

IN THE COURT OF APPEAL OF BOTSWANA
HELD AT LOBATSE

COURT OF APPEAL CIVIL APPEAL 38/2001
HIGH COURT MISCA 300/2000

In the matter between:

J B GABAAKE
S MABILETSA
G MASUSU

1ST APPELLANT
2ND APPELLANT
3RD APPELLANT

And

ACCOUNTANT GENERAL
ATTORNEY GENERAL

1ST RESPONDENT
2ND RESPONDENT

Advocate A de Bourbon with Mr Attorney Luke for Appellants
Advocate G Hoffman for the with State Counsel T G Bogosi for Respondents

J U D G M E N T

Coram: **P H Tebbutt AJ P**
 C Plewman J A
 F H Grosskopf J A

PLEWMAN J A.

This is an appeal against an order of the High Court made on a case stated by the parties under Order 35 of the High Court rules seeking adjudication on a point of law. The issue is how Section 5 of the Ministers and National Assembly Gratuities and Pensions Act 1998 (the Act) is to be interpreted. In terms of Section 1 of the Act, though passed in April 1998 is deemed to have come into operation on 14 November 1994.

Section 5 provides as follows:-

"5 Every member shall, upon the dissolution of Parliament, at the end of every Parliamentary term, be entitled to receive a gratuity equal to 30% of the

entitled to receive a gratuity equal to 30% of the aggregate basic salary paid to him and average of constituency allowances payable to him, during such term of parliament.

It is not necessary to refer in detail to the agreed facts but the dispute which arose and the opposing contentions must be noted. These relate to how the amount of the gratuities payable in terms of the section should be computed.

There were three contentions as follows:-

- (1) The Appellants asserted that in terms of Section 5 each member was entitled to 30% of the basic salary paid to him during the life of the Parliament, together with a sum which represented the average of the constituency allowances paid to all members during the particular Parliament (which was stated to amount to P143.608.30).
- (2) The Respondents originally contended that members were to be paid 30% of the aggregate basic salary paid to each member during the life of the Parliament together with 30% of the average constituency allowances paid to all members during the particular Parliament (which was agreed to be P43 044). (In the judgment of the court a quo it is said that this meaning was abandoned but it has been revived in the appeal).

- (3) The Respondents' final assertion was that a third interpretation was possible namely that each member was entitled to 30% of the aggregate basic salary paid to him during the life of the particular Parliament together with 30% of the constituency allowance actually **paid to such member** during the Parliament. (The emphasis is my own intended to highlight the particular feature which received attention.)

The learned Judge in the court a quo held that the section when properly construed has the third meaning set out above. It will be appreciated that the parties' contentions raise or involve two questions namely:-

- (i) whether the amount of the constituency allowance taken into the computation is the average of the constituency allowances payable to all the members of the Parliament or simply in respect of each member of parliament the average of the constituency allowance actually payable to such member himself. (It will be convenient to describe this as the "allowance component" of gratuities.)
- (ii) whether the words "30% of ..." govern both what may be called the "salary component" and the allowance component of the gratuities payable;

It is implicit in the proposition formulated in paragraph (i) that different constituency allowances are payable to members. Some must receive more than others. This seems in fact to be the case. But the situation is in fact even most complex because constituency allowances are sums payable to members in terms of the National Assembly (Salaries and Allowances) Act first passed in 1987, reenacted in 1992 and again re-enacted in 1998 (which reenactment took effect on 1 July 1998). Each of the re-enactments raised the allowances payable to members but all showed a variation between constituencies of a substantial order and an increase over the years of the number of constituencies. While the allowance for the member of Gaborone South was originally P2508 p.a and that of the member for Kgalagadi P9 978 p.a the lowest current allowance (Lobatse) is P40 344 p.a. while the member for Kgalagadi is now entitled to P56 292 p.a. In interpreting the statutory provision in question the acknowledged and often stated rules are to be applied namely to ascertain the intention of the legislature.

Innes CJ in **Venter v Rex, 1907 T S, 911 at 913** in the classic enunciation of the principles said:-

"By far the most important rule to guide courts in arriving at that intention is to take the language of the instrument, or the relevant portion of the instrument, as a whole; and, when the words are clear, and unambiguous, to place upon them their grammatical construction and give them their ordinary effect. But it is universally recognized that this is subject to certain exceptions. These arise from the difficulty – a difficulty inherent in the nature of language – that no matter how carefully words are chosen there is difficulty

in selecting language which, while on the face of it expressing generally the idea of the framer of the measure, will not, when applied under certain circumstances, go beyond it and when applied under other circumstances fall short of it"

The rule adopted in **Venter's** case (and consistently followed both in South Africa and in Botswana) was that when to give the plain words of the statute their ordinary meaning would lead to absurdity so glaring that it could never have been contemplated by the legislature, or where it would lead to a result contrary to the intention of the legislature, as shown by the context or by such other considerations as the court is justified in taking into account, the court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and to give effect to the true intention of the legislature. As **Innes C J** stated (at p.915) what has been set out does not exhaust so difficult a subject. There are further important principles to be considered. In **Jaga v Donges N. O and Another 1950 (4) S A 653 (A)** at 662 G – H. **Schreiner J A** said:-

"Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that "the context", as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on that part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose and, within limits, its background."

It must also be understood that words cannot be taken in **vacuo**. An acknowledged line of approach is that the statute must be read as a whole and then the question must be posed: "In this statute, in this context, relating to this subject matter, what is the true meaning of that word" See **Lord Greene, Master of the Rolls, in Re Bidie (1949, Ch 121)**. In the present case the words "average of constituency allowances" has been defined in the Act. It is provided in Section 2 that the phrase means "an amount equal to the average of the aggregate of constituency allowances payable in respect of all the different categories of constituencies specified in paragraph 4 of the Schedule to the National Assembly (Salaries and Allowances Act.)"

Appellants argue that the constituency allowance component in Section 5 means that the "total" of the constituency allowances paid during the life of Parliament (that is to all members together) must be ascertained and then divided by the number of members (44) yielding P143 698.30. Counsel however, concedes that to so construe the section would involve that the words "payable to him" (in the last line of the section) would have to be treated as meaningless. But this is contrary to principle. The suggestion in counsels' written heads of argument that to hold otherwise would render the concept of "average of constituency allowances" an absurdity is not, in my view, sound. The question is not how Section 2 is to be construed but how the disputed words are to be read in Section 5. The words "payable to him" in the section seem to me to put it beyond doubt. However awkward the

wording may be the words "payable to him" match the words (in the salary component) " paid to him" and show that the intention of the legislature in Section 5 was to concern itself with the position of members as individuals. If the Act is looked at as a whole – as it must be – it will be seen the words "and average of constituency allowances" are also used in Section 6 (indeed fifteen times in this section) in Section 7 and in Section 8. In the light of that fact it can hardly be suggested that the words be "eliminated" in Section 5 (as counsels' argument goes). What must also be noted other than in the provisos to subsections 6(1)(a)(b) and (c) and to 6 (2)(a) and (c) the words are followed by the words" of such member current at the time of the (payment) to be made"

This will perhaps be more easily understood if I take one of these subsections as an example. Section 6(1)(a) will serve. It reads;

"6(1) In place of the gratuity payable in accordance with the provisions of Sections 5, a member may opt to receive a pension calculated in accordance with one of the following, provided that, with effect from 14 November 1994 he serves not less than 10 years in the National Assembly; or he has, immediately before the date of the enactment of this Act, served not less than one term in the National Assembly;

(a) a member may opt to receive no gratuity in terms of Section 5, in which case, from the date of his leaving Parliament, or from the age of 45 years, whichever comes later, he shall be entitled to receive a pension equal to 1/360 of the basic salary, and average of constituency allowance, of such member current at the time the pension is

payable, for each completed month of service as such member.

Provided that his maximum entitlement shall not exceed 240/360th of such current basic salary, and average of constituency allowances"

The Section shows that, in all, three options are offered as possible pension alternative to payment of the Section 5 gratuity. This very clearly underlines the need to read the Act as a whole because it gives a context and indicates the legislature's intention. It is unlikely that, even if the pension alternative may in individual cases be financially more favourable to particular members, the legislature would have intended startlingly different amounts to be paid under one alternative (the gratuity) than under the other (the pension). Two things I think follow from this. The first is that Section 6 demonstrates that the legislature, in fixing the amount of members' pensions, was concerned with the members as individuals. The repeated use of the words "of such member current at the time the pension is payable" shows this to be the case. Secondly, there is the consideration that the words "of the basic salary, and average of constituency allowances of such member" are used throughout. The allowance component as constituted by the words "average of constituency allowances" is employed in this setting. Given that situation it can hardly be suggested that that phrase, in and of itself, connotes the average of the constituency allowances paid to **all** the (combined) members. Yet this was appellant's suggestion. Indeed there are other indications which show that appellants' contention must be incorrect. Each subsection of section 6 contains a proviso similar to that quoted above. If the pension

payable to a member cannot exceed "2/3 of the basic salary, and average of constituency allowances" of the **individual** member why should the gratuity provision be read to stipulate the whole of the allowance payable. Finally, there is appellant's problem with the words "payable to him" When it is seen that it is accompanied, in each of subsections 6(1) and 2(a)(b) and (c) by the words "of such member current at the time" and in Section 7 by the words "and average constituency allowances of an ordinary member" appellant's proposition would seem to me untenable. Regard must also be had to Section 8 where again one finds the phrase "and average constituency allowances, payable **to a member...**"

In these circumstances appellants' contentions in regard to the first issue must be rejected.

In turn then to the second question. The first observation I would make with regard to this issue is that in my view the third meaning (that is that contended for by Respondent) can be accommodated grammatically by the wording of Section 5. Once that is so one would, given the context and purpose of the legislature (as I have expounded it above), have to find some reason to read the section as appellants wish to. The phraseology is certainly very inept if the object was to provide a substantial independent lump sum payable. I can see no reason to do so. The act as a whole is concerned to increase the gratuities of members over and above what we are told the position was under the pre-existing legislation. What clearly seems

to have been intended was to add to the **base** amount provided by members' salaries an amount representing their constituency allowances. But given the framework of the Act as a whole it seems that what was desired was a payment to a member which bore some relationship to his length of service and which was also related to own emoluments. I am unable to discern any other purpose in the Act. In my view therefore appellants' contentions in relation to the second issue must also be rejected.

There remains one issue on which it is necessary to add a word. In appellants' heads of argument there is a reference a passage from Hansard reflecting what the Minister is reported as having stated in a debate in Parliament. It is suggested that the passage lends support to appellants' contentions. In making this submission counsel (very properly) conceded that the reference did not meet "the narrow strictures" set out in the case of **Pepper (Inspector of Taxes) v Hart [1993] A C 593 (H L) [1993] All E R 42 (H L)**.

This concession in itself is sufficient justification for saying that the extract from Hansard should not be relied upon. However, I would wish expressly to leave open the question of when it may be proper to refer to parliamentary material where one is grappling with the interpretation of a statute.

I say this particularly because I have read the extract and must confess to having derived no assistance from it. But beyond that it should be recognized

that the topic is a controversial one. Such material was at one time strictly ruled out both in England and in South Africa. See **Mayromati vs Union Exploration Import Ltd.** 1949(4) S A 917 (A D). However there has been a shift of emphasis both in England and in South Africa. In the **Pepper** case **Lord Browne- Wilkinson** made an exhaustive examination of the earlier English authorities and concluded that use may be made of parliamentary material under certain strict conditions. It will be sufficient to say it should be left to this court to deal with the use of such material and any conditions relevant thereto if it is to be used if and when the need to do so arises.

In the result by approaching the matter on the basis of what Schreiner J A described in the case of **Jaga v Donges N.O** (Supra)" as the second line of approach" the appeal must be dismissed. There was some debate as to the appropriate order for costs – it being suggested that possible "public interest" should dictate that no order for costs be made. I have considered this but on balance it seems to me that the ordinary rule should be followed. The appellant must pay the costs. The order I make is therefore as follows:-

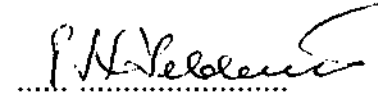
The appeal is dismissed, with costs.

DELIVERED IN OPEN COURT ON THE DAY OF JULY 2002.



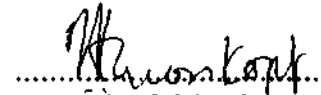
C. H. PLEWMAN
JUDGE OF APPEAL

I agree:



P. H. TEBBUTT
JUDGE PRESIDENT OF APPEAL

I agree:



F. H. GROSSKOPF
JUDGE OF APPEAL