IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **Case No.: 46/22**

In the matter between:

ALFRED MAIA **Appellant**

And

PUBLIC SERVICE PENSIONSS FUND **Respondent**

Neutral Citation: *Alfred Maia v Public Service Pensions Fund (46/22) [2024] SZSC 74 (11/04/2024)*

Coram: **Justice S.P. Dlamini JA;**
Justice S.J.K Matsebula JA; AND
Justice M.D. Mamba JA

Date Heard: 22nd November, 2023.

Date Delivered: 11th April 2024.

SUMMARY : *Law of Contract – Appellant employed by Eswatini Government – Appellant a member of the Public Service Pensions Fund established by the Eswatini Government – Government accused Appellant of theft – DPP did not prosecute because of lack of evidence – Government, through the Civil Service Commission held disciplinary proceedings and found Appellant guilty and dismissed him – Appellant sued Government for unfair dismissal – Before the Industrial Court could pronounce on the dismissal, Government settled the dispute out of court – Government on the other hand had instructed the Public Service Pensions Fund that Appellant had been dismissed and therefore not entitled to Government's contributions – Deed of Settlement examined – Regulation 13 of the Public Service Pensions Fund examined – section 3 and 4 of the Public Service Pensions Order also examined.*

Held: Regulation 13 of the Public Service Pensions Fund Regulations refers to lawful dismissals and not to unfair and automatically unfair dismissals as stated under section 16 of the Industrial Relations Act, 2000.

Held: Appellant lawfully sued the Respondent in demanding the Government's contribution as a member of the Fund.

Held finally: Regulation 13 not applicable to the matter under determination and Appeal allowed with costs.

MAJORITY JUDGMENT

S.J.K MATSEBULA, JA:

[1] I have had an opportunity to read the well-reasoned judgment of my brother D.M. Mamba JA but with due respect I differ with the conclusion so reached. My reasons follow. I intend to look at the matter in a more holistic manner, not piece meal, from how it started, the path it travelled and how it reached the stage where it is.

Background

[2] The Appellant was employed by the Eswatini Government on a permanent and Pensionable establishment and deployed as a mechanic at the Central Transport Administration (CTA but now CTO). Being Pensionable meant the Appellant was a member of the Public Service Pensions Fund, an organization with a legal persona but established by the Government under the control and administration of the Minister responsible for the Public Service. The Minster, in consultation with the Board, exercises control and administration through the power provided under section 9 of the Order by making periodic Regulations as and when necessary.

[3] According to the Appellant's Founding Affidavit in the court *a quo* he was unfairly dismissed by the Government of Eswatini through the Civil Service Commission (the CSC) on or about October 2011. The letter of summary dismissal from the CSC is dated 11th November, 2011 and nothing turns on

these differing dates. What is significant is that the CSC basis its decision on the accusation of theft. This tallies well with paragraph 5 of the Appellant's Founding Affidavit in the court *a quo* where he says-

> *"...I hereby mentioned (sic) that I was also charged with theft but the prosecution has long abandoned that matter as it no longer appears in the Mbabane Magistrate's Court roll."*

I will say something about this procedural issue in this judgment as it is an issue governed by Government's General Orders which are binding to Government and to its employees as internal rules of administration and procedure. The DPP who is responsible for all prosecutions is also governed by the General Orders and is alleged to have abandoned prosecution because of lack of evidence to support the charge of theft. The DPP is Government's legal expert in criminal matters and is presumed to know better.

[4] The chronology of the events from hereon are as follows although the parties herein are not particular with exact dates of events that took place -

(a) The CSC dismisses Appellant by letter dated 11th November, 2011 after a disciplinary hearing which could not have been legal if criminal proceedings were pending in court as per General Order A. 909 (2) which reads-

> *"(2) If criminal proceedings are instituted against an officer in any court, disciplinary proceedings upon any grounds involved in the criminal charges shall not be take pending the result of the criminal proceedings.")*

Nothing much will turns on the operation of this General Order but it assists the Court to ask the question whether the dismissal was unlawful *ab nitio* or not.

(b) In 2012 the Appellant filed an application before the Industrial Court challenging his dismissal as an unfair or unlawful demanding re-instatement or maximum compensation for unfair dismissal which would include severance and additional notice pay amounting to E101 404.41 (Emalangeni one hundred and one thousand four hundred and four and forty one cents). (my underlining)

(c) Three years later, in 2015 the Appellant demanded from the Public Service Pensions Fund, the Respondent herein, his contribution to the Fund. That was expected because at this time the dismissal letter from the Civil Service Commission was in place and operative and the application to the Industrial Court challenging it had been stalled for the past three (3) years. There seemed to be no end in sight so the Appellant in the circumstances sought his dues and the Respondent obliged and paid his contributions to the Fund without the Government's contribution.

(d) On the 6th October 2017 the Government represented by the Attorney General (a legal expert in civil litigation) finally to bring closure on the matter which had dragged for six (6) or seven (7) years advised and concluded a deed of settlement with the Appellant, effectively removing the matter from the court, a

court that was expected to pronounce on the lawfulness or unlawfulness of the dismissal. What can be noted under the settlement is that the Government paid the claimant, that is, the Appellant the full amount up to the last cent in monetary terms of suit for unfair dismissal. Government paid full compensation including notice and severance pay which is payable under section 16 of the Industrial Relations Act, 2000. (my underling)

(e) The Appellant, in February 2019 after the Government having **given in** to the compensatory claim for unlawful or unfair dismissal, wrote to the Public Service Pensions Fund, the Respondent herein, claiming to be paid to his pensions the Government contribution. The Respondent refused to pay citing Regulation 13 of the Public Service Pensions Regulations as the reason for refusing to pay the Government's contribution.

(f) On an unspecified date on the papers before this Court, the Appellant as Applicant approached the High Court on the refusal by the Respondent to pay him the Government's contribution. The matter went smoothly through this court and the court found for the Respondent by its judgment delivered on the 17th June, 2022. The Appellant took the matter to this Court.

The Appellant's Case

[5] The grounds of appeal are-

> *"1. The court a quo erred both in fact and in law by dismissing the application on the basis of dismissal of the Appellant from the Civil Service. The alleged dismissal was never confirmed by the Industrial Court.* (My underlining).
>
> *2. The court a quo erred both in fact and in law in its application of the legislation relevant in casu. In its application of the legislation the court a quo disregarded Constitutional provisions.*
>
> *3. The court a quo erred both in fact and in law by in its finding that the Appellant did not plead the Constitution in the court a quo, when the Applicant did raise a Constitutional attack."*

[6] The Appellant's argument is that he was charged under section 36 (b) of the Employment Act, 1980 and was summarily dismissed by the Civil Service Commission under that section. The dismissal was challenged through an application to the Industrial Court and Government could not provide evidence of the alleged misconduct (first at the Magistrate Court on the criminal charge – secondly, at the disciplinary hearing before the Civil Service Commission and lastly, at the Industrial Court) hence it opted for a settlement out of court which bore the Deed of Settlement of 6th October 2017. He states the genesis of this matter is the alleged theft that Government charged him with but had to abandon the case before the Magistrates Court due to lack of

evidence that he had committed the crime. The Appellant says the emergence of the Deed of Settlement was proof that Government had no evidence of the offence he was being dismissed for and the Deed of Settlement exonerated him.

[7] The Appellant further argued that the payments embodied in the Deed of Settlement are not a bar to further payments that an unfairly dismissed employee is entitled to. For this submission he cited section 16 (9) of the Industrial Relations Act, 2000.

Respondent's Case

[8] The Respondent mainly relies on Regulation 13 for its refusal to pay to the Appellant the Government's contribution. It holds that "dismissal is a trigger event entitling it not to pay. The Respondent submits that once it receives notification that an employee, as in *casu*, has been dismissed it suffices for it not to pay the Government contribution. It holds that it is immaterial whether the dismissal is fair and lawful or unfair and unlawful.

[9] The Respondent argued during the hearing also that the Appellant should have joined the Government so that its side could be heard as an interested party. I may add, it is not clear to me how the case affects Government to be an interested party because Government concluded a deed of settlement with the Appellant in terms found under section 16 of the Industrial Relations stipulates that compensation, such as paid by Government, is no bar to further

payments or entitlements to an employee, such as the Appellant. The Deed of Settlements spells out what Government was paying for, it speaks for itself. Government was out of this matter between itself and the Appellant but that did not bar the Respondent from talking to Government in case there was such a need.

[10] Mr. Motsa argued that on fairness it is not as if the Appellant has no remedy if the Respondent refuses to pay and the court endorses such decision. He could sue Government directly for its contention that it is entitled to the Government contribution because it is Government who wrote the letter indicating that the Appellant had been dismissed which is a trigger event.

Analysis of the Law

[11] The real issue of dispute, as the court *a quo*, found revolves on Regulation 13 of the Public Service Pensions Fund Regulations, 1993. The Regulation reads

"Retirement or dismissal from the service in consequence of disciplinary proceedings

> *13. 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)."* (My underlining).

[12] As a general rule in our practice and Parliamentary practice, words in legislation without a prefix, are used to mean the positive and lawful intent of the word. For example, if the legislation states -

> *"A police or citizen may arrest,* it means lawful arrest*; detain* means lawful detaining*; custody* means lawful custody, *prosecution* means lawful prosecution*; dismissal* means lawful dismissal.
>
> The law does not give power to a person to do an unlawful act. No law empowers a person or entity to do unlawful acts. In this vain, I cannot see a law giving power to the Respondent to withhold payment to the Appellant as he did in this case based on an unfair or unlawful dismissal.

[13] It is apposite or proper to also understand what is meant by "dismissed or dismissal". We must find the mind of the law-giver. To get an answer it is permissible to read the Employment Act together with the Industrial Relations Act. The former provides substantive rights, stipulations and other provisions whilst the latter provides how those rights are to be enjoyed and enforced. The law-giver in its great wisdom understands and differentiates "dismissal" into three categories and attaches different consequences to each category. There is **dismissal (lawful dismissal), unfair dismissal and automatically unfair dismissal.** The last two are unlawfully and whoever implements them is punished by either reinstatement (reversal of decision) or a payment of compensation and other additional and appropriate compensation in monetary terms to the employee. This is in terms of section 16 of the Industrial Relations Act, 2000. There is no requirement for compensation where an

employee is dismissed lawfully but there are sanctions if unfairly or automatically unfairly dismissed. To me this distinction is crucial in this case.

[14] Two conclusions may be drawn from the preceding paragraph. The argument by the Respondent that it is immaterial whether a dismissal is fair and lawful or whether is unfair and unlawful is untenable and must be rejected. Since the law-giver knows the three types of "dismissal", **fair, unfair and automatically unfair**, it should have clarified or defined **dismissal** to include unfair or unlawful dismissal for purposes of Regulation 13, that is, if it meant the consequences to be same for fair and unfair dismissals. It did not and it cannot be. The conclusion is that it meant the lawful dismissal in Regulation 13. If there is a challenge to a dismissal, a prudent person would wait for the conclusion of the challenge and act in accordance with the final conclusion of the matter whether such conclusion is by a court or by a final agreement by the parties and thereafter know whether to apply or not to apply Regulation 13. The Respondent cannot just shut its ears whilst aware that there is a challenge going on respecting the initial Government instruction respecting Regulation 13 and hold that whatever conclusion is subsequently reached from the challenge is inconsequential. The second conclusion is that one pays compensation where the dismissal is unfair and unlawful. Government must be taken to have realized its error that it dismissed the Appellant when it did not have tangible evidence for the Appellant's wrong-doing. Had it possessed the evidence it would have stuck to its guns. The lack of evidence manifests itself first in the criminal case and later when the CSC's decision is challenged at the Industrial Court where Government decides to pay compensation.

[15] Looking closer at the Deed of Settlement will also assist this Court to find the intention of the parties especially whether the parties regarded the dismissal fair or unfair, lawful or unlawful. Only the relevant parts are quoted hereinunder-

> *"Preamble*
>
> *Whereas the Applicant Instituted proceedings for* ***unfair dismissal seeking reinstatement or alternatively maximum compensation for unfair dismissal*** *and notice pay and additional notice pay of* ***E101 440.41*** *One Hundred and one thousand four hundred and forty Emalangeni and forty one cents).*
>
> *Now Therefore the* ***Parties hereby agree*** *to settle the matter as follows-*
>
> *(i) The Respondents shall pay the Applicant the sum of* ***E101 440.41*** *(one hundred and one thousand four hundred and forty Emalangeni forty one cents).*
>
> *(ii) The said sum E101 440.41 (one hundred and one thousand four hundred and forty Emalangeni forty one cents)* ***shall constitute full and final settlement of this claim.***" (Underlining and bolding is mine for emphasis).

[16] The underlined and especially the bolded words in the proceeding paragraph tells us, first that the Appellant disagreed with the decision of CSC and therefore instituted a claim for reinstatement or alternatively for compensation for the unlawful dismissal. Government chose the alternative option to pay full compensation. Secondly the parties by entering into this settlement were

in fact excluding the court in this matter in the context of - "we can deal with it ourselves". It is therefore inconceivable to say the court did not declare the dismissal unlawful or unfair because the parties themselves declared it so by word and deed, full payment of compensation was agreed upon and paid. When Government paid full compensation it was not through its benevolence but for its authority for so doing relied on the dictates of law as found in section 16 of the Industrial Relations Act, 2000. This type of compensation as framed herein is inconsistent with a person lawfully dismissed under section 36 of the Employment Act. Had the Government lawfully dismissed the Appellant under this section 36, there was no compensation due for payment. The effect of the payment of compensation or the deed of settlement as framed is, in my analysis and conclusion, nullified or relegated the dismissal to the type known as unfair dismissal which is unlawful. This is not the only conclusion in favour of the Appellant, there is yet still another which I will shortly discuss.

[16] The Public Service Pensions Order, 1993 provides some insights on the workings of the Respondent. Section 4 (1) (a) and (b) provides-

> *"4. (1) There shall be a Public Service Pensions Board to perform the following functions-*
>
> *(a) to supervise the operations and management of the Fund;*
>
> *(b) ...*
>
> *(c) ...*
>
> *(d) **to decide** on any matter from time to time referred to it by the Minister."*

Regulation 13 of the Order is one such reference amongst many from the Minister to the Board: to pay a member's contributions plus interest where the member is dismissed. But I say, once the Board is aware there is a challenge to a dismissal it is incumbent upon the Board to enquire or investigate and decide whether is member has actually been dismissed or not, whether the dismissal has been reversed by a Court or through agreements. This is their member and are expected to be fair and just to him. Section 4 (1) (d) of the Order allows the Board **to decide** on pertinent matters before it, I refuse to believe the Board functions like a programmed robot. Had the Board enquired after being aware that the dismissal was being or had been challenged, the Respondent would be standing on a solid ground because they would have been in possession of a final response from Government after the latter had signed a deed of settlement with the Appellant. By any stretch of statute interpretation the Respondent is not empowered to implement unlawful instructions or instructions based on a retracted decision. The retraction emanates from the Deed of Settlement where the Government, instead of standing its ground on dismissal, offered to pay and compensate for an unfair dismissal. One only needs to read carefully and pay attention to detail in the Deed of Settlement: no idle words are put in a legal document.

[17] The Industrial Relations Act, 2000 is applicable to this matter and section 16 is relevant to guide this Court. This is a section that tells the Industrial Court what should happen in cases of dismissals, that is, unfair dismissals and automatically unfair dismissals. In *casu* the court did not pronounce itself because whilst the matter was before it, Government, by its own action, settled

the dispute with the Appellant by following section 16 (1) (c) which reads as follows-

"16 (1) If the court finds that the dismissal is unfair, the court may-

(a) ...

(b) ...

(c) order the employer to pay compensation to the employee

(2) ...

(3) ...

(4) ...

(5) ...

(6) ...

(7) ...

(8) ...

(9) Compensation awarded under this section is in addition to, and not in substitution for, any severance allowances or ***other payment payable to an employee under any law,*** *including any payment to which any employee is entitled under his or her contract of employment or any applicable collective agreement."* (My underlining and bolding).

[18] The *"payable to an employee under any law"* includes payments payable under the Public Service Pensions Order, 1993. Regulation 13 of the Public Service Pensions Funds which purports to oust section 16 (9) of the Industrial Relations Act, 2000 is no match as it is an inferior law or a subordinate legislation. It is a well-established principle of law in our jurisdiction that subordinate legislation cannot have power over principal legislation. Simply

cannot override it. It is unheard of and if it can happen, Parliamentary supremacy in making laws could have been undermined. The power of Minsters to make Regulations is a delegated power given by Parliament hence every such delegation reads "the Minister may make Regulations..." In *casu*, the Public Service Pensions Regulations under section 2 defines –

> *"Regulations" means the Public Service Pensions Fund Regulations, 1993 and any other regulations which the Minister may, in consultation with the Public Service Pensions Fund Board, make from time to time to fulfil the objects and purpose of this Order."*

Regulation 13 is enjoying the status of subordinate legislation. Note should be taken of the following events –

(a) In 1993 the Public Service Pensions Fund Regulations were passed into law;

(b) In 1997 an amendment was done to some of the regulations but Regulation 13 was not affected; and

(c) In 2000 the Industrial Relations Act, was passed into law by Parliament and its section 16 (9) supersedes Regulation 13 in case there is a conflict between the two legislative provisions. The conflict is there if one fails to understand that the "dismissal" in Regulation 13 only refers to lawful dismissal and not to unfair dismissal. On the other hand, if one holds that the "dismissal" there caters for both fair and unfair "dismissals" then there is a conflict between Regulation 13 and section 16 (9) of the Industrial Relations Act, 2000. In which event Regulation 13 must give way to the superior law provision. Regulation 13 is understood to be saying dismissal following disciplinary proceedings

does not entitle a civil servant to the Government share of contributions whilst section 16 (9) is understood to be saying payment of compensation in respect of unfair dismissal is not a bar to other allowances and payments provided for in other laws or Acts or collective agreements.

(d) Section 16 (9) states that compensation is payable for unfair or unlawful dismissals under the Industrial Relations Act. No compensation is required to be paid for fair or lawful dismissals. What would the employee be compensated for because he would have been fairly and legally dismissed. Put differently, compensation is a sanction to an employer for unfairly dismissing an employee. The sanction attaches to unfair dismissals. It would be mischievous of this Court to seek a conflict where there is none and nullify Regulation 13 especially when there is a plausible interpretation: that Regulation 13 does not refer to unfair and automatically unfair dismissals.

I therefore hold that Regulation 13, (a subordinate legislation) if it was in conflict with this section 16 (9) (a principal legislation) would not prevail over section 16 (9). If this Court can subscribe to the Respondents argument the conclusion is dire.. The Respondent has argued that dismissal is a trigger event empowering it not to pay irrespective of whether the dismissal is fair or unfair. To that end, the Regulation would be dead as it would be in conflict with section 16 (9) of the Industrial Relations Act, 2000. On the other hand, if Regulation 13 of the Public Service Pensions Fund only refers to fair and lawful dismissals, then the Regulation is alive and should only be implemented to lawful dismissals. Section 4 (2) of the Industrial Relation Act, 2000 further stipulates-

"4. (2). Any person applying or interpreting any provision of this Act (sic) shall take into account and give meaning and effect to the purposes and objectives referred to in subsection (1) and to other provisions of this Act".

Subsection (1) includes the following-

"4. (1) The purpose and objective of this Act is to-

(a)promote harmonious ***industrial relations'***

(b)promote fairness and equity in ***labour relations.***

(c) (etc) (Underlining and bolding is mine).

[19] Having come to the conclusion that Regulation 13 of the Public Service Pensions Fund Regulations is not applicable to the case at hand, I need not elaborate on the other arguments presented to us by the parties. This matter could be decided on whether Regulation 13 is applicable or not applicable. It is not applicable.

Conclusion.

[20] (a) Regulation 13 of the Public Service Pensions Fund Regulations, 1993 only applies to fair and lawful dismissals.

(b) Regulation 13 of the Public Service Pensions Fund Regulations, 1993 does not apply to unfair and automatically unfair dismissals, in line with the events and consequences, as provided and explained under section 16 of the Industrial Relations Act, 2000.

(c) The dismissal of Appellant was unfair as correctly captured or evidenced in and by the Deed of Settlement between the Government and the Appellant dated 6th October,2017.

[21] Having examined the statutory provisions relating to industrial relations, labour relations and Pensions provisions which govern this matter it is ordered that-

(a) The appeal is allowed and the decision of the court *a quo* is set aside; and

(b) Costs awarded to the Appellant.

S.J.K. MATSEBULA

JUSTICE OF APPEAL

I agree

S.P. DLAMINI

JUSTICE OF APPEAL

Dissenting Opinion

[1] *Civil law- Law of contract- civil servant or public officer and member of the Public Service Pension Fund- Dismissed from employment following disciplinary hearing against him. Regulations of Fund prohibit payment of employer's contributions to dismissed employee. Regulation 13 of Public Service Pension Fund of 1993.*

[2] *Civil law- Dismissed employee suing employer for compensation for unfair dismissal- parties reach out-of-Court settlement in full and final settlement. Former employee paid in full. Unlawfulness or otherwise of dismissal not stated in agreement of settlement. In law dismissal stands until and unless set aside by a competent forum.*

[3] *Civil law and Procedure- Orders sought must be adequately canvassed or articulated in Founding papers. Substantive orders may not be granted if not prayed for in the Notice of motion or summons.*

MAMBA JA.

[22] The Appellant, Mr. Alfred Maia, was at one stage employed by the Eswatini Government as a Motor Vehicle Mechanic. He was based at the Central Transport Administration depot in Mbabane. As an employee of the said government, he was a Civil Servant or public officer as defined in the relevant legislation to which I shall refer later in this judgment. Again, as a public officer, he was a member of the Respondent herein. Together with his employer, he paid his monthly pension contributions to the Respondent.

[23] Following a disciplinary hearing on 28 September, 2011 conducted by the Civil Service Commission, the Appellant was summarily dismissed from his employment by his employer, with effect from 09 November, 2011. This decision was duly communicated to him by the Civil Service Commission by letter dated 11 November, 2011. It would appear from this letter that the Appellant had been 'accused of theft of Government property.' Although this letter does not explicitly say so, it is implied therein that he was found guilty. The Commission described his deeds as 'serious misconduct', and thus the dismissal that followed as a sanction.

[24] It is common cause that the dismissal of the Appellant was formally conveyed to the Respondent by the Central Transport Administration in July, 2014. It is, however, significant to note that in 2012, the Appellant filed an application before the Industrial Court, challenging his dismissal from the Civil Service. In this application the Appellant sought '. . . reinstatement or alternatively maximum compensation for unfair dismissal and Notice Pay and additional Notice Pay of E101,404.41.' The parties eventually reached an out-of-court settlement whereby the Appellant was paid the aforesaid amount. This Deed of Settlement was duly executed by the parties on 06 October, 2017 (See annexure A at pages 7-9 of the record). This Deed of Settlement recorded that it

constituted a full or final settlement of the Court dispute. It is also not insignificant to note that the Respondent herein was not a party to the dispute before the Industrial Court.

[25] The Appellant, by letter dated 30 November, 2015, requested the Respondent to pay him his share of his pension contributions. He erroneously informed the Respondent that his 'last date of employment was on December, 2011.' It was infact 09 November, 2011. Nothing turns on this error though in this judgment. The Respondent paid the Appellant his monthly contributions together with accrued interest thereon on 07 December, 2015.

[26] Perhaps the next significant step in the matter is that in February, 2019, the Appellant demanded from the Respondent that he must be paid his erstwhile employer's contribution to his pension benefit, alleging that it had been found or held that he had been 'unfairly dismissed'. (See letter at page 10 of the Record). The Respondent declined this demand, stating that the Appellant had been dismissed from his employment and that because of this dismissal he was not entitled to his employer's contributions to the fund. It stated further that whether the dismissal was unfair or not was immaterial. This stance by the Respondent resulted in the Appellant filing and serving an application under

case 1425/2019 before the Court *a quo*. In that application, which was unsuccessful, the Appellant sought two prayers; namely:

> '1. Ordering and directing the Respondent to calculate the amounts due to the [Appellant] from his pension benefits including interest.
>
> 2. Ordering and directing the Respondent to pay the balance of his pension benefits after calculation.'

These two prayers are, to say the least, not a model of clarity when viewed in the context of the contents of the accompanying affidavit by the Appellant. The Appellant was demanding that he be paid his former employer's contributions (plus accrued interest) in respect of his pension benefits. He alleged that his dismissal had been adjudged to have been unfair and therefore the Respondent could not, in law, rely on it as a reason for denying him his employer's contributions to his pension benefits.

[26] The application was opposed by the Respondent. Essentially, the Respondent raised two grounds namely that:

'5.1 If a member is dismissed, in terms of regulation 13 [of its regulations], he has to be refunded the contributions he has made to the fund together with accrued interest in terms of regulation 3 (4). Whether the dismissal was fair or not is an immaterial consideration.

5.2 The [Appellant] did not win any Court matter wherein his dismissal was deemed to be unfair and the [Respondent] was ordered to pay the pension contributions of the employer.' (See page 19 of the Record).

[27] As already stated above, the Court *a quo* dismissed the application by the Appellant. Judgment was handed down on 17 June, 2022. In dismissing the application, the Court below came to the conclusion that:

'[39] I must state [that] there is no evidence before this Court that the dismissal was set aside. It is common cause that the [Appellant] remained dismissed from employment. The deed of settlement itself is predicated on the dismissal [consequent] to disciplinary procedures, and in my view the payment or refund which was made to the [Appellant] on December 2015 was justified in terms of regulation 13. The refund and or payment which was processed and eventually paid to the [Appellant] on the 7 December, 2015, was based on the

[Appellant's] own request that he be paid back his contributions and also because the trigger event is dismissal which falls within the ambit of regulation 13. It remains a mystery why the [Appellant] did not ask for the employer's contributions on the 30 November 2015 when he addressed annexure JN3 to the Respondent.'

[28] This appeal challenges the above order of the Court *a quo.* There are three (3) grounds of appeal and these are couched in the following terms:

'1. The Court *a quo* erred both in fact and in law by dismissing the application on the basis of dismissal of the Appellant from the Civil Service. The alleged dismissal was never confirmed by the Industrial Court.

2. The Court *a quo* erred both in fact and in law in its application of the legislation relevant *in casu.* In its application of the legislation the Court *a quo* disregarded constitutional provisions.

3. The Court *a quo* erred both in fact and in law by its finding that the Appellant did not plead the Constitution in the Court *a quo,* when the [Appellant] did raise a Constitutional attack.'

[29] The first ground of appeal stated above, in essence suggests that the dismissal of the Appellant by his employer needed to be approved or 'confirmed' by the Industrial Court for it to be deemed to have been lawful. If not so confirmed, it would be of no force and effect. It would, so the proposition goes, be ineffectual. Mr. Jele, Counsel for the Appellant, modified or altered this proposition in his Heads of Argument and in his submissions before us to read as follows:

> '3 . . . the Appellant and the government (employer) entered into a Deed of Settlement which effectively reversed the termination and was an acknowledgment of its unfairness.'

What is postulated or stated in this ground of appeal is legally unsound and untenable. There is, in my humble opinion, no legal requirement that a dismissal of an employee shall only come into effect upon such dismissal being confirmed or approved by a Court of law. Counsel for the Appellant was unable to provide this Court with any authority for this rather bold but bald proposition or submission. Whilst it is true that the Industrial Court had the jurisdiction or power to declare the dismissal of the Appellant unfair and unlawful, this does not mean that the said dismissal could only be lawful and effective if confirmed by the said Court. Generally, unless specifically agreed to between the parties or provided in some

legislation or regulation, the dismissal of an employee need not be sanctioned by a Court for it to take effect. This ground of appeal is plainly without merit and is rejected. The assertion or suggestion that the appeal must succeed because the dismissal of the Appellant was either not confirmed or was reversed by the Industrial Court is in my view a clear acceptance of the fact that the dismissal, unless set aside, is a bar to the Appellant's claim.

[30] The Deed of Settlement that was entered into by and between the Appellant and his erstwhile employer is in the following terms:

> 'NOW THEREFORE, THE PARTIES HEREBY AGREE AS FOLLOWS:
>
> PREAMBLE.
>
> Whereas the [Appellant] instituted proceedings for unfair dismissal seeking reinstatement or alternatively maximum compensation for unfair dismissal and Notice Pay and additional Notice Pay of E101,440.41 . . .
>
> And whereas the parties have now agreed to settle the matter in full and final settlement.

NOW THEREFORE THE PARTIES HEREBY AGREE TO SETTLE THE MATTER AS FOLLOWS:

(i) the [employer] shall pay the [Appellant] the sum of E101,440.41 . . .

(ii) The said sum of E101,440.41 . . . shall constitute full and final settlement of this claim.

The payment shall be directed to [Appellant's] attorneys within a reasonable period from the date of signature thereof.

This agreement will be made an order of Court by either of the parties as soon as possible.'

Although not specifically alleged in the papers herein, I shall assume that this deed of settlement was made an order of Court.

[31] The Deed of Settlement does not say anything about the reversal of the dismissal of the Appellant or that the employer accepts that the said dismissal was unfair or unlawful. Accepting as I do that Heads of Argument do not constitute pleadings, the submission by Counsel that the deed of settlement effectively reversed the dismissal of the Appellant and was an acceptance or

acknowledgment that such dismissal was unfair, is again not supported by either the deed of settlement or legal principles or reasoning. On the facts before this Court, there is no reason stated why the parties found it appropriate to settle the issue or dispute on the terms stated in the deed of settlement. The suggestion or submission that by entering into the agreement of settlement, the employer signified its acknowledgment that the dismissal in question was unfair, is not supported by any of the terms of the Deed of Settlement. It is sheer conjecture or guesswork that is to say, an unverified supposition. This Court may not resort to such exercise. Indeed, there could be a litany of reasons why the employer entered into the deed of settlement on the terms stated therein.

[32] The second challenge alleges that the Court a quo 'disregarded constitutional provisions.' This ground of appeal is too vague. It is meaningless. It fails to refer to any specific Constitutional precept or provision. In his Heads of Argument, Counsel for the Appellant specifically referred this Court to Section 195 (6) of the Constitution which provides as follows:

> '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 judgment or civil proceedings are in respect of maintenance.'

It was argued on behalf of the Appellant that regulation 13 of the Public Service Pension Fund Regulation of 1993, which was invoked or relied upon by the Respondent in refusing to pay to the Appellant the latter's employer's contributions to his pension benefits, sins against Section 195 (6) of the Constitution and it 'arbitrarily deducts the employer's contribution without any thorough investigation and takes no consideration of whether an employee is found guilty of the misconduct or not.' Reliance was also placed on the judgment by Mamba J. in *Swaziland Government v Lucky Mhlanga and 2 Others (432/2017) [2018] SZHC 176 (01 August, 2018)*, where the Court held that:

'(b) The provisions of Section 32 (2) of The Retirement Funds Act of 2005 are to the extent that they permit or allow a retirement fund to deduct an amount from a public officer's benefit in respect of any cause other than in respect of maintenance, are inconsistent with the provisions of Section 195 (6) of the Constitution and are to that extent invalid.

(c) It is hereby declared that pension benefits of public officers shall not be the subject of attachment by order of Court for the satisfaction of any judgment or pending the determination of civil proceedings to which a person is a party except where that judgment or civil proceedings are in respect of maintenance.'

This decision was, however, set aside by this Court in *Government of Eswatini v Lucky Mhlanga and Two Others (72/2018) SZSC 69. [2019] (12th March, 2020).'* This Court held that:

'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 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.'

[33] From the outset, one notes that Section 195 (6) of the Constitution regulates and prohibits or outlaws attachments by an order of a Court. An attachment by its very nature follows and is part of a judicial or adjudicative act. The Section specifically refers to an order of Court. In the case of the Appellant, the refusal to pay the employer's contribution was consequent upon or as a result of the dismissal of the Appellant from his employment. This was not a Court order or judicial act. It was an administrative act by an administrative functionary; the employer in the form of the Civil Service Commission. Similarly, the refusal to pay was an administrative act by the Respondent. It cannot by any stretch of the imagination or characterisation be viewed as an attachment. In *Mhlanga (supra),* the applicant unsuccessfully sought a Court order to attach a portion of the Respondent's pension benefits to satisfy a shortage of funds allegedly embezzled by the public officer, which was not in respect of maintenance. This was not the case in the Court *a quo*. So clearly, the said section 195 (6) finds no application at all in this case.

[34] The characterisation of the act of dismissal as administrative may admittedly appear to be at odds with the decision in *Chirwa v Transnet (2008) 29 ILT 73 (CC)* which came to the conclusion that dismissals of employees do not constitute administrative actions as contemplated in PAJA. We do not, I think, have a statute similar to PAJA. In *Nakin v MEC, Department of Education, Eastern Cape Province (2008) 29 ILJ 1426 (EC)* at paragraph 50, commenting on this ruling the Court had this to say:

> 'The nature of the legal employment relationship between the applicant, a public employee, and the department, an organ of state, is a complex one that is not, in my view, capable of exclusionary compartmentalisation into only one of the three possibilities mentioned above. The common law contract of public employment is framed by administrative law principles and should include, as a constitutionally mandated implied legal term, the right to fair labour practices. Fairness is required in administrative justice, in labour legislation and, yes, in contract too. And fairness has much to do with equality, dignity and freedom; founding values of our Constitution. To view this interlocking aspects of a public employment relationship in separate compartments of their own would deprive one of viewing the whole and complete

picture of such a relationship. And in the process, one might forget to ask and assess the real substantive issue at stake in a particular case.'

[35] In dismissing the application by the Appellant in the Court *a quo* the Court came to the conclusion that because the Appellant had been dismissed from his employment, he was not entitled to be paid his employer's contributions to the pension fund. His benefits were restricted to what he, the Appellant or employee had actually contributed to the fund, together with interest accrued thereon. Regulation 13, it is common cause, provides that where a member of the fund has been dismissed from his or her employment or forced to retire following disciplinary proceedings against such member, the said member is only entitled to be paid his contributions together with interest thereon. In other words his dismissal or forced retirement results in him or her forfeiting his or her employer's contributions to the fund. In the present appeal, it is common cause that the Appellant was dismissed consequent upon disciplinary proceedings against him.

[36] The only Constitutional issue raised by the Appellant in the Court *a quo* was in respect of Section 195 (6) of the Constitution, which I have dealt with above. The Court *a quo* held that '. . .the [Appellant's] Founding Affidavit did not fully motivate the constitutional issue or issues . . ., it is only in paragraph 10 that it

is mentioned, and not in the manner in which it should have been addressed by the [Appellant] who has also not included a prayer for constitutional relief in his or her Notice of Motion.' The Appellant's application was premised or predicated on the fact that his dismissal had been reversed by the Industrial Court. He was, however, in error in this regard. His second and perhaps alternative argument in support of his case was that the regulations relied upon by the Respondent for its refusal to pay to him his employer's contributions to his pension benefits was contrary to the provision of Section 195 (6) of the Constitution as determined by the Court in *Mhlanga (supra)* and therefore invalid. This is of course not entirely correct. The Appellant did not, however, pray for an order declaring the relevant regulation i.e. regulation 13, unconstitutional. In any event, this is a non-issue in this appeal inasmuch as I have found that the said Section 195 (6) was irrelevant or inapplicable in this case because it regulates the attachment of benefits due or accrued to a public officer. Where, for whatever reason, specific portions or components of the contributions are not due to the public officer, this can hardly be called his benefits. They are simply not due to him, or, he is disentitled to have these accrued to him. This ground of appeal must, perforce, be dismissed. This equally applies to the third ground of appeal. The constitutional issue raised was irrelevant and was cursorily raised and there was no prayer for a

declaratory order. In like manner, neither the Industrial Court nor the Court below was requested to declare the dismissal of the Appellant unfair and unlawful. Until and unless set aside by a competent authority, the dismissal of the Appellant stands and is a bar to his claim in these proceedings. In the circumstances of this case, this Court is not the proper authority or forum to make this declaratory.

[37] It was argued on behalf of the Appellant that it was not necessary to specifically plead the unconstitutionality of Regulation 13 of the Fund since this issue had already been decided by the Court in Mhlanga (supra). Again, this is incorrect. Neither this Court nor the High Court dealt with Regulation 13 in *Mhlanga.* The Court dealt with Section 32 (2) of the Retirement Funds Act of 2005. A declaration on one of these pieces of legislation is not a declaration on the other.

[38] I agree entirely with the majority judgment that the dismissal referred to in regulation 13 of the Public Service Fund Regulations of 1993 is lawful dismissal and I think this is the case that was presented by the appellant when he argued that his dismissal had been reversed by the Industrial Court. (See the

first ground of appeal above). For this reason this Regulation is not inconsistent with section 16(9) of the Industrial Relations Act, 2000.

[39] The majority judgment makes three fundamental and profound errors. First, it concludes that the Government withdrew the criminal charges against the appellant and also concluded the deed of settlement because of lack of evidence to support its case. There is not an iota of evidence to support this finding. In fact there is no evidence that the charges were withdrawn. Appellant merely stated that the case did not appear on the court roll. In any event, even if the charges were withdrawn, it does not automatically follow that this was due to lack of evidence to support the charges. The Crown may have, for example, decided that the dismissal of the appellant was a sufficient sanction for his misconduct or, that the Government general orders prohibited such prosecution running simultaneously with the disciplinary action. The second erroneous finding is that by concluding the deed of settlement on the stated terms, the Government was accepting or admitting that the dismissal was unlawful. The deed of settlement or court order is totally silent on this point and no such inference can reasonably be drawn from its wording. Thirdly, the judgment has made a finding and declaration that the dismissal was unlawful, whereas there was no such prayer for this declaration either in the High Court or in this appeal.

That such a declaration is granted in proceedings wherein the employer is not a party, compounds the error. Even if this is to be inferred from the wording of the deed of settlement, one would expect that the employer would be heard thereon before such declaration is made. Additionally, if indeed the Industrial Court declared the dismissal unlawful, then there is no need to make this declaration in this appeal.

[40] For the foregoing reasons, I would dismiss this appeal with costs and make the following order:

40.1 The appeal is dismissed.

40.2 The Appellant is ordered to pay the costs of this appeal.

M.D. MAMBA
JUSTICE OF APPEAL