

Exploring the Obligations to Complete Insurance Reforms in Lesotho

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Abstract

In 2014, Lesotho reformed the insurance business sector by adopting the Insurance Act 12 of 2014 and repealing the Insurance Act 18 of 1976. These reforms resulted from the government's recognition that the Insurance Act of 1976 was outdated and not in keeping with modern insurance principles and practices. This state of affairs made it difficult for the government to regulate and supervise insurance companies. However, in 2019, the Revenue Appeals Tribunal (Tribunal) decided an important case that revealed that the executive branch had not fully implemented these reforms through the Central Bank of Lesotho. In the Insurance Act of 2014, the Central Bank of Lesotho is defined as the Commissioner. There are gaps in the Insurance Act of 2014. This article investigates the gap in the insurance legislation identified by the Tribunal and the obligations of the Commissioner to complete the reforms. It argues that the Commissioner is compelled to fill this gap in the law for at least two reasons. First, the Commissioner has national and international legal obligations to define funeral insurance policies and fully implement the insurance reforms. Second, it is submitted that with the advent of the Pension Funds Act 5 of 2019, the need to complete the insurance reforms is even more significant because this will enable pension funds to cost-effectively procure long-term insurance products, such as funeral benefits, for the advantage of their members and their members' beneficiaries.

Keywords: life insurance; funeral insurance; administrative law; separation of powers; Lesotho; Insurance Act of 2014; Pension Funds Act of 2019; Revenue Appeals Tribunal; judicial review

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Introduction

In 2014, Lesotho reformed the insurance business sector by adopting the Insurance Act 12 of 2014 and repealing the Insurance Act 18 of 1976. These reforms resulted from the government's recognition that the Insurance Act of 1976 was outdated and not in keeping with modern insurance principles and practices.¹ This state of affairs made it difficult for the government to regulate and supervise insurance companies.² However, in 2019, the Revenue Appeals Tribunal (Tribunal) decided an important case that revealed that the executive branch had not fully implemented these reforms through the Central Bank of Lesotho. There are gaps in the Insurance Act of 2014.³ In the Insurance Act of 2014, the Central Bank of Lesotho is defined as the Commissioner.

Section 2 of the Insurance Act of 2014 requires the executive, using regulations, to define what constitutes a funeral insurance policy for insurance regulation and tax liability. The executive has not done this yet, even though the Commissioner regularly reviews existing laws and proposes new ones to address changing needs.⁴ The absence of this definition means that the state has adopted measures that treat certain long-term insurance products differently, for example, taxing funeral insurance policies differently from life insurance policies. Income generated from the life insurance business is tax-exempt, while income generated from the funeral insurance business is subject to tax. To fully implement the Insurance Act of 2014 and to remove the anomaly of the differentiated tax treatment of these long-term insurance products requires the

1 Central Bank of Lesotho, *Annual Report* (2009) 29, noting that the 'Insurance Act 1976 is not aligned with current developments in the industry and the modern Insurance Core principles. It has become very difficult to regulate and supervise the insurance industry in Lesotho as a result of the outdated Act. In an effort to address this challenge, the Bank has drafted a new Insurance Bill. This bill has been submitted to the Parliamentary Counsel for certification and subsequent submission to the Parliament for enactment.'

2 *ibid.*

3 Central Bank of Lesotho, *Supervision Annual Report* (2019) 30, reporting that '[d]uring the year, the Bank further initiated the process to repeal the Insurance Act of 2014, which was beginning to show some gaps during its implementation. The purpose of the repeal is further to align with best international practices and for convergence within the SADC. In an effort to improve the current regulatory environment, the Bank collaborated with the Government to develop draft regulations. These included the Licensing of Insurance Regulations, Qualifications Notice for Intermediaries and Micro Insurance Regulations. These pieces of legislation are expected to improve on the prevailing gaps of the Insurance Act 2014 while the process to repeal is ongoing.'

4 See, for example, the Central Bank of Lesotho, *Annual Report* (2021) 34, reporting that 'as the Regulator of the financial sector, the Bank continually reviews existing laws and proposes new ones in order to address the changing needs of the sector. The following pieces of legislation were gazetted during the Financial Year 2021: ... Insurance (Registration and Licensing Requirements for insurers) Regulations, 2021. This law outlines the application process and requirements for obtaining a licence to carry on insurance or re-insurance business in Lesotho under the Insurance Act, 2014. It was published on 28 May, 2021 ... Insurance (Qualification Requirements for Insurance Intermediaries) Notice, 2021. This law prescribes the minimum qualifications which insurance intermediaries and principal officers should hold in order to qualify to lawfully conduct insurance business in Lesotho. It applies to insurance agents, insurance brokers, and principal officers. It was published on 26 March, 2021.'

Commissioner, as the regulator, to formulate regulations that define what constitutes a funeral insurance policy in line with modern insurance principles, national priorities, trade usage and international practice.

This article is anchored on the decision by the Tribunal. It seeks to investigate the gap in the insurance legislation identified by the Tribunal and the obligations of the Commissioner to complete the reforms. It argues that the Commissioner is compelled to fill this gap in the law for at least two reasons. First, the Commissioner has national and international legal obligations to define funeral insurance policies and fully implement the insurance reforms. Second, it is submitted that with the advent of the Pension Funds Act 5 of 2019, the need to complete the insurance reforms is even greater because this will enable the institution of the pension fund to procure long-term insurance products, such as funeral, death and disability benefits, for the advantage of their members and their members' beneficiaries.⁵

The article has four sections in addition to the introduction. Section 2 discusses the decision of the Tribunal and the gaps identified in the insurance legislation. Section 3 discusses the Commissioner's domestic and international obligations to complete the insurance reforms. This discussion considers the administrative law process of judicial review and the legislative oversight process regarding the separation of powers and checks and balances. It then looks at international obligations under some of the treaties signed by Lesotho.

Section 4 examines additional reasons from the perspective of the Pension Funds Act that compel the Commissioner to complete the insurance reforms. This section is predicated on the idea that pension fund trustees have fiduciary obligations under the Pension Funds Act to procure risk benefits for members independently from employers who participate in these funds. The current practice in Lesotho is for employers, through group insurance, to provide these risk benefits, which typically include life, funeral and disability cover. However, with the advent of pension legislation, the insurance market needs to be completely reformed to enable pension funds to carry out their functions, such as cost-effectively procuring those long-term insurance products. The absence of the regulations contemplated in the Insurance Act of 2014 hinders the social security goals in the pension and insurance legislation. Section 5 concludes the article.

The Revenue Appeals Tribunal Case

In 2005, parliament established the Tribunal in terms of the Revenue Appeals Tribunal Act 2 of 2005.⁶ This Act repealed section 203 of the Income Tax Act 9 of 1993, which

5 See Central Bank of Lesotho, *Supervision Annual Report* (2019) 30, reporting that 'the long-term insurance sector dominates the insurance sector in Lesotho. In 2019, it collected in excess of M2 billion gross premiums with the profits of about M416 million.'

6 For litigation about the transition from the Administrative Tribunal for Tax Appeals to the Tribunal, see *Osman v Lesotho Revenue Authority & Others* [2005] LSHC 189.

had established the Administrative Tribunal for Tax Appeals. One of the responsibilities of the Tribunal is to hear all appeals under the Income Tax Act of 1993, especially about the assessment of income or fringe benefits tax, decisions, rulings and determinations of the Commissioner-General of the Lesotho Revenue Authority (LRA). Decisions of the Tribunal must be published for general information purposes.⁷

In July 2019, the Tribunal decided the important case of *Metropolitan Lesotho Limited v Lesotho Revenue Authority & Another*.⁸ The case arose from a tax assessment against Metropolitan Lesotho Limited prepared by the LRA concerning taxes from 2009 to 2014.⁹ A dispute arose between the parties over the correct interpretation of section 100 of the Income Tax Act, which provides as follows:

100. (1) The income of the life assurance business of a taxpayer, calculated in accordance with the regulations, is exempt from income tax.

(2) In this section, 'life assurance business' means the business of assuming the obligation as an insurer under life policies other than group life assurance but does not include funeral insurance business.¹⁰

The nub of the dispute was that Metropolitan Lesotho Limited sought to obtain a tax exemption from income generated from its funeral insurance business. In its view, the funeral insurance business should be deemed a life insurance business within the meaning of section 100(1) of the Income Tax Act. The LRA disagreed with this view on the basis that the funeral insurance business is expressly excluded and not deemed as a life insurance business in terms of section 100(2) of the Income Tax Act. The question for resolution before the Tribunal was whether funeral insurance policies are life insurance policies for purposes of section 100 of the Income Tax Act.

7 See s 17(3) of the Revenue Appeals Tribunal Act of 2005.

8 RAT 02/2016/17.

9 See Seenyane Nthejane, 'An Investigation of Customer Choice Criteria in Life Endowment Products: Case Study of Lesotho' (MBA dissertation, Henley Business School 2022), noting that Metropolitan Lesotho Limited controls 73 per cent of the long-term insurance market.

10 See also reg 17 of the Income Tax (Superannuation and Life Assurance) Regs 1994, which provides that:

The income of the life assurance business of a taxpayer that is exempt under s 100 of the Order is calculated according to the following formula –

'A x B/C

where,

A is the gross income of the taxpayer, disregarding s 100, and

B is so much of the calculated liabilities of the taxpayer at the end of the year of assessment as, in the opinion of the Commissioner, are referable to life policies assumed by the taxpayer and

C is so much of the calculated liabilities of the taxpayer at the end of the year of assessment as, in the opinion of the Commissioner, are referable to all insurance policies assumed by the taxpayer.'

The Ruling by the Tribunal

From the outset, the Tribunal acknowledged that the legislative framework in Lesotho does not cater to certain industry practices, which created inconsistencies between the legal framework and practice. The Tribunal found that in terms of industry practice, funeral insurance policies are regarded as life insurance policies because they contain features of life insurance products. However, the Income Tax Act expressly bars funeral insurance policies from being considered as life insurance policies for tax purposes. In resolving the dispute in favour of the LRA, the Tribunal found that it was not possible to solve the issue by simply interpreting life insurance policies broadly to include funeral insurance policies because parliament, in section 100 of the Income Tax Act, decided to differentiate between these two types of long-term insurance products clearly.

From the law of separation of powers point of view, it is difficult to fault the reasoning of the Tribunal.¹¹ The Constitution of Lesotho, 1993, establishes three main branches of government.¹² Each of these branches has distinct responsibilities. Parliament is the branch of government vested with the power to make laws.¹³ Due to the growth of the functions of a modern state, the framers of the Constitution in Lesotho recognised the need for delegated law-making powers where other authorities could develop detailed provisions. More than a decade ago, Fombad, writing about the separation of powers in the context of Botswana, made a similar observation.¹⁴ He noted that although section 86 of the Constitution of Botswana entrusts parliament with law-making powers, over the years, parliament has entrusted the exercise of limited legislative powers to certain persons and subordinate bodies in the executive for various reasons. Fombad noted that the ‘bulk of subsidiary legislation far exceeds legislation enacted by parliament in the form of parliamentary Acts.’¹⁵ He correctly observed that delegated legislation is an inevitable feature of a modern state for many reasons, including the fact that ‘legislation on certain technical topics necessitates prior consultations with experts and stakeholders’ and that ‘in enacting legislation, the parliament cannot foresee every administrative ... difficulty that may arise, nor is parliamentary recourse feasible each time amendments to Acts become necessary.’¹⁶ Other scholars and authorities agree

11 For a review of the jurisprudence on separation of powers in Lesotho, see *Sole v Cullinan & Others* [2003] LSHC 9 para 52, noting that separation of powers is not an absolute principle; *Sekoati & 48 Others v President of the Court Martial & 2 Others* 2001 (7) BCLR 750, 761 (Les), noting that absolute separation of powers is not possible; *Judicial Officers' Association of Lesotho & Another v Right Honourable the Prime Minister Pakalitha Mosisili NO & Others* [2006] LSHC 150, noting the limits of judicial power in the context of the law of separation of powers.

12 See chs VI, VIII and XI of the Constitution of Lesotho.

13 See s 70(1) of the Constitution of Lesotho.

14 Charles Fombad, ‘The Separation of Powers and Constitutionalism in Africa: The Case of Botswana’ (2005) 25 *Boston College Third World LJ* 301, 322–323.

15 *ibid* 322.

16 *ibid*.

with these observations.¹⁷ For similar reasons, parliament in Lesotho is also vested with the power to delegate to another person or authority the power to make any rules or regulations or other instruments having legislative effect.¹⁸

Furthermore, regarding the law-making powers of parliament, the Court of Appeal, the apex court in Lesotho, has held that legislation passed by parliament is presumed constitutional.¹⁹ This constitutional stance is designed to ensure that everyone, including organs of state, respects the laws enacted by parliament unless a judicial body sets aside the laws. Thus, in the context of the Income Tax Act, the choice by parliament to distinguish life insurance policies from funeral insurance policies is presumed constitutional until set aside by a competent judicial body. And it was correct for the Tribunal to respect that constitutional presumption.

However, the Tribunal correctly recognised that under section 2 of the Insurance Act of 2014, the Commissioner has delegated authority to determine what constitutes a funeral insurance policy by issuing regulations. This authority is conferred within the context of section 2 of the Insurance Act of 2014, which defines a funeral policy as

a contract of insurance whereby the insurer assumes, in return for a premium or the promise of a premium, an obligation to provide, on the death of any person, benefits to be determined by the Commissioner by regulations.

17 See Cora Hoexter and Glenn Penfold, *Administrative Law in South Africa* (Juta 2021) 33–34, noting that ‘modern legislatures are under tremendous pressure to push through legislative programmes and legislative reform, especially in the developing world. As a result of the vast range of responsibility borne by the state, legislatures are busier than ever ... to flesh out the bones of legislation ... [I]t is simply not in a position to foresee all the practical difficulties that may arise in the implementation of a legislative scheme, or to imagine the mass detail that will be required for its effective regulation. For these reasons, original legislation tends to encapsulate rather broad principles and overarching policy, simultaneously empowering the administration ... to make detailed rules needed for effective regulation’; *Bezuidenhout v Road Accident Fund* [2003] ZASCA 69; [2003] 3 All SA 249 (SCA) para 10, where the court noted that ‘underlying the concept of delegated legislation is the basic principle that the legislature delegates because it cannot directly exert its will in every detail. All it can in practice do is to lay down the outline’; *Executive Council of the Western Cape Legislature & Others v President of the Republic of South Africa & Others* 1995 (4) SA 877 para 51, where the court recognised the imperative for delegated legislative powers and stated that ‘in a modern state detailed provisions are often required for the purpose of implementing and regulating laws, and Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies’; Oagile Dingake, ‘Separation of Powers in Botswana’, a paper presented at the Southern African Chief Justices’ Conference, 6–8 August 2009, Kasane, Botswana, <https://www.venice.coe.int/SACJF/2009_08_BTW_Kasane/speeches/Dingake_Separation_of_powers.pdf>, noting that ‘it is also true that even in the sphere of law making, legislation is not the sole prerogative of the National Assembly as ministers are also empowered by legislation to promulgate subsidiary legislation in certain cases without reference to the National Assembly.’

18 See s 70(2) of the Constitution of Lesotho.

19 *Sechele v Public Officers Defined Contribution Pension Fund & Others* [2011] LSCA 23 paras 11 and 16.

The Commissioner has not yet issued the regulations contemplated in this provision. The result is a gap in the Insurance Act of 2014. The Insurance Act of 1976 continues to regulate funeral insurance policies, and Lesotho's insurance reforms remain incomplete and partially outdated.

The Gap in the Insurance Act of 2014

According to the Tribunal, the Commissioner can address the above gap in the Insurance Act of 2014 by exercising its powers under section 2 of the Act. In the Tribunal's words:

If the Commissioner acts in terms of section 2 to make the required prescription of what would constitute a funeral policy, then from that moment a change in the conceptualization of a funeral policy would have come about. That would have the effect of repealing the previous legislation and all trade usages concerning how a funeral policy should be defined ... In the circumstance it is my considered view that the legal position that prevailed under the 1976 Act continues to prevail until such time as a successful alteration of the status quo has been achieved by appropriate action by the Commissioner in terms of Section 2 of the Act.²⁰

One significant effect of the Commissioner's delay in acting under section 2 of the Insurance Act of 2014 is that Lesotho maintains an irrational and differentiated tax treatment of long-term insurance products, as reflected in section 100(1) of the Income Tax Act. The Tribunal recognised this predicament and correctly left it to parliament or the Commissioner to address it legislatively.

It is essential to highlight that the Court of Appeal has established that the exercise of legislative and executive power in Lesotho is subject to the minimum threshold requirement of rationality.²¹ The effect of this requirement is that a law must always have a rational connection to a legitimate government purpose.²² This requirement forms part of the rule of law and protects against the arbitrary or irrational exercise of legislative or executive authority.²³ The objective of this threshold is to determine whether, viewed objectively, the means selected by parliament or the executive are

20 *Metropolitan* (n 8) para 36.

21 *Ralekoala v Minister of Justice, Human Rights, Law and Constitutional Affairs & Others* [2012] LSCA 38 para 16.

22 *ibid.* See also *Thahane & Others v Specified Offices Defined Contribution Pension Fund & Others* [2017] LSCA 10 paras 25–27. See also *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others* [2008] ZACC 10 para 260, where the court held that 'it is by now axiomatic that our Constitution requires legislation to be rationally related to a legitimate government purpose. If legislation fails to meet this requirement, it is inconsistent with the rule of law and is therefore invalid ... The requirement of rationality in legislation is a safeguard against arbitrariness or caprice in the exercise of legislative power.'

23 See *Thahane* (n 22) para 25; *ACB & Ors v Prime Minister & Ors* [2020] LSHCONST 1 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.

rationally related to the objectives sought to be achieved by the measures adopted.²⁴ Notably, the threshold does not allow the judiciary to replace the choices of parliament or the executive with their own simply because the judiciary believes the power can be exercised better by them.²⁵ The means adopted will be invalidated if legislation or regulations fail to meet this threshold.

In the context of funeral insurance policies in Lesotho, it is submitted that the government has a legitimate objective to raise revenue through taxes and to exempt certain activities from the pain of paying taxes. However, there must be a rational connection between the objectives, namely revenue generation and the measures (such as exemptions in section 100) chosen to achieve those objectives. Life insurance contracts insure the life of an insured, where a sum of money is paid to nominated beneficiaries in the event of the insured's death. In the same way, a funeral insurance contract insures the life of the insured, where a sum of money is paid in the event of the insured's death. In both contracts of insurance, death is the event that gives rise to the payment of a sum of money to identified beneficiaries. It is irrational for the Income Tax Act to exempt income from a life insurance contract and not do the same for a funeral insurance contract. It is rational to expect that the justification for exempting life insurance products from income tax should equally apply to funeral insurance products. A law must be declared invalid if there is no rational basis. Since there is no rational basis for the anomaly created by section 100 of the Income Tax Act, the executive and legislature have an obligation to correct this. This article argues that the executive and legislature have domestic and international obligations to address the gap in the insurance legislation. I discuss these obligations next.

Is the Commissioner Obligated to Decide under Section 2 of the Insurance Act of 2014?

Obligations under Domestic Law

One of the questions that must be considered in addressing the gap identified in the previous section is whether the Commissioner is obligated, by any legal principle, to determine what constitutes a funeral insurance policy. By constitutional design, the executive authority in Lesotho is exercised by the Cabinet of Ministers headed by the Prime Minister.²⁶ The Cabinet is responsible for executing the government's business

24 Thahane (n 22) para 27; *Albutt v Centre for the Study of Violence and Reconciliation & Others* [2010] ZACC 4 para 51, explaining that the purpose of the review 'is not to determine whether there are other means that could have been used.'

25 *Merafong Demarcation Forum* (n 22) para 274, where the court held that 'rationality is a minimum requirement for the exercise of legislative power. This standard does not permit us to substitute our opinions as to what is appropriate for the opinions of the Legislature. Once it is established that the purpose sought to be achieved is within the authority of the Legislature, and as long as the Legislature's decision, viewed objectively, is rational, we cannot interfere with that decision simply because we disagree with it or because we consider that the power was exercised inappropriately.'

26 See ss 86, 87(1) and (2), 88(1) and (2), and 89 of the Constitution of Lesotho.

and the laws passed by parliament.²⁷ When executing these functions, the Cabinet is collectively responsible to parliament for everything done or not done.²⁸ From this constitutional design, laws passed by parliament are expected to be implemented, and the Cabinet is held collectively accountable for its constitutional responsibility of executing laws.

In relation to the insurance industry, parliament entrusted the Commissioner,²⁹ an executive organ of the state, with delegated authority to execute the insurance reforms by defining, through regulations, what constitutes a funeral insurance policy in Lesotho. Two important implications flow from this. First, the Commissioner is under a legal obligation to fully implement the Insurance Act of 2014 by making those contemplated regulations. Second, the Commissioner's powers to make those regulations are supervised by administrative law principles because the making of regulations constitutes administrative action and is, therefore, governed by the principles of administrative law.³⁰ Therefore, there is no doubt that the delay (since 2014) by the Commissioner to determine section 2 of the Insurance Act of 2014 is unreasonable and should be addressed. Two possible ways to address the Commissioner's failure to make the regulations are discussed below.

Judicial Review

The first way is through judicial review of the Commissioner's failure to decide terms of section 2 within a reasonable time. This is one of the few means that can be used to hold the executive to account. The failure to decide within a reasonable time has always existed under the common law to force a slow or reluctant government official to

27 Section 89 of the Constitution of Lesotho.

28 Section 88(2) of the Constitution of Lesotho.

29 Presumably in terms of section 70(2) of the Constitution of Lesotho.

30 See *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC) para 27, where the court held that 'laws made by functionaries may well be classified as administrative; laws made by deliberative legislative bodies can seldom be so described'; *Minister of Health & Another v New Clicks South Africa (Pty) Ltd & Others* 2006 (2) SA 311 (CC) paras 113, 135, where the court explained that 'the making of delegated legislation by members of the executive is an essential part of public administration. ... [T]o hold that the making of delegated legislation is not part of the right to just administrative action would be contrary to the Constitution's commitment to open and transparent government', and that 'the making of the regulations in the present case was a decision of an administrative nature [because] the regulations were made under an empowering provision'; *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* 2010 (3) SA 589 (SCA) para 10, where the court held that 'I agree with the appellant's contention that the making of regulations by a Minister constitutes administrative action'; and *Security Industry Alliance v Private Security Industry Regulatory Authority & Others* 2015 (1) SA 169 (SCA) para 15, where the court found that 'it is not in dispute that the decision of the Minister to publish the amendment to the regulations on the recommendation of the Authority constituted administrative action.' But see *McDonald & Others v Minister of Minerals & Energy & Others* 2007 (5) SA 642 (C), where the court explained that 'as appears from the various judgments in the *New Clicks* case, *supra*, it is still an open question whether the minister's decision to make regulations amounts to administrative action.'

decide.³¹ When dealing with a delay in the application for the registration of a trade union, the court in *Cape Furniture Workers Union v McGregor*³² held that ‘where a statute requires an official to give a decision within a reasonable time, and he fails to do so, the Court will order him to carry out his duties, even though there has been no direct refusal on his part to do so.’³³

The legal proposition from *Cape Furniture Workers Union v McGregor* and similar authorities is that if a statute prescribes timelines according to which an administrator must act, an aggrieved person can institute review proceedings against an administrator for failure to decide according to the prescribed timelines. If no timelines are prescribed in the legislation, an aggrieved person may institute review proceedings on the grounds that there has been an unreasonable delay in making a decision. An important component of this ground of review is that an administrator must be under an obligation to decide. This must be distinguished from an administrator who merely enjoys a right to decide.³⁴ I argue below that the Commissioner has an obligation and not merely a right to determine what constitutes a funeral insurance policy under section 2 of the Insurance Act of 2014.

The scope and purpose of this ground of review for failure to decide has been explained in several cases, including *Offit Enterprises (Pty) Ltd & Another v Coega Development Corporation (Pty) Ltd, & Others*.³⁵ There, the Supreme Court of Appeal of South Africa explained that the purpose of the ground of review for unreasonable delay concerns:

31 *Jooste v Witwatersrand Licensing Court* 1909 TS 33, where the court held that if an official or board does not exercise powers granted by a statute which a person is entitled to require to be exercised in his favour, the court will interfere; *Johannesburg Consolidated Investment Company v Johannesburg Town Council* 1930 TS 111, 115, where the court held that ‘whenever a public has a duty imposed upon it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this Court may be asked to review the proceedings complained of and set aside or correct them. This is no special machinery created by the Legislature; it is a right inherent in the Court, which has jurisdiction to entertain all civil causes and proceedings arising within the Transvaal. The non-performance or wrong performance of a statutory duty by which third persons are injured or aggrieved is such a cause as falls within the ordinary jurisdiction of the Court. And it will, when necessary, summarily correct or set aside proceedings which come under the above category.’

32 1930 TPD 862.

33 *ibid* 686.

34 *Commissioner, SARS v Trend Finance (Pty) Ltd* [2007] ZASCA 59.

35 *Offit Enterprises (Pty) Ltd & Another v Coega Development Corporation (Pty) Ltd & Others* [2010] ZASCA 1.

a decision that the administrator in question is under some obligation to take, not simply to indecisiveness in planning on policy issues. It is directed at dilatoriness in taking decisions that the administrator is supposed to take and aims at protecting the citizen against bureaucratic stonewalling. As such its focus is the person who applies for an identity document, government grant, licence, permit or passport and does not receive it within an appropriate period of time and whose attempts to chivvy officialdom along are met with: ‘Come back next week.’ It is not directed at decisions in regard to future policy.³⁶

The ground of review for unreasonable delay was successfully applied in *Noupoort Christian Care Centre v Minister of National Department of Social Development & Another*,³⁷ where the Ministry of Social Development failed to make a final decision on an application by the applicants for a permanent business registration certificate as a drug treatment centre in terms of the Prevention and Treatment of Drug Dependency Act 20 of 1992. The Ministry allowed the applicants’ temporary business registration to linger on indeterminately rather than making a final decision about their permanent business registration status. The court ordered that the decision about the application for business registration had to be made within one month.

Another case where this ground of review was applied successfully is *Intertrade Two (Pty) Ltd v MEC for Road and Public Works, Eastern Cape*.³⁸ In this case, the Eastern Cape provincial government failed to decide on a few government tenders following a defective tender process. The applicant, who was the only tenderer, brought a cause of action for judicial review for failure by the provincial government to decide within a reasonable time. The court ruled in favour of the applicant and ordered the provincial government to appoint an independent consultant to evaluate the tenders and to make recommendations to the government within two months. In turn, the provincial government was ordered to decide on the tenders within one month of receiving those recommendations.

Lastly, in *Jose & Another v Minister of Home Affairs & Others*,³⁹ the High Court relied on the ground of unreasonable delay to order the Minister of Home Affairs to grant citizenship to the applicants.⁴⁰

36 *ibid* para 43.

37 *Noupoort Christian Care Centre v Minister of National Department of Social Development & Another* 2005 (1) BCLR 1034 (T).

38 2007 (6) SA 442 (Ck). See Raisa Cachalia, ‘Clarifying the Exceptional Circumstances Test in *Trencon*: An Opportunity Missed’ (2015) 7 *Constitutional Court Review* 115, discussing the dictum in *Intertrade* about when a court can substitute the decision of the government; Lauren Kohn, ‘The Test for “Exceptional Circumstances” Where an Order of Substitution is Sought: An Analysis of *Trencon* Against the Backdrop of the Separation of Powers’ (2015) 7 *Constitutional Court Review* 91.

39 [2019] JOL 41649.

40 See also *Minister of Home Affairs & Others v Jose & Another* [2020] ZASCA 152 (upholding the high court order).

Based on the above case authorities, I submit that the Commissioner has the right, power and duty to determine what constitutes a funeral insurance policy under section 2 of the Insurance Act of 2014. It is also evident that the delay (since 2014) by the Commissioner to make that determination is unreasonable because it has created uncertainty in the pension and insurance industry and should be judicially reviewed.⁴¹

Reliance on the institution of judicial review to address the problem identified in this article has a few weaknesses. One weakness is that it is difficult to identify an aggrieved party willing to challenge the government on a public policy issue like the present one. In most developing countries like Lesotho, the government of the day is seldom challenged through the courts on issues that involve public policy uncertainty. At the heart of the problem with the funeral insurance business in Lesotho is that because of the gaps in the Insurance Act of 2014, there is policy uncertainty about whether the funeral insurance business should be treated differently from the life insurance business. Both businesses are an integral part of the (long-term) insurance business.⁴²

Another weakness of reliance on judicial review is that the courts are not best equipped to deal with the technical and polycentric terrain of pension funds, insurance and the associated tax and budgetary considerations reserved for the executive and legislature.⁴³ In a recent comparative study on pension deductions in Lesotho and Eswatini, Mhango and Mosito developed this point by observing that ‘courts are not well suited to judge technical pension policy decisions that should be made by specialist bodies such as pension regulators, pension professionals, or tax authorities.’⁴⁴ They also cite with approval the most quoted paragraph from O’Regan J’s judgment in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & Others*:⁴⁵

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.⁴⁶

41 *Metropolitan* (n 8) paras 63–83.

42 Section 2 of the Insurance Act of 2014 defines the insurance business as ‘the business of undertaking liability under a contract of insurance to indemnify a person in respect of any loss or damage, including the liability to pay damages or compensation contingent upon the happening of a specified event, and includes assurance and reinsurance business.’

43 *Phoofolo KC v The Right Honourable Prime Minister* 2017 LSCA 8 paras 24–25, where the court found that a taxpayer has no standing to challenge the executive for violation of the revenue statute because it is the legislature’s function to hold the executive to account over budgetary matters; *Attorney General v His Majesty the King* (C of 2015 LSCA 1 (12 June 2015) para 26, where the court discussed the importance of the national budget in Lesotho.

44 Mtendeweka Mhango and Kananelo Mosito, ‘The Constitutional Implications of Pension Deductions under the Pension Funds Act of Lesotho: A Comparative Analysis’ (2023) 27(1) LDD 183, 204.

45 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & Others* 2004 (7) BCLR 687 (CC).

46 *ibid* para 48.

It is submitted that Mhango and Mosito are correct in their observations. In addition to separation of powers considerations, courts are reluctant to intervene or to substitute the government's choices with their own choices in technical areas where other departments have greater expertise than the judiciary. In *Intertrade Two (Pty) Ltd*, Plasket J locates this reluctance within the constitutional principle of separation of powers, which defines the authority and limits of each government department. Based on this principle, Plasket J cautioned that

courts, when considering the validity of administrative action, must be wary of intruding, even with the best of motives, without justification into the terrain that is reserved for the administrative branch of government. These restraints on the powers of the courts are universal in democratic societies.⁴⁷

Nevertheless, the best remedy that Basotho can get from this option of using judicial review is an order against the Commissioner to make regulations within a specific time.

Legislative Oversight

The second way to address the Commissioner's delay is through a parliamentary process. Section 88(2) of the Constitution of Lesotho provides that the Cabinet is collectively accountable to parliament for the execution of government business. Parliament has a right and a responsibility to hold the executive responsible for the lack of a definition of a funeral insurance policy in Lesotho's insurance legislation. As a lawmaker, parliament has a few options, including requiring the Commissioner to issue the envisaged regulations within a specific time frame or to amend section 2 of the Insurance Act 2014 by including a definition in the legislation. The best option is within the wisdom of parliament. What is important for parliament to consider is the impact of this issue on Basotho society and the advancement of social security objectives in the Constitution of Lesotho.⁴⁸

One of the advantages of resolving the problem discussed in this article is that it will promote social security and produce policy certainty in the way that the government of Lesotho treats and regulates long-term insurance products. Policy certainty is essential for ensuring foreign and domestic institutional investor confidence. It engenders investor confidence, leading to greater investment and economic development and improving a nation's quality of life and stability.⁴⁹ Policymakers in Lesotho must consider these noble ideals in addressing the law gap identified in this article.

47 *Intertrade Two (Pty) Ltd* (n 38) para 46.

48 See s 30(a) of the Constitution of Lesotho.

49 For literature about the impact of policy uncertainty on an economy, see Goodness Aye, 'Effects of Fiscal and Monetary Policy Uncertainty on Economic Activity in South Africa' (2020) 25(1) *Advances in Decision Sciences* 1, generally arguing that there is every need to reduce policy uncertainty to a bare minimum for the economy to thrive; Dani Rodrik, 'Policy Uncertainty and Private Investment in Developing Countries' (1991) 36(2) *Journal of Development Economics* 229, noting that private investment is a necessary ingredient of a sustainable recovery in heavily indebted

Obligations under Treaty Law

Through the Commissioner, Lesotho is also obligated to act under section 2 of the Insurance Act of 2014 in light of some of the treaties it has ratified. For example, Lesotho has a treaty obligation under Article 18 of the African Charter on Human and Peoples' Rights to adopt special measures that will assist the family in addressing the risks of death, disability, old age and other social risks. Defining a funeral insurance policy in a manner that deems it to be a life insurance policy will ensure that Lesotho complies with its obligations under Article 18 of the African Charter.

In another context, Lesotho has complied with this treaty obligation by passing the Specified Offices Defined Contribution Fund (Amendment) Act 3 of 2014.⁵⁰ In *Thahane*,⁵¹ the court commended the state for adopting measures in the form of the Specified Offices Defined Contribution Fund (Amendment) Act, which it recognised as an implementation of Lesotho's treaty obligations under Article 18 of the African Charter. In the same way, I submit that the Commissioner must advance the imperatives of the African Charter by acting under section 2 of the Insurance Act to define what constitutes a funeral insurance policy because this will alleviate the burden on the family following the death of a breadwinner.

Lesotho is also a signatory to the Treaty of the Southern African Development Community and its subsidiary instruments, such as the Charter of Fundamental Social Rights in SADC (2003), the Protocol on Finance and Investment (2006),⁵² and the Code on Social Security in SADC (2007). One of the purposes of the Code on Social Security is to provide member states with a valuable mechanism for the coordination, convergence and harmonisation of social security systems in the region. For our purposes, Articles 6 and 9 are the most significant provisions in the Code on Social Security. Article 6 requires member states to establish social insurance schemes. The Code on Social Security defines social insurance as

a form of social security designed to protect income earners and their families against a reduction or loss of income as a result of exposure to risks. These risks impair one's capacity to earn income. Social insurance is contributory with contributions being paid by employers, employees, self-employed persons, or other contributors, depending on the nature of the specific scheme. Social insurance is aimed at achieving a reasonable level of income maintenance.⁵³

developing countries, that policy uncertainty can act as a hefty tax on investment, and that otherwise sensible reforms may prove damaging if they induce doubts as to their permanence.

50 See also the Public Officers Defined Contribution Pension Fund Act 8 of 2008.

51 *Thahane* (n 22) para 31.

52 The Protocol of Finance and Investment was enforced on 16 April 2010.

53 Paragraph 1.3 of the Code on Social Security in SADC. See also para 1.5, where social security is understood to refer to 'public and private, or to mixed public and private measures, designed to protect individuals and families against income insecurity caused by contingencies such as

The enactment of the Insurance Act of 2014 ensures compliance with the Code on Social Security by Lesotho. The Code on Social Security also implores member states to adopt legislative measures to guarantee proper governance of these schemes.⁵⁴ In the main, Article 9 of the Code on Social Security implores Lesotho to, among other things, ensure that social insurance schemes in the country protect against the contingency of death, which should include assistance with funeral costs.

In addition to the Code on Social Security, the broad objectives of the Protocol on Finance and Investment are, through various democratic institutions such as the Committee of Insurance, Securities and Non-Banking Financial Authorities of SADC (CISNA), to foster the harmonisation of the legislation of member states to ensure consistency and adherence to international regulatory standards and best practice, as well as to promote adherence to sound corporate governance practices.⁵⁵ Lesotho is mindful of these treaty objectives and obligations.⁵⁶

By its admission, Lesotho has not kept up with its neighbours, many of whom have complied with their obligations and addressed the treatment of the funeral insurance business in their legislation.⁵⁷ For example, in Botswana, the authorities have established, pursuant to Schedule 2 of the Insurance Industry Act 10 of 2015, a class of long-term insurance business, which includes disability business, health business, fund business, life business and sinking fund business.⁵⁸ Besides these legal obligations that compel the Commissioner to act appropriately in terms of section 2 of the Insurance Act, new legislative measures in the Pension Funds Act provide additional incentives for the Commissioner to act accordingly.

unemployment, employment injury, maternity, sickness, invalidity, old age and death. The main objectives of social security are: (a) to maintain income, (b) to provide health care, and (c) to provide benefits to families. Conceptually and for the purposes of this Code, social security includes social insurance, social assistance and social allowances.'

54 See Art 21 of the Code on Social Security, providing that 'Member States should endeavour to establish proper administrative and regulatory frameworks in order to ensure effective and efficient delivery of social security benefits, in particular: ... improved monitoring and sound governance structures independent of social security providers to ensure the protection of members, autonomous decision making and sound investment, among other requirements.'

55 See Annex 10 of the Protocol on Finance and Investment.

56 See *Supervision Annual Report* (n 5) 30, reporting that there is an ongoing process to repeal the Insurance Act of 2014 to bring it in line with treaty obligations.

57 *ibid*, reporting that the Central Bank of Lesotho 'initiated the process to repeal the Insurance Act of 2014, which was beginning to show some gaps during its implementation. The purpose of the repeal is further to align with best international practices and for convergence within the SADC.'

58 But see s 5 of the Insurance Act of 2014, which recognises different types of long-term insurance, and yet funeral insurance is treated differently. For a discussion of Botswana's Insurance Industry Act, see Thabo Khumalo, 'A Commentary on the Insurance Industry Act 2015 of Botswana' (2018) 26(1) *Lesotho LJ* 147.

The Implications of the Pension Funds Act

Long-term insurance products such as life, funeral and disability insurance policies and other forms of social security can be accessed by members of pension funds directly (by personally entering into an insurance contract with an insurer) from an insurer or indirectly (by being designated as a third party beneficiary in an insurance contract) from a pension fund⁵⁹ or an employer.⁶⁰ One of the problems in Lesotho is that most employees are not covered against these risks as part of their participation in a pension fund. The Pension Funds Act is designed to change this situation by providing a mechanism for pension funds to procure these risk benefits and for members to access them through a pension fund.

Section 1 of the Pension Funds Act defines a pension fund as a fund registered under section 10 of the Pension Funds Act and set up to conduct pension fund business. A pension fund business is defined as the ‘business of undertaking liability in return for contributions from members or sponsoring employers to provide annuities or lump-sum payments and other related benefits on the attainment of retirement age of member or some other contingency.’⁶¹ Any person intending to operate a pension fund must register and satisfy inevitable minimum retirements.⁶² The effects of registration by a pension fund are set out in section 11:

11(1) A fund registered under this Act shall –

- (a) be a body corporate, governed by a board, and capable of suing and being sued in its own name;
- (b) be capable of owning or holding property, and of doing or performing all such acts as may be necessary or incidental to the exercise of its powers or the performance of its functions in terms of its rules; and
- (c) assume liability for and guarantee the benefits offered to its members in terms of the rules.

Section 18(1)(d), read with section 37 of the Pension Funds Act, envisages that, as an institution separate from the employer who participates in it, a pension fund can and should provide risk benefits, including life, disability and funeral benefits as part of the pension promise. This is partly because pension funds do not build reserves to pay risk benefits. Instead, benefits are insured or paid from the contributions received plus any investment growth. Moreover, regulation 8(2)(k) and (4)(j) of the Pension Funds

59 See *Nkuebe v Metropolitan* [2014] LSHC 43, which involved risk benefits provided to members through their participation in a pension fund.

60 For a discussion of cases dealing with problems associated with long-term insurance products obtained by employers for the benefit of pension members, see Naleen Jeram, ‘Participating Employers under Scrutiny in Disability Claims’ (2008) 29 *Industrial LJ* 51.

61 Section 1 of the Pension Funds Act.

62 See ss 9 and 10 of the Pension Funds Act.

(Disclosure) Regulations, 2020, requires pension funds to provide a benefit statement annually to its members. The regulations also prescribe the minimum information that must be contained in a benefit statement, which includes life, disability and funeral benefits or any other benefits provided by the fund.

The above provisions confirm that there is a legislative expectation that pension funds will provide risk benefits, such as funeral benefits, to members or employees based on their institutional risk assessment process and fiduciary obligations towards the fund members.⁶³ One could argue that the primary goal of a pension fund business, read with the main function of the board of trustees in section 17 of the Pension Funds Act, which is to act with due care and in the best interest of the members, requires it to provide funeral benefits, because this is one of the contingencies that members or their survivors face in the event of death. Therefore, through section 2 of the Insurance Act of 2014, the Commissioner has an opportunity to practicalise the above treaty obligations and change the status quo by providing an enabling environment for pension funds in Lesotho to improve their benefit offerings by directly procuring funeral insurance contracts for their members.

If the gap in section 2 of the Insurance Act of 2014 is not addressed, it may be too costly for pension funds to procure funeral benefits. Due to the envisaged direct involvement of pension funds in procuring funeral benefits, it will promote social protection if the Commissioner closes the gap identified in this article.

Conclusion

It has been nine years since the Insurance Act of 2014 was adopted in Lesotho, but the process of implementing the Insurance Act of 2014 remains incomplete. It is recommended that the Commissioner use its powers under section 2 of the Insurance Act of 2014 to define what constitutes a funeral insurance policy and, in crafting the definition, to cause the removal of the legal and tax anomalies that currently exist. Consumers of long-term insurance products, pension funds and, by extension, society at large stand to benefit from such a decision. The decision will also ensure that Lesotho harmonises its legislative measures and practices with the rest of the SADC region.

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