities, the judgment by the Supreme Court of Zimbabwe in *Nyambirai*,<sup>3</sup> where a similar challenge was resolved in favour of government pension reforms in Zimbabwe.

The 2008 reforms affected only pension funds operating in the public sector of Lesotho. Private sector pension funds continued to be regulated by the archaic Income Tax (Superannuation and Life Assurance) Regulations, 1994 (Income Tax Regulations) until the Pension Funds Act 5 of 2019 (PFA 2019) was promulgated in 2019. The PFA 2019 has ushered in far-reaching reforms that change primarily the way in which private

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<sup>1</sup> For a discussion of the reasons for these reforms, see Mhango M “Challenges in the implementation of a compulsory pension fund: The case of Lesotho” (2014) 131(2) *South African Law Journal* 408 at 433–434; Mhango M & Dyani-Mhango NV “Reform of the death benefit provisions in Lesotho’s public sector pension fund: Lessons from South Africa and Swaziland” (2016) 24(2) *African Journal of International and Comparative Law* 199 at 199–200.

<sup>2</sup> *Sechele v Public Officers’ Defined Contribution Pension Fund and Others* [2011] LSCA 23 (in the main, the applicant challenged the fact that the legislation compelled employees to contribute to the fund); *Sechele v Public Officers’ Defined Contribution Pension Fund and Others* [2010] LSHC 94.

<sup>3</sup> *Nyambirai v National Social Security Authority and Another* 1996 (1) SA 636.

sector pension funds are controlled, but, in a secondary way, how public sector pension funds are controlled.<sup>4</sup>

It is important to state at the outset that two types of statutes regulate pension funds in Lesotho. The first type comprises mainly the Public Officers' Defined Contribution Pension Fund Act and the Specified Offices Defined Contribution Pension Fund Act 19 of 2011. These statutes establish two public sector pension funds, namely the Public Officers' Defined Contribution Pension Fund (PODCPF) and the Specified Offices Defined Contribution Pension Fund (SODCPF). The statutes apply only to public officers who become members of these special pension funds.<sup>5</sup> The second type comprises the PFA 2019, which applies to all pension funds except when it conflicts with a special pension statute. In this regard, Lesotho is one of the few countries in southern Africa that operates a parallel pension regime in which public sector pension funds have their own legislation separate from the main legislation governing pension funds. In countries such as South Africa and Eswatini where a similar arrangement is in place,<sup>6</sup> constitutional problems have been experienced.<sup>7</sup> This phenomenon is relevant to Lesotho as well.

This article draws on that experience, particularly that of Eswatini, in relation to deductions from pension benefits. The article is based on a recent landmark decision by the Supreme Court of Eswatini in *Government of Eswatini v Lucky Mhlanga and Others*,<sup>8</sup> which declared section 32(2) of the Retirement Funds Act 5 of 2005 (RFA 2005) unconstitutional for breaching the provisions in sections 195 and 196 of the Constitution of Eswatini. The two opinions in the case will be discussed in order to apply them to Lesotho.

The importance for Lesotho of the judgment in *Mhlanga* is that section 32(2) of the RFA 2005, which was the subject of the dispute, is similar, in significant ways, to section 33(d) of the PFA 2019. Also, sections 195 and 196 of the Constitution of Eswatini are similar to sections 150 and 151 of the Constitution of Lesotho of 1993. These

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<sup>4</sup> See section 3 of the PFA 2019, which excludes the application of the PFA 2019 to public sector pension funds when there is a conflict with a public sector pension statute.

<sup>5</sup> The PODCPF and the SODCPF are special pension funds because, unlike all other pension funds in Lesotho, they have a special pension statute that establishes and regulates them.

<sup>6</sup> In Eswatini, there are, in addition to the Retirement Funds Act 5 of 2005, at least three separate pension statutes that establish and regulate special pension funds: the Public Service Pension Fund Order 1993; the Members of Parliament and Designated Office Bearers Pension Fund Act 11 of 2013; and the Swaziland National Provident Fund Order 23 of 1974. In the South African context, the term "public sector" is broad. There are at least eight separate statutes: the Associated Institutions Pension Fund Act 41 of 1963; the Members of Statutory Bodies Pension Act 94 of 1969; the Associated Institutions Provident Fund Act 11 of 1971; the Closed Pension Fund Act 197 of 1993; the Government Employees Pension Law Proclamation 21 of 1996; the Post Office Act 44 of 1958; the SA Public Library (Pensions and Provident Fund) Act 9 of 1924; and the Transnet Pension Fund Act 62 of 1990.

<sup>7</sup> For a discussion of the problems in Eswatini and South Africa and their relevance to Lesotho, see Mhango and Dyani-Mhango (2010) at 205–213.

<sup>8</sup> *Government of Eswatini v Lucky Mhlanga and Others* [2020] SZSC 3.

similarities in the legal framework, coupled with the judgment in *Mhlanga*, raise important comparative questions. Chief among these is whether the newly enacted section 33(d) of the PFA 2019 potentially offends the Constitution of Lesotho in the same way that section 32(2) of the RFA 2005 offended the Constitution of Eswatini, as the majority judgment found in *Mhlanga*. Since there were two opinions in *Mhlanga*, an additional question for this article is whether the minority opinion in *Mhlanga* offers a better justification for how section 33(d) of the PFA 2019 ought to be interpreted. Another question raised by the experience in Eswatini is whether section 33(d) of the PFA 2019 can withstand constitutional scrutiny in Lesotho. This question could arise if a challenge like the one in *Mhlanga* were to be raised in Lesotho.

The article is divided into four parts in addition to this introduction. Part two discusses Lesotho's private pension framework, the legislation governing public sector pension funds, and the constitutional provisions which form part of that framework. There is also discussion of the parallel nature of the pension regime in Lesotho and, in this regard, of the potential problems of equal protection associated with it. In addition, part two discusses the emerging jurisprudence around pension deductions in Eswatini. The third part examines the majority and dissenting opinions in *Mhlanga* with a view to drawing lessons for Lesotho, in particular as regards how it should address the comparative questions raised in that case – these questions will almost certainly arise in Lesotho. Part four conducts a comparative analysis of Eswatini and Lesotho, as well as an analysis of the legislative framework in Eswatini. In the light of the discussion in part three, part four considers the possible constitutional validity of section 33(d) of the PFA 2019, which, contrary to the provisions in the Constitution of Lesotho, permits a board of a pension fund to make deductions from a member's pension benefits. Concluding remarks are made in part five.

## 2 THE LEGISLATIVE FRAMEWORK GOVERNING LESOTHO'S PENSION FUNDS

The PFA 2019 is the default legislation that provides national standards for all pension funds in Lesotho. Section 3 of the PFA 2019 encapsulates this principle:

### "3. Application of the Act

(1) The Act shall apply to all pension funds in Lesotho.

(2) Where a pension fund is subject to the provisions of any other law specifically applicable to such pension fund, the provisions of this Act which would otherwise apply to such pension fund shall not apply wherever those provisions would be inconsistent with any such law."

A few public sector pension funds, chiefly the PODCPF and SODCPF, are established and regulated by specific pension statutes as well as the PFA 2019.<sup>9</sup> The interaction between the PFA 2019 and these two public sector pension funds is governed by section 3 of the PFA 2019. The latter recognises these public sector pension funds, as well as the conflict

<sup>9</sup> Public officers born before 1 April 1964 continue to be regulated by the Pension Proclamations Act 4 of 1964. The Corporate Bodies Pension Scheme is a defined benefit fund established under the Pension Scheme (Corporate Bodies) Act 6 of 1979, as amended.

that could arise between the specific pension statutes that establish them and the provisions of the PFA 2019. To minimise this conflict, section 3(2) entrenches what may be called a “pre-emption clause”<sup>10</sup> to ensure that those specific pension statutes supersede the provisions of the PFA 2019. In other words, if the application of the PFA 2019 conflicts with any provisions of the two specific pension statutes, then, under the “pre-emption clause”, the specific pension statute prevails over the PFA 2019. For example, under the current arrangement, the death benefit provisions, or the provisions relating to the maintenance of financially sound conditions in the PFA 2019, would probably not apply to public officers because the statutes establishing the PODCPF and SODCPF contain provisions that conflict with the PFA 2019.<sup>11</sup>

Section 3 of the PFA 2019 is not a new feature of Lesotho’s pension regulatory framework. Traditionally, Lesotho has maintained a parallel regime to regulate pension funds in the private and public sectors of the economy. In the public sector, the Pension Proclamations Act 4 of 1964<sup>12</sup> was for a long time the primary legislation that controlled public sector pension funds, until it was replaced by the Public Officers’ Defined Contribution Pension Fund Act and its sister legislation, the Specified Offices Defined Contribution Pension Fund Act.<sup>13</sup> In addition to the Public Officers’ Defined Contribution Pension Act, the Constitution of Lesotho 1993 controls certain aspects of public sector pension funds. In the private sector, the Income Tax Regulations controlled the administration of pension funds until they were replaced by the PFA 2019. Therefore, examining the framework that governs deductions from pension benefits in Lesotho involves a dual examination of the framework contained in the two

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<sup>10</sup>Borrowed from US literature on section 514 of the Employment Retirement Income Security Act 1974 (ERISA). Under ERISA, to pre-empt is to take higher priority over or supersede another law. ERISA enjoys higher priority than similar or directly conflicting state laws. See Goodyear J “What is an employee benefit plan: ERISA preemption of any willing provider laws after Pegram” (2001) 101(5) *Columbia Law Review* at 1107; Bailey JD “ERISA pre-emption” (1997) 74(2) *Denver University Law Review* at 473; Covington RN “Amending ERISA’s preemption scheme” (1998) 8(2) *Kansas Journal of Law and Public Policy* at 1; Irish LE & Cohen HJ “ERISA pre-emption: Judicial flexibility and statutory rigidity” (1985) 19(1) *University of Michigan Journal of Law and Reform* 109.

<sup>11</sup>See sections 25, 34 and 35 of the PFA 2019. See also sections 26, 30, the definition of a dependant in section 2 of the Public Officers’ Defined Contribution Pension Fund Act, and the definition of a dependant in section 3 of the Specified Offices Defined Contribution Pension Fund Act.

<sup>12</sup>This legislation dates to 1879, when the Public Service Widows Pension Act 22 of 1879 was enacted. The Pension Proclamations Act 4 of 1964 was preceded by several pieces of legislation, including the Civil Service and Pension Funds Act 32 of 1895; the Office of Resident Commissioner on Fixed Establishment of Civil Service of Basutoland and making Provision for Pension to Sir Marshall J Clarke 7 of 1900; the Pension Proclamation 13 of 1908; the Basutoland Nursing Sisters (Retiring Allowances) Proclamation 21 of 1931; the Basutoland Provident Fund (Repeal) Proclamation 74 of 1950; the Basutoland Special Pensions Proclamation 13 of 1953; the Basutoland Special Pensions (Further) Proclamation 78 of 1953; the Basutoland Special Pensions Proclamation 66 of 1954; the Basutoland Nursing Sisters Allowances (Amendment) Proclamation 101 of 1955; the Adaptation of Existing Laws (No. 1) Order of 1964; and the Adaptation of Existing Laws (No 2) Order of 1964.

<sup>13</sup>Specified Officers’ Defined Contribution Pension Fund Act 19 of 2011

statutes, the Public Officers' Defined Contribution Pension Fund Act<sup>14</sup> and the PFA 2019, read together with the relevant provisions in the Constitution of Lesotho. The next two subsections are dedicated to this discussion.

## 2.1 The Constitution of Lesotho

Pension funds exist as part of Lesotho's constitutional and treaty obligation to advance social security for its citizens.<sup>15</sup> Their primary goal is to provide a regular income to their members upon retirement or disability, or death benefits to the dependants of the member.<sup>16</sup> To help achieve this goal, the framers of the Constitution of Lesotho, as well as Parliament in subsequent years, have afforded special protection to pension benefits in the Constitution and legislation. Section 150 of the Constitution contains measures that safeguard public officers' pension benefits. The section reads as follows:

"150. Pensions laws and protection of pension rights

(1) The law to be applied with respect to any pensions benefits that were granted to any person before the coming into operation of this Constitution shall be the law that was in force at the date on which those benefits were granted or any law in force at a later date that is not less favourable to that person ...

(6) References in this section to the law with respect to pensions benefits include ... references to the law regulating the circumstances in which any such benefits that have been granted may be withheld, reduced in amount or suspended and the law regulating the amount of any such benefits"

Section 151 of the Constitution provides additional safeguards for the pension benefits of public officers. It prohibits the withholding, reduction or suspension of pension benefits unless there is agreement by the Public Service Commission, which is a constitutionally created body. This section provides as follows:

"151. Power to withhold Pensions, etc.

(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,

<sup>14</sup> While our focus will be on the Public Officers' Defined Contribution Pension Fund Act, much of what is contained in this Act is identical to the Specified Offices Defined Contribution Pension Fund Act.

<sup>15</sup> See *Thahane and Others v Specified Offices Defined Contribution Pension Fund and Others* [2017] LSCA 10 at para 31 (characterising pension law as social security legislation and as a constitutional and treaty obligation for Lesotho). See also section 30(a)(i) of the Constitution of Lesotho.

<sup>16</sup> Both the legislative and treaty frameworks promote the payment of a regular income rather than lump sum payments. See sections 31 and 35 of the Specified Offices Defined Contribution Pension Fund Act. See also Article 9.2 of the Code on Social Security in the SADC (2007), which provides as follows: "9.2 The benefits payable in the event of death of a breadwinner should include a death grant, to assist with funeral costs and – subject to qualifying conditions – survivors' benefits, which should be in the form of periodical payments, aimed at the upkeep of survivors."

those benefits shall be granted and may not be withheld, reduced in amount or suspended unless the Public Service Commission concurs in the refusal to grant the benefits or as the case may be, in the decision to withhold them, reduce them in amount or suspend them.”

Two important judicial points should be made in relation to the above constitutional provisions to enable an understanding of their scope and impact on Lesotho’s legislative pension framework. These points will be made in the context of the Public Officers’ Defined Contribution Pension Fund Act.

### **2.2 The Public Officers’ Defined Contribution Pension Fund Act**

The first point is that the apex court in Lesotho has addressed the question of how far section 150 goes in protecting pension benefits and the limits it places on Parliament’s ability to regulate private pension benefits. This question was considered in the landmark case of *Sechele*,<sup>17</sup> where the court held that, to ensure compliance with section 150(1) and (2) of the Constitution, any legislation in respect of pensions must not create less favourable conditions to a concerned public officer.<sup>18</sup> The court also observed that Mr Sechele, who lodged the initial lawsuit, had complained that section 27<sup>19</sup> of the Public Officers’ Defined Contribution Pension Fund Act provided him with a much smaller gratuity and pension benefit upon his retirement than he would have been entitled to under the repealed Defence Force Regulations of 1998.<sup>20</sup> Under the Defence Force Regulations, Mr Sechele would have been entitled to a 75 per cent lump sum benefit, as opposed to 25 per cent under the new and impugned legislation.<sup>21</sup>

The court dismissed the complaint as premature.<sup>22</sup> In its view, since there is potential for growth in the investments of the PODCPF – owing to the fundamental nature of a defined contribution fund<sup>23</sup> – it was impossible for Mr Sechele to sustain the argument that he would have received more favourable benefits under the Defence Force Regulations than under the Public Officers’ Defined Contribution Pension Act.<sup>24</sup>

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<sup>17</sup>*Sechele v Public Officers Defined Contribution Pension Fund and Others* [2011] LSCA 23.

<sup>18</sup>*Sechele v Public Officers* (2011) at para 23.

<sup>19</sup>Section 27 provided that “[o]n retirement, a member shall be entitled to a portion of his or her fund credit to the maximum of 25% as cash benefit. The remaining percentage shall be used to purchase an annuity for him or her.”

<sup>20</sup>*Sechele v Public Officers* (2011) at para 25.

<sup>21</sup>*Sechele v Public Officers* (2011) at para 25. See also section 27 of the Public Officers’ Defined Contribution Pension Fund Act.

<sup>22</sup>*Sechele v Public Officers* (2011) at para 26.

<sup>23</sup>See Mhango M “Challenges in the implementation of a compulsory pension fund: The case of Lesotho” (2014) 131(2) *South African Law Journal* 408 at 428–430 (explaining the characteristics of a defined contribution pension fund and noting that its benefits are determined based on the contributions made and the investment growth on those contributions). See also *Komane Motaba v Board of Trustees: Public Officers’ Defined Contribution Fund and Others* C OF A (CIV) 31/2021 at para 14 (explaining that the PODCPF is a defined contribution fund).

<sup>24</sup>*Sechele v Public Officers* (2011) at para 28.

Nevertheless, the court reasoned that in the event that the PODCPF's investments do not perform as expected, causing Mr Sechele to receive fewer benefits than under the Defence Force Regulations, the Public Officers' Defined Contribution Pension Fund Act would contravene section 150(1) and (2) of the Constitution.<sup>25</sup> According to the court, the only way to prevent this risk of a constitutional breach is to read the following words into section 27 of the said Act:

“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.”<sup>26</sup>

Therefore, the court dismissed the appeal, but ordered that the words quoted above be read into the Public Officers' Defined Contribution Pension Fund Act to save it from being declared invalid.

The second point is that the framers of the Constitution found it appropriate to deviate in selected circumstances from the general protections the latter affords to the pension benefits of public officers. These deviations are outlined in the Public Officers' Defined Contribution Pension Fund Act, which must be interpreted together with the above constitutional provisions. For instance, section 32 of the Public Officers' Defined Contribution Pension Fund Act provides a general prohibition against any cession and attachment of pension benefits. Still, Parliament found it fitting to create exceptions to this general prohibition within the same provision. Hence, section 32 contains the general prohibition and exception, which read as follows:

“32. A benefit granted under this Act shall not be assignable, executable, payable or transferrable except for purposes of satisfying –

- (a) a debt to the Government;
- (b) a maintenance order; or
- (c) a divorce order.”

In terms of section 32(a), the PODCPF is permitted to pay to, or deduct from a member's pension benefits, an amount representing a debt owed by a member to the government. The policy consideration that necessitated this exception is protecting the government as an employer by permitting it to recoup its debts from a member's pension benefits. The problem with section 32(a) is that it is applied to permit deductions prior to retirement to satisfy a debt to the government. The following are among the debts to the government that are regularly deducted in terms of section 32(a) by the PODCPF: salary advances, salary overpayments, loans or bursaries from the National Manpower

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<sup>25</sup>*Sechele v Public Officers* (2011) at para 28.

<sup>26</sup>*Sechele v Public Officers* (2011) at para 29.

## THE CONSTITUTIONAL IMPLICATIONS OF PENSION DEDUCTIONS

Development Secretariat,<sup>27</sup> bond agreements with the Ministry of Public Service, surcharges (loss of government property), income tax, and motor vehicle advances.<sup>28</sup>

A related problem is that, whilst section 32(a) permits a deduction from pension benefits if a member is indebted to the government, it does not expressly state what kind of debts to the government are covered by the provision. This is why the above-mentioned debts are regularly deducted in terms of section 32(a). This open-ended exception to the general prohibition in section 32 of the Public Officers' Defined Contribution Pension Fund Act has the potential to undermine the social security objectives of the legislation and the Constitution, because pension members could find themselves retiring without sufficient retirement income due to accumulated debts having been deducted from their pension benefits during their employment. Deductions reduce a member's purchasing power. It is not good public policy to permit members of a defined contribution fund to have open-ended access to their savings prior to retirement through loans that can be deducted from their benefits.

This is particularly relevant in Lesotho when one has regard to the two primary risks that drove the 2008 reforms: (1) the risk of underfunding the public service pension system due to other demands on the national budget; and (2) the lack of death benefits when a pensioner dies.<sup>29</sup> If section 32(a) continues to permit open-ended access to benefits before retirement, the problem that the Government of Lesotho sought to address will remain unresolved. Some working Basothos may have insufficient income on their retirement or when their breadwinner passes away, causing them to make financial demands on the national budget.

In *Thahane and Others v Specified Offices Defined Contribution Pension Fund and Others*,<sup>30</sup> the Court of Appeal upheld as constitutionally sound a government policy that prevented a retired member of Parliament from withdrawing more than 25 per cent of his pension fund in cash; the balance of 75 per cent had to be taken in the form of regular payments. The government justified these restrictions on the grounds that this approach would "provide [members] with security of income, particularly in old age, and [would] prevent members from being left destitute at the end of their working lives".<sup>31</sup> In the same vein, we argue that Parliament needs to reform section 32 of the

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<sup>27</sup>This is a government bursary or scholarship scheme for higher education studies in Lesotho.

<sup>28</sup>Email from Advocate Sempe Moshoeshe, corporate secretary of the PODCPF, 8 July 2022 5:21pm (on file with the authors).

<sup>29</sup>Mhango & Dyani-Mhango (2016) at 199. See also Central Bank of Lesotho "Economic review: Introduction of government pension fund and its implications on inflation, saving and investment in Lesotho" (September 2008) 1-4.

<sup>30</sup>*Thahane v Specified Offices* (2017) at para 25.

<sup>31</sup>*Thahane v Specified Offices* (2017) at para 28. However, see the Specified Offices Defined Contribution Pension Fund (Amendment) Act 2022, which removed the restrictions that were challenged and approved in *Thahane*. Specified officers are now permitted 50 per cent of their pension benefits in cash and the remainder in the form of regular payments. See also the Public Officers Defined Contribution Pension Fund (Amendment) Act 16 of 2022.

Public Officers' Defined Contribution Pension Fund Act by aligning it with the policy justifications correctly advanced in *Thahane*. To put it differently, *Thahane* approved a policy that restricted members from accessing their pension benefits and sought thereby to protect income-earners and their families against a reduction in, or loss of, income due to their exposure to risks in old age.

This policy imperative is equally important in the context of pension deductions and should be applied to address similar risks associated with the current application of section 32(a) of the Public Officers' Defined Contribution Pension Fund Act. One way to achieve this is to specify and restrict the kinds of debts that can give rise to a claim for a deduction from a member's pension benefits. For example, the Public Officers' Defined Contribution Pension Fund Act could be reformed to permit a deduction in the case of a debt to government that arises from a housing loan or guarantee. This could be justified on the ground that it may promote home-ownership, as well as ensure consistency between the policies in the PFA 2019 and the Public Officers' Defined Contribution Pension Fund Act.

Unlike the Public Officers' Defined Contribution Pension Fund Act, the PFA 2019, in its section 33, gives a detailed account of the conditions and the kinds of debt that may give rise to a deduction from a pension fund. The only debts recognised under section 33 of the PFA 2019 for the purpose of making a deduction are housing loans or guarantees. We submit that, through the pre-emption clause in section 3, read in harmony with section 33 of the PFA 2019, the provisions in the PFA 2019 dealing with housing loans or guarantees should be deemed to apply to the PODCPF, because this would eliminate any conflict between the PFA 2019 and the two special pension statutes. The legislative scheme in section 3 of the PFA 2019 is that whatever is not in conflict with or regulated in a specific pension statute is deemed to be regulated by the PFA 2019. Our view is that home loans or guarantees fall into that category.

Another protective measure in the Public Officers' Defined Contribution Pension Fund Act is section 33. In terms of this section, pension benefits are not considered property in a deceased insolvent estate. Specifically, the section reads:

"No benefit or right to a benefit, due and payable, in terms of this Act, to a member, beneficiary or deferred pensioner on or as a result of death of that member, shall be deemed to be property, for purposes of the Insolvency Proclamation 1957 and Estates Proclamation 1937."

Section 33 of the Public Officers' Defined Contribution Pension Fund Act protects pension members by exempting their benefits or right to a benefit from the reach of creditors in the deceased insolvent estate. The exemption means that pension benefits are ring-fenced to cater for members upon their reaching retirement age, or for dependants in the event of the member's death. As alluded to earlier, sections 32(a) and 33 of the Public Officers' Defined Contribution Pension Fund Act must be read consistently with the requirements in sections 150 and 151 of the Constitution. Chief among these requirements is that the Public Service Commission must concur with any possible reduction, suspension or withholding of pension benefits belonging to a public

officer. Public officers are not the only members of pension funds who enjoy certain safeguards over their pension benefits. Employees in the private sector who are members of pension funds also enjoy certain protections from deductions under the PFA 2019. Some of these protections are discussed in the next section.

### 2.3 The Pension Funds Act

The PFA 2019 is the most recent social security legislation introduced in Lesotho. In *Thahane v Specified Offices Defined Contribution Pension Fund*, the court correctly described the Specified Offices Defined Contribution Pension Fund Act as:

“...a noble legislative intervention to practicalise the principle of state policy in section 30(a)(i), of the Constitution of providing pension or retirement benefits to all workers. It also constitutes the implementation of Lesotho’s treaty obligations under Article 18 of the 1981 African Charter on Human and Peoples’ Rights to make special measures to assist the family and protect the aged and disabled.”<sup>32</sup>

This description is even more apt for the PFA 2019 in view of its wide application to all pension funds in Lesotho. Consistent with other modern pension laws,<sup>33</sup> the PFA 2019 contains two significant safety measures for pension beneficiaries. The first is contained in section 32, which protects any pension benefit by declaring it to exist outside the assets of the estate of a member, thereby ring-fencing it from creditors or the Master of the High Court. The section reads: “Notwithstanding anything to the contrary contained in any law or in the rules, any benefit payable by a fund shall not form part of the assets of the estate of a member.” This means that the benefits payable by a pension fund do not fall into the pot containing the assets of the estate of the member.<sup>34</sup> In addition, the phrase “[n]otwithstanding anything to the contrary contained ... in the rules” makes it unmistakably clear that it does not matter what the rules of the fund may say – no benefits, including those benefits contemplated in section 37 of the PFA 2019,<sup>35</sup> may form part of the assets of the member’s estate.

One of the most significant aspects of section 32 of the PFA 2019 is that it shifts a member’s freedom of testation (the power of a person to make a will and testament), in relation to any benefit payable by a pension fund in Lesotho,<sup>36</sup> from being exercised

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<sup>32</sup> *Thahane v Specified Offices* (2017) at para 31. See also *Thahane v Specified Offices Defined Contribution Pension Fund* [2016] LSHC 9 at para 29.

<sup>33</sup> See section 37 of the Botswana Retirement Funds Act 27 of 2014; sections 73, 74 and 75 of the Malawi Pension Act 6 of 2011; sections 31 and 34 of the RFA 2005; and section 60 of the Malawi Local Government Act 42 of 1998.

<sup>34</sup> For an interpretation of the scope of the wording in section 32, see *Kaplan and Katz NNO and Another v Professional and Executive Retirement Fund and Another* [1999] ZASCA 27.

<sup>35</sup> Section 37 provides that “[a]ll benefits not provided for under this Act by a fund shall be dealt with in accordance with the rules of the fund”.

<sup>36</sup> For a discussion of freedom of testation in the pension fund context in South African law, see *Mashazi v African Products Retirement Benefit Provident Fund* 2003 (1) SA 629 (W) at 632H–J; *Ndwandwe v Trustees of Transnet Retirement Fund and Others* [2023] ZAKZDHC 8. See also Marumoagae C “The

through the last will and testament to being exercised through a beneficiary nomination form which is administered separately from the estate. The principle underlying section 32 is that pension benefits do not form part of assets in the deceased's estate, and so the provisions of deceased estate legislation apply, but the pension benefits must be paid in accordance with the statutory scheme in the PFA 2019 or by the rules of the fund.<sup>37</sup> The second safety measure is contained in section 33 of the PFA 2019.<sup>38</sup> It allows deductions from pension benefits to be made by the pension fund, provided that certain conditions are satisfied. Section 33 of the PFA 2019 outlines these conditions:

“A fund may deduct an amount from the benefit of a member in respect of:

- (a) maintenance of dependants of a member by court order;
- (b) a debt arising from a housing loan issued or guarantee granted by the fund in respect of a housing loan of that member;
- (c) an amount for which the employee is liable under a guarantee issued by the employer for the purposes of obtaining a housing loan; and
- (d) an amount representing the loss suffered by the employer due to any unlawful activity of the member for which judgment has been obtained against the member in a court of law or a written acknowledgement of culpability has been signed by the member before a commissioner of oaths.”

For present purposes, attention is drawn to the safeguards in section 33(d). At its core, section 33(d) of the PFA 2019 permits a pension fund to deduct an amount from a member's pension benefits and to pay it to the employer in circumstances where an employee or member causes financial loss to an employer due to unlawful activity by the employee or member. A deduction is permitted, provided that the specific legislative requirements in the PFA 2019 are satisfied. As shown in recent jurisprudence, the objective of this section is to protect the employer's property interests.<sup>39</sup>

#### **2.4 Emerging comparative jurisprudence on pension deductions in Eswatini**

Jurisprudence has emerged around the application and scope of the power to deduct and withhold pension benefits in Eswatini. This jurisprudence is relevant to understanding Lesotho's new pension dispensation, especially in view of the similarities

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weight accorded to the wishes of deceased retirement fund members when distributing death benefits in South Africa: Do such members have freedom of testation?” (2018) 30(1) *South African Mercantile Law Journal* 115 at 129-130.

<sup>37</sup>See sections 34 & 35 of the PFA 2019. See *Executor, Estate Late Sentje Lebona and others Maliako Lebona/Mpontsheng Monaheng & Others* [2022] LSH 309 Civ (where one of the questions was whether the executor of the deceased estate had the right to access and distribute, in terms of the Administration of Estates Proclamation Act 19 of 1935, the death benefits accruing from the pension fund: the court ruled that the Specified Offices Contribution Pension Fund Act precludes the executor of the deceased estate from accessing and distributing death benefits accruing from a pension fund).

<sup>38</sup>Section 33 of the PFA 2019 must be read together with another protective measure in section 40 of the PFA 2019.

<sup>39</sup>See *Standard Bank Limited v Motsa and 11 Others* [2012] SZHC 124 and *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen* [2009] 2 All SA 225 (SCA).

## THE CONSTITUTIONAL IMPLICATIONS OF PENSION DEDUCTIONS

in the legal traditions and legislative frameworks of the two countries. Section 32 of the RFA 2005 regulates pension deductions in Eswatini. It provides as follows:

“(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 the employer due to any unlawful activity of the member and for which judgement has been obtained against the member in a court or a written acknowledgement of culpability has been signed by the member and provided that the aforementioned written acknowledgement 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.”

In *Standard Bank Limited v Motsa and 11 Others*,<sup>40</sup> the High Court of Eswatini was called upon to resolve a dispute involving a pension deduction after the death of a member. In resolving the dispute, the court established a principle that pension benefits may be deducted or withheld in terms of section 32 of the RFA 2005 following the death of a member. Before 2012, it was not certain whether, after the death of a pension fund member, a pension fund in Eswatini was permitted to deduct money from a member's pension fund account and pay it to an employer as compensation for embezzlement in terms of section 32 of the RFA 2005. In that year, this question was tested and answered affirmatively in *Standard Bank Limited*. It is important to highlight the context in which these judicial pronouncements were made.

In *Standard Bank Limited*, a certain Mr Mavela Motsa, an employee of Standard Bank of Swaziland Limited, died while in the employ of Standard Bank. Mr Motsa was a member of the Standard Bank Swaziland Pension Fund and, as a result, his dependants were entitled to certain benefits from the fund upon his death. The facts of the case reveal that the fund decided to pay two of his dependants.<sup>41</sup> Before the pension fund could pay out any death benefits, Standard Bank of Swaziland discovered that Mr Motsa had embezzled E5.5 million.<sup>42</sup> Standard Bank of Swaziland then started a process to deduct some of this money from the member's death benefit by approaching the High Court with a request for the pension fund and the executor of the estate to be interdicted from

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<sup>40</sup>*Standard Bank Limited v Motsa and 11 Others* [2012] SZHC 124.

<sup>41</sup>See para 40(2) of the order of the court, stating that “the 4th and 5th Respondents be and are hereby interdicted from paying out any pension benefit to the first and second Respondents or to any of the beneficiaries of the deceased estate, pending the final determination of the action”.

<sup>42</sup>*Emalangeni* is the currency of Eswatini. One *lilangeni* is equivalent to one South African rand.

paying out death benefits or liquidating or distributing any assets of Mr Motsa's estate.<sup>43</sup> The dependants and the executors of Mr Motsa's estate objected to the bank's attempts, arguing that the deduction provisions in section 32 of the RFA 2005 apply only to a member who is alive and exiting the fund due to resignation, dismissal or retirement. Since the member in this case did not resign, retire or get dismissed, section 32 of the RFA 2005 could not be applied to deduct money from the employee's death benefit.

The court dismissed this argument. It reasoned that, since the misconduct resulting in loss to the employer could be discovered after a member's retirement, dismissal or death, a rigid interpretation of section 32 of the RFA 2005 to limit the application of the deduction provisions to circumstances where the member is still alive would defeat the intention of Parliament.<sup>44</sup> The court noted that the purpose of the deduction provisions is to protect the employer's financial interest in recovering misappropriated funds by allowing the employer to deduct from an employee's pension fund account any money which has been misappropriated by an employee.<sup>45</sup> The nub of the court's reasoning was that it does not matter whether a deduction is made after the employee has died, resigned, retired or been dismissed. Parliament wanted to ensure that the employer is compensated for financial loss resulting from an employee's misconduct; whether the misconduct is discovered before or after the death of the employee is beside the point. The position of the court in *Standard Bank Limited* was that Parliament could never have intended to allow deductions only against a member or employee who is alive rather than deceased. The court reasoned that if this had been the case, Parliament would have made it unambiguously clear.

In the end, the court held that section 32 of the RFA 2005 must be read widely, by extending it to circumstances "where a member has died without acknowledging culpability or without a judgment against him, and his employer proceeds against his estate, dependants or beneficiaries who are by the rules of the Act liable to be deducted".<sup>46</sup> The effect of this ruling is that the deduction provisions in Eswatini will be understood to apply when a member ceases to be a member of the fund, whether due to death, resignation, dismissal or retirement. The court also held that a pension fund is empowered to withhold pension benefits to pursue the financial interests of the employer based on the circumstances outlined in section 32 of the RFA 2005. The constitutionality of section 32 of the RFA 2005 came under the spotlight in *Mhlanga*, which is discussed in the next section.

### **3 PENSION DEDUCTIONS IN ESWATINI: *GOVERNMENT OF ESWATINI V LUCKY MHLANGA AND OTHERS***

#### **3.1 The relevant facts**

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<sup>43</sup> *Standard Bank Limited v Motsa and 11 Others* (2008) at para 1.

<sup>44</sup> *Standard Bank Limited v Motsa and 11 Others* (2008) at para 31.

<sup>45</sup> Citing *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen*.

<sup>46</sup> *Standard Bank Limited v Motsa and 11 Others* (2008) at para 32.

## THE CONSTITUTIONAL IMPLICATIONS OF PENSION DEDUCTIONS

The case of *Mhlanga* arose after Mr Mhlanga, a member of the Public Service Pension Fund (PSPF), was dismissed as head teacher in 2016 for embezzling E114,333. Following his dismissal, the government sued in the High Court to prevent the PSPF from paying out any pension benefits to Mr Mhlanga pending the outcome of the lawsuit. The government instituted this lawsuit to recover the embezzled funds through a deduction from his pension benefits. Both the PSPF and Mr Mhlanga resisted the government's court action by challenging the constitutionality of section 33(2) of the RFA 2005, which was the basis for the court action. In their view, a retirement fund is not permitted to deduct money from pension benefits except for maintenance purposes. The High Court found that section 33(2) is unconstitutional because it permits a retirement fund to deduct an amount of money other than for maintenance purposes from a public officer's pension benefits. According to the High Court, this conflicts with section 195(6) of the Constitution of Eswatini, which provides as follows:

"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 judgement or civil proceedings are in respect of maintenance."

Based on the above provision, the court held that the pension benefits of a public officer cannot be attached by an order of court to satisfy any judgment against an affected member. The only exception to this rule is where the judgment is in connection with satisfying maintenance obligations.

The government appealed this decision to the Supreme Court on two grounds. The first was that the High Court erred by holding that section 196(1) of the Constitution is a provision of general application, as opposed to section 195(6), which is of specific application to public officers.<sup>47</sup> Section 196(1) of the Constitution provides as follows:

"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."

The High Court found that section 195(6) is restricted to public officers. It also found that this section does not discriminate against private sector employees (who are not protected by it) but differentiates them from public officers. The government's position was that leaving private sector employees open to the full application of section 32 of the RFA 2005 leads to discrimination which is outlawed by the equal protection clause

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<sup>47</sup> *Government of Eswatini v Mhlanga* (2020) at para 10.

in section 20 of the Constitution of Eswatini.<sup>48</sup> The government's argument was that section 195(6) is clear and unambiguous in that it regulates public sector employees and excludes private sector employees.<sup>49</sup>

The second ground of appeal related to the question of whether the High Court was correct in declaring the entire section 32(2) invalid. On this point, one of the respondents, the Financial Services Regulatory Authority (FSRA), the regulator of pension funds in Eswatini, submitted that the High Court was correct in its decision. The FSRA submitted that section 195(6) is not unique to Eswatini. Other jurisdictions, such as India and United States, retain similar provisions to prevent the attachment of the pension benefits of public officers.<sup>50</sup>

### 3.2 The majority decision

Based on the above contentions, the Supreme Court endorsed the protectionist view advanced by the FSRA. It held that, in view of section 195(6), the only permissible deductions from the pension benefits of a public officer that can be lawfully made through a court order are the ones relating to maintenance.<sup>51</sup> Put simply, a public sector retirement fund such as the PSPF can deduct money from pension benefits only if such deduction is to satisfy a court's maintenance order.

The majority opinion left open the question of whether the Constitution is limited in its application to public officers, thereby entrenching the idea of a parallel pension regime in Eswatini. In resolving the second ground of appeal, the Supreme Court concluded that the entire section 32 of the RFA 2005 was not unconstitutional; according to the court, only section 32(2)(a) of the RFA 2005 was unconstitutional. In arriving at this conclusion, it reasoned that section 32(1) of the RFA 2005 permits a retirement fund to deduct an amount from a member's pension benefits based on a debt from a housing loan or guarantee issued by the employer under section 19 of the RFA 2005. The court went on to review section 19, which regulates the investment of retirement fund assets through either the granting of a loan to a member as an investment or the issuance of a financial guarantee so that a member may obtain a loan to enable him or her to build, renovate or purchase a house.<sup>52</sup>

<sup>48</sup>Section 20(1) of the Eswatini Constitution provides that "[a]ll persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law".

<sup>49</sup>*Government of Eswatini v Mhlanga* (2020) at para 10.

<sup>50</sup>*Government of Eswatini v Mhlanga* (2020) at para 12. For some Indian authorities on deductions, see *State of Jharkhand and Ors v Jitendra Kumar Srivastava and Ors* (2013) 12 SCC 210 (holding that the withholding of pension benefits is not permitted when departmental or judicial proceedings are still pending); *Dr Hira Lal v State of Bihar and Ors* Civil Appeal No. 1677-1678 of 2020 (holding that pension benefits cannot be withheld without the sanctioning of the rules of the fund); and *Vijay Kumar Mishra v State of Bihar* 2017 (1) PLJR 575 (where the High Court upheld the right to withhold pension benefits pending the outcome of a criminal case).

<sup>51</sup>*Government of Eswatini v Mhlanga* (2020) at para 18.

<sup>52</sup>See section 19(4) of the RFA 2005, which provides:

Based on its analysis, the majority court held that section 32(1), read together with section 19 of the RFA 2005, should permit a retirement fund to deduct money from pension benefits in the circumstances referred to in those sections.<sup>53</sup> In its view, the deductions permitted in section 32(1), combined with section 19, do not offend the Constitution and should not have been struck down by the High Court. The court decided that only the first part of section 32(2) of the RFA 2005 was unconstitutional. This means in effect that the government as an employer cannot deduct money from its employee's pension fund benefits as compensation for suffering financial loss due to unlawful activity such as embezzlement. As to the second part of section 32(2)(a) of the RFA 2005, the court reasoned that the subsection is saved from constitutional attack provided that the same restrictions found in section 19(8) of the RFA 2005 are applied to deductions. Chief among those restrictions is that deductions cannot exceed 60 per cent of the value of the member's cash withdrawal benefit in the fund.<sup>54</sup> Based on this reasoning, the court held that section 32(2) of the RFA 2005 should be amended by Parliament and that the first part of section 32(2)(a) must be read down from the RFA 2005.

Essentially, the court read into the legislation and introduced a new condition for the application of the second part of section 32(2)(a). While it is not unusual for a court to read into the legislation as a remedy, the court's approach in this case (as explained later) is constitutionally problematic on grounds related to separation of powers and institutional competence. In line with its decision, the court ordered Parliament to amend section 32(2) within 12 months.

### 3.3 Dissenting opinion

The judgment in *Mhlanga* was not unanimous. Justice Dlamini penned a minority opinion in which he disagreed with the majority on a few fundamental grounds. At the outset, Dlamini notes that the necessary provisions of the relevant Acts and Constitution were not correctly interpreted and applied. In his view, the inquiry in this case should have started with the Public Service Pension Order of 1993, because this legislation gives substantive content to what is contemplated in section 196(1) of the Constitution. We shall return to this point shortly, but for present purposes it is important to highlight Justice Dlamini's historical account of sections 123 and 124 of the Constitution

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"(4) Notwithstanding the provision of subsection (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 make additions or alterations to or to maintain or repair a dwelling which belongs 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."

<sup>53</sup> *Government of Eswatini v Mhlanga* (2020) at para 26.

<sup>54</sup> *Government of Eswatini v Mhlanga* (2020) at para 27.

of Swaziland of 1966. He correctly notes that the latter constitutional provisions were largely reproduced in sections 195 and 196 of the current Constitution.

In his interpretation, section 196(1) of the Constitution allows Parliament to authorise any person or authority to decide whether pension benefits can be granted, withheld, reduced or suspended. Once granted, such pension benefits are constitutionally protected and may be suspended, withheld or reduced only if the appropriate constitutionally established commission concurs. For Justice Dlamini, the starting-point of the analysis by any person or authority who enjoys the discretion to grant or not grant pension benefits is the law that establishes or confers the discretion. In his view, the Public Service Pension Order is one such law, and the Board of the PSPF should have first considered whether the Pension Service Pension Order conferred it with any discretion to decide one way or another about Mr Mhlanga's termination benefits.

Justice Dlamini notes that another law envisaged by the Constitution is the RFA 2005. The latter gives discretion to the PSPF to deduct from a member's benefits an amount of money as compensation for the damage suffered by the government (as an employer) if confirmed by a court order or a written acknowledgement of culpability signed by the member. From this analysis, Justice Dlamini concludes that the PSPF is permitted to deduct money from pension benefits to pay the government, on condition that the Teaching Service Commission concurs with a recommendation by the board of the PSPF. Justice Dlamini's minority opinion reveals that the framers of the Constitution in Eswatini opted for a general rule, contained in section 195(1), which protects pension benefits from invasion by creditors, and an exception to that general rule, contained in section 196(1), which grants an appropriate commission the authority to derogate from it. Dlamini's analysis dispels the proposition that section 32(2) of the RFA 2005 is inconsistent with the provisions of section 195(6) because the former is a law which, in section 196(1), assigns discretion to any authority to regulate pension benefits.

According to Justice Dlamini, if section 32(a) of the RFA 2005 is invalid on the basis that it conflicts with section 195(6), then section 196(1) of the Constitution is pointless because it deals with a situation that will never arise. Simply put, the framers of the Constitution contemplated that Parliament would enact legal provisions such as section 32 of the RFA 2005 to implement sections 195 and 196 of the Constitution read together; if section 195 is used to invalidate laws that seek to implement section 196, this renders the constitutional scheme redundant.

As a remedy, Justice Dlamini proposes an interpretation that harmonises the relevant constitutional provisions and section 32(2)(a) of the RFA 2005. He reasons that what would ensure harmony between the Constitution and section 32(2)(a) of the RFA 2005 is for the applicable commission – in the present case, the Teaching Service Commission – to concur in a proposed deduction by the PSPF. In effect, Justice Dlamini's approach is that a decision by the board of the PSPF made under section 32(2)(a) of the RFA 2005 is not final (though it has legal consequences) unless it obtains the concurrence of the

relevant commission set up under the Constitution.<sup>55</sup> The problem in this case, according to Justice Dlamini, is that the Teaching Service Commission acted hastily by taking action without first considering if any discretion were conferred on it by the provisions of the Public Service Pension Order. He fears that this could encourage widespread embezzlement of funds by school officials because their pension benefits, as held by the majority, would be protected from attachment by the employer.

On the question left open by the majority judgment – whether sections 195 and 196 of the Constitution are restricted to public officers – Justice Dlamini confirms that sections 195 and 196 of the Constitution deal with public officers and their dependants. He notes that these provisions must be distinguished from section 32(2) of the RFA 2005, which applies to all members of pension funds, whether public or private. He observes that even if there is any discrimination or differentiation between private and public sector employees, it is discrimination about which the courts can do nothing. Accordingly, it is permissible to find that a segment of section 32(2) is not applicable to public officers without declaring it invalid because the same segment may be applicable to private sector employees. Based on this reasoning, Justice Dlamini opposed the majority's decision to amend section 32(2).

#### 4 LESSONS FOR LESOTHO

The debate between the justices in *Mhlanga* about the constitutionality of the deduction provisions in the RFA 2005 is likely to play out in Lesotho as well, given the similarities in the constitutional and legal frameworks that govern pension fund deductions in the two kingdoms. Since Eswatini has already taken this journey, its experience serves as a learning opportunity for Lesotho. Hence, in this section we provide an account of how the courts ought to decide the question in *Mhlanga* when it arises in Lesotho.

Constitutional interpretation is a vehicle through which the judiciary enforces and develops the law. One of the early cases decided by the Constitutional Court in South Africa, *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others*,<sup>56</sup> offers some interpretative guidelines which are useful in the context of this article. The court in *Hyundai Motor Distributors* explained the role of the judiciary “when the constitutionality of legislation is in question”.<sup>57</sup> The court noted

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<sup>55</sup>This argument raises policy questions about the independence of the board of trustees, as contemplated in section 8 of the RFA 2005. See also *PPWAWU National Provident Fund v Chemical Energy Paper Printing Wood and Allied Workers Union* 2008 (2) SA 351 (W) (emphasising the independence of the board of trustees). Some English authorities have established the proposition that while recommendations are not binding, they produce legal consequences and burdens. See *R (on the application of Bradley and others) v Secretary of State for Work and Pensions* [2008] 3 All ER 1116 CA; *R (Equitable Members Action Group) v HM Treasury* [2009] EWHC 2495 (Admin), (2009) 159 NLJ 1514 (Gr Brit).

<sup>56</sup> *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) (*Hyundai Motor Distributors*).

<sup>57</sup> *Hyundai Motor Distributors* (2000) at para 22.

that, in those situations, the judiciary is “under a duty to examine the objects and purport of an Act and to read its provisions, so far as is possible, in conformity with the Constitution”.<sup>58</sup> In other words, the judiciary “must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section [of the legislation]”.<sup>59</sup>

The court, citing several authorities, also imposed limitations on this principle of interpretation, which applies to both the judiciary and the legislature. In relation to the judiciary, the court observed that judicial power is limited to interpreting legislation in conformity with the Constitution to the extent reasonably possible.<sup>60</sup> It is possible, as scholars have demonstrated, to assess judicial compliance with this limitation by examining the reasoning offered by the judiciary during adjudication.<sup>61</sup> Building on this point, Mhango has observed that “the exercise of all public power requires some measure of accountability ... the judiciary is not excused from this general requirement of accountability”.<sup>62</sup> He noted that reason-giving is one important way of holding the judiciary to account.<sup>63</sup>

In addition, the legislature “is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them”.<sup>64</sup> In explaining the inner workings of this interpretive principle, the court in *Hyundai Motor Distributors* noted:

“There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read “in conformity with the Constitution”. Such an interpretation should not, however, be unduly strained.”<sup>65</sup>

The process of applying this interpretative principle involves a balancing exercise between competing interests, as well as a dialogue among the branches of government about separation of powers.<sup>66</sup> In its concluding remarks, the court in *Hyundai Motor*

<sup>58</sup>*Hyundai Motor Distributors* (2000) at para 22.

<sup>59</sup>*Hyundai Motor Distributors* (2000) at para 23. See also *S and Others v Van Rooyen and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC) at para 88 (holding that “legislation must be construed consistently with the Constitution and thus, where possible, interpreted so as to exclude a construction that would be inconsistent with judicial independence”); *S v Dzukuda and Others*; *S v Tshilo* 2000 (4) SA 1078 (CC) at para 37(a); *Van Rooyen v The State* 2002 (5) SA 246 (CC) at para 88 (explaining that all law must be interpreted to avoid inconsistency with the Constitution).

<sup>60</sup>*Hyundai Motor Distributors* (2000) at para 24.

<sup>61</sup>Mhango M “Transformation and the judiciary” in Hoexter C & Olivier M (eds) *The Judiciary in South Africa* Cape Town: Juta (2014) at 75.

<sup>62</sup>See Mhango (2014) at 75.

<sup>63</sup>See Mhango (2014) at 75.

<sup>64</sup>*Hyundai Motor Distributors* (2000) at para 24.

<sup>65</sup>*Hyundai Motor Distributors* (2000) at para 24.

<sup>66</sup>*Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) at para 36 (explaining that “in exercising their powers to develop the common law, judges should be mindful of the fact that the major

*Distributors* describes the principle that it articulates as follows: “where a legislative provision is reasonably capable of a meaning that places it within constitutional bounds, it should be preserved. Only if this is not possible should one resort to the remedy of reading in or notional severance.”<sup>67</sup> In *Sechele*, the Court of Appeal in Lesotho endorsed and applied the principle in *Hyundai Motor Distributors* by interpreting the Public Officers’ Defined Contribution Pension Fund Act in conformity with the Constitution. In that case, the court dismissed the appeal and read certain words into the Public Officers’ Defined Contribution Pension Fund Act to ensure that it conformed with the Constitution.

In the context of *Mhlanga* and any possible challenges to section 33 of the PFA 2019, we submit that a court in Lesotho should opt for an interpretation that saves rather than invalidates the deduction provision in the PFA 2019. As indicated earlier, section 151 of the Constitution of Lesotho provides that the pension benefits of public officers may not be withheld, reduced or suspended without the concurrence of the Public Service Commission. In our view, section 33 of the PFA 2019 can be interpreted in conformity with section 150 of the Constitution by reading it to apply only when the Public Service Commission concurs with a decision by the board of trustees of the pension fund at issue. To put it another way, when a board of trustees decides to withhold or deduct from the pension benefits of a public officer, in terms of section 33 of the PFA 2019 such decision must be deemed to be a recommendation to the Public Service Commission and will become final only once the Public Service Commission concurs.<sup>68</sup> Only in relation to private sector employees will a board decision to deduct or withhold become final, because the Constitution does not provide additional safeguards or apply in relation to private sector pension funds.

The problem in Eswatini was that the *Mhlanga* court did not properly consider the principles of *Hyundai Motor Distributors* and the associated separation of powers considerations before reaching its decision. The court in *Mhlanga* was directed to South African authorities, including *Provincial Minister for Local Government, Environmental Affairs and Development Planning, Western Cape v Municipal Council of the Oudtshoorn*

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engine for law reform should be the legislature and not the judiciary”). See also Ngcobo S “South Africa’s transformative constitution: Towards an appropriate doctrine of separation of powers” (2011) 22(1) *Stellenbosch Law Review* 37 at 40–42. Ngcobo discusses the concept of “constitutional dialogue”. A constitutional dialogue is a conversation among the branches of government. It operates whenever a decision taken by a court prompts a response from the legislature or executive. Ngcobo explains that “when I say that the courts are engaged in a constitutional dialogue, first and foremost, I mean that the courts and the other branches are engaged in a continuing conversation about their respective constitutional roles, and what it means to uphold our shared mission to uphold the Constitution”. He goes on to observe that “the idea of a constitutional dialogue arose, in part, in ... response to the need to find a formulation of the separation of powers that accurately captures the true relationship between the courts and other branches of government”.

<sup>67</sup>*Hyundai Motor Distributors* (2000) at para 26.

<sup>68</sup>This is similar to what happens when a portfolio committee adopts a bill. A bill does not become law. It is simply a recommendation to the full house of Parliament, which must then decide whether to enact the bill or not.

*Municipality and Others*,<sup>69</sup> and other judgments that articulate a similar principle to *Hyundai Motor Distributors*. Even though the court in *Mhlanga* agreed that it is important to prefer an interpretation of a statutory provision that avoids any constitutional misalignment, it noted that one must be cautious not to opt for an interpretation that cannot be supported by the text of the provision. In its consideration of this principle, the court did not address the minority's view, which demonstrated that section 32 of the RFA 2005 can be interpreted in conformity with the Constitution of Eswatini.

The remedy of reading-in which was applied in *Mhlanga* is a well-established constitutional principle.<sup>70</sup> However, the remedy is often not appropriate in the technical and polycentric terrain of pension funds and the concomitant finance, tax or budgetary considerations reserved for the executive and legislature. Courts are not well suited to judge technical pension policy decisions that should be made by specialist bodies such as pension regulators,<sup>71</sup> tax authorities and pension experts.<sup>72</sup> We criticise the majority judgment in *Mhlanga* for overreaching because it fails to show deference to the policy choices adopted by the legislature and executive branches when it fashioned the remedy in that case.<sup>73</sup> In crafting the remedy in *Mhlanga*, the court considered the investment rules in section 19 of the RFA 2005 and applied them to the deduction provision in the same legislation.<sup>74</sup> This was incorrect. Section 19 governs the

<sup>69</sup>*Provincial Minister for Local Government, Environmental Affairs and Development Planning, Western Cape v Municipal Council of the Oudtshoorn Municipality and Others* 2015 (6) SA 115 (CC) at para 23 (holding that “this Court warned 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 an interpretation that cannot be readily inferred from the text of the provision”).

<sup>70</sup> See *Sechele v Public Officers* (2011); *Schachter v Canada* [1992] 2 SCR 679 (discussing the appropriate use of the reading-in remedy); *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) at para 74; *Lawyers for Human Rights and Others v Minister of Home Affairs and Others* 2004 (4) SA 125 (CC) at paras 45-47.

<sup>71</sup> In Lesotho, the Minister of Finance sponsored the Specified Offices Contribution Pension Fund Act, as amended, which incorporated a government policy to promote social security in relation to members of Parliament who resigned and those who retired from office. The court in *Thahane* rejected calls to interfere with this policy position by declaring it unconstitutional. The court concluded that “the question whether the retired members of parliament should be treated the same as those who have resigned, involves a matter of policy and provided that the differentiation is not arbitrary or irrational, it is not for a court to make such choice on the basis that the scheme chosen by the legislature could perhaps be improved in one or more respect”. *Thane v Specified Offices* (2017) at para 28.

<sup>72</sup>*Associated Institutions Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302 (SCA) at para 39 (where, in dismissing the case, the court reasoned that “in the light of the training, skills, experience and intricacies involved in the application of actuarial science, I believe that this is a matter where judicial deference is appropriate”).

<sup>73</sup> See *Mosito and Others v Letsika and Others* [2018] LSCA 1; *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* 2018 (2) SA 571 (CC) at para 223 (describing textbook-case judicial overreach as “a constitutionally impermissible intrusion by the Judiciary into the exclusive domain of Parliament”).

<sup>74</sup>*Government of Eswatini v Mhlanga* (2020) at paras 25–27.

investment of retirement funds. It allows a pension fund to grant a loan to a member as an investment against a member's fund credit or withdrawal benefit in the fund at the time of the loan.<sup>75</sup> A few restrictions are imposed by section 19 of the RFA 2005.

First, the loan must be used to purchase, build or renovate a dwelling.<sup>76</sup> The board of trustees is expected to ensure that loans granted under this provision are used for the intended legislative purpose. Otherwise, it would be unlawful to grant them.<sup>77</sup> Secondly, the member can encumber only up to 60 per cent of the value of the member's fund credit at the date of the loan. It is important to mention that a member does not get cash on hand when a loan is granted to him or her under the RFA 2005. In practical terms, the pension benefits remain in the member's fund account, and a member is expected to service the loan according to the agreement with the financial institution that grants the loan, except that the debt is retained in the fund so that when a member ceases to be a member of the fund, due to death, retirement, resignation or dismissal, it becomes payable to the financial institution.<sup>78</sup> Hence, the deduction provisions find application at the member's exit point.

The purpose of section 19 is to promote home ownership.<sup>79</sup> The *Mhlanga* court applied these investment rules and considerations and ordered Parliament to amend the RFA 2005 to allow a member who acknowledges a debt under section 32(2)(a) to be encumbered by a deduction from his benefits, provided that the 60 per cent restriction under section 19(8) is honoured. What the court failed to appreciate is that the debt under section 19 serves a different government policy objective from the debt under section 32(2)(a) of the RFA 2005. Under section 19, a member makes an investment, while under section 32(a) a member incurs a debt because he or she has engaged in an unlawful activity. The policy considerations that inform section 19 and section 32(2)(a) of the RFA 2005 are not the same. The court did not appreciate that, under section

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<sup>75</sup>*Isaacs v SFF Provident Fund* [2001] 3 BPLR 1727 (PFA) at para 15 (noting that before a registered fund may grant a loan to a member, its rules must permit such an investment).

<sup>76</sup>It is a general fiduciary responsibility of trustees to ensure that the loan is used for the intended purposes outlined in the legislation. See *Khambule v CNA Ltd, now CNA (Pty) Ltd and Others (1)* [2001] 9 BPLR 2472 (PFA).

<sup>77</sup>*Kemmis-Betty v Woolworths (Pty) Ltd and Another* [1999] 10 BPLR 170 (PFA) at para 23 (noting that the purpose of the housing loan provision is to allow members to access their retirement capital for the purposes of acquiring adequate housing for themselves and their families).

<sup>78</sup>*Morris and Others v Metal Industries Provident Fund* [2002] 11 BPLR 4054 (PFA) (holding that a creditor cannot sue the fund directly for amounts outstanding in terms of loans to members; the primary responsibility to repay the loan rests with members, and the fund would only be entitled to deduct overdue amounts from benefits on termination of membership of the fund or of employment); and *Mphelo v Municipal Employees Pension Fund and Another* [2011] 3 BPLR 403 (PFA) (holding that the member has the primary responsibility for ensuring that repayments are made).

<sup>79</sup>*Khambule v CNA Ltd, now CNA (Pty) Ltd and Others* (2001) at paras 41–53 (where the adjudicator admonished trustees for abdicating their responsibility over the authorisation and management of the housing loans scheme).

19(8), a member's benefits remain intact within the fund for as long as the loan is serviced and the member has not terminated his or her membership of the fund.

Conversely, under section 32(2)(a) of the RFA 2005, a member's benefits are withdrawn upon the termination of his or her membership of the fund and paid over to the employer. Surely these policy considerations – home ownership versus the employer's property interests – should be determined by Parliament, given their polycentric nature? At the very least, the court in *Mhlanga* should have left it to Parliament to decide how the RFA 2005 must be amended to comply with the Constitution. The reason for this was best explained by Justice O'Regan in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*,<sup>80</sup> where she stated that:

“...a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field .... A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a court should pay due respect to the route selected by the decision-maker.”<sup>81</sup>

We argue that the above observations apply equally to Lesotho and Eswatini, and that the court in *Mhlanga* should have heeded these observations. We therefore submit that Lesotho's judicial branch should resist the temptation to descend into the arena of policy-making, unlike their counterparts in *Mhlanga*. When called upon to determine the constitutionality of section 33 of the PFA 2019, the judiciary should maintain the tradition started in *Sechele*, and continued in *Thahane*, of respecting the policy-laden decisions of Parliament that address public interest issues.<sup>82</sup>

To be clear, *Sechele* and *Thahane* established a standard of review that rests on two pillars. The first pillar is that legislation is presumed constitutional.<sup>83</sup> The second pillar is that for legislation to pass constitutional muster, it must be rationally related to a legitimate government objective.<sup>84</sup> This is a requirement of the rule of law to protect

<sup>80</sup>*Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) at para 48.

<sup>81</sup>*Bato Star Fishing (Pty) Ltd* (2004) at para 48.

<sup>82</sup>See also *Judicial Officers' Association of Lesotho and Another v Right Honourable the Prime Minister Pakalitha Mosisili NO and Others* [2006] LSHC 150 at para 121 (where the court held that important matters of government policy traditionally are not for the courts to determine because this is the prerogative of a democratically elected government; it is not for the courts of law to criticise or go behind issues of national policy because such exercise or endeavour may bring the courts into the arena of politics; an important national policy, however, can be scrutinised if the constitutionality of the policy in question is challenged in court).

<sup>83</sup>*Sechele v Public Officers* (2011) at paras 11, 16.

<sup>84</sup>*Thahane v Specified Offices* (2017) at paras 25–27. See also *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* 2008 (5) SA 171 (CC) at para 260.

against the arbitrary or irrational exercise of legislative authority.<sup>85</sup> The objective of this standard of review is to determine whether, viewed objectively, the means selected by Parliament are rationally related to the objectives sought to be achieved.<sup>86</sup> The standard does not allow the judiciary to replace the choice of Parliament with its own choice simply because the judiciary believes the power can be exercised better by itself.<sup>87</sup> If legislation fails to meet this standard, it is invalid. The judiciary in Lesotho should continue to uphold the wisdom in *Sechele* and *Thahane* and defer to the policy-laden choices of Parliament on how pension funds should be administered.

Considering the above, the lessons for Lesotho, in relation to the developments in Eswatini, are twofold. Firstly, the courts in Lesotho should, when the opportunity arises to interpret section 33 of the PFA 2019 with reference to the Constitution, give meaning to this section so that it is rendered constitutional. We have demonstrated how section 33 may be harmonised with Lesotho's Constitution. The judiciary should resist the temptation to overreach. Secondly, the judiciary should apply the principles in *Sechele* and *Thahane* to the future interpretation and implementation of section 33 of the PFA 2019.

## 5 CONCLUSION

The need for an efficient, viable retirement benefits sector that allows for wider coverage in a developing country such as Lesotho cannot be overemphasised. An effective retirement benefits sector is a precondition for sustainable socioeconomic development. Lesotho, like Eswatini, has shown interest in reforming its retirement benefits sector to address the current socioeconomic dynamics, such as labour mobility, the breakdown of traditional social security systems, fiscal pressures, and the increasing informality of the labour market. It then became necessary to critically analyse the legal framework for any potential constitutional implications of pension deductions in Lesotho. The comparative jurisprudence on pension deductions has strengthened current views on Lesotho's jurisprudence in this area of the law. The principles gleaned from the way in which the various jurisdictions have dealt with enactments like those of Lesotho have added much value.

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<sup>85</sup>See *Thahane v Specified Offices* (2017) at para 25; *ACB and Ors v Prime Minister and Ors* [2020] LSHCONST 1 at para 116.7 (where the High Court of Lesotho set aside the decision to prorogue Parliament on the basis that the Prime Minister acted arbitrarily and irrationally when exercising his advisory powers).

<sup>86</sup> *Thahane v Specified Offices* (2017) at para 27; and *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC) at para 51 (explaining that the purpose of the review "is not to determine whether there are other means that could have been used").

<sup>87</sup>*Merafong Demarcation v President* (2008) at para 274.

**AUTHORS' CONTRIBUTIONS**

Both authors conceptualised the study, conducted the literature review, drafted, and edited the manuscript.

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