IN THE HIGH COURT OF SWAZILAND

Civil case No: 539/2012

In the matter between:

CHARLES DLAMINI	**FIRST APPLICANT**
SIPHO SIYAYA	**SECOND APPLICANT**
COXIN TSABEDZE	**THIRD APPLICANT**
SANDILE NKHOMA	**FOURTH APPLICANT**

AND

THE REGISTRAR OF INSURANCE AND RETIREMENT FUNDS	**FIRST RESPONDENT**
THE SWAZILAND WATER SERVICES CORPORATION PENSION FUND	**SECOND RESPONDENT**
ANGELINE MATSENJWA N.O.	**THIRD RESPONDENT**
SWAZILAND WATER SERVICES CORPORATION	**FOURTH RESPONDENT**

Neutral citation: *Charles Dlamini & 3 Others v The Registrar of Insurance & Retirement funds & 3 Others (539/12) [2012] SZHC 102 (30 April 2012)*

Coram: **M.C.B. MAPHALALA, J**

For Applicants Attorney Zweli Shabangu
For Respondents Attorney Zweli Jele

Summary

Civil Procedure – Review proceedings of decision of first respondent – Common law review grounds not established – application dismissed.

JUDGMENT
30 APRIL 2012

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[1] An urgent application was brought seeking an order interdicting the Respondents from proceedings with and/or finalizing the distribution of E43, 629, 104.00 (Forty three million six hundred and twenty nine thousand one hundred and four emalangeni) received by the second and/or fourth respondents from the Public Service Pension Fund (PSPF) pending finalization of this application; they further sought an order reviewing, correcting and/or setting aside the first respondent's decision of the 15th December 2011 as restated in a letter dated 21st December 2011 to the effect that the amount of E43, 629, 104.00 (Forty three million six hundred and twenty nine thousand one hundred and four emalangeni) received by the second and/or fourth respondents from the Public Service Pension Fund being in respect of the transfer values of the applicants and other former employees of the Swaziland Water and Sewerage Board should be distributed indiscriminately to the members of the second respondent including those who are not former employees of the Swaziland Water and Sewerage Board. They also sought an order declaring that the amount of E43, 629, 104.00 (Forty three million six hundred and twenty nine thousand one hundred and four emalangeni) received from the Public Service Pension Fund vests only in or is an entitlement of the former employees of the Swaziland Water and Sewerage Board who are members of the Public Service Pension Fund.

[2] The applicants are employees of the fourth respondent; they further allege that they are former pensionable employees of the Swaziland Water and Sewerage Board

as well as former members of the Swaziland Government Pension Fund Scheme which was administered by the Public Service Pension Fund (PSPF). They alleged that the Government took a decision to convert the Swaziland Water and Sewerage Board into a parastatal which culminated in the establishment of the Swaziland Water Services Corporation, the fourth respondent. They argued that the employees of the Water and Sewerage Board, inclusive of the applicants, were transferred into the employ of the fourth respondent on the 1st July 1994, but they continued being members of the PSPF until such time that the second respondent was established wherein they would cease to be members of the PSPF, a pension fund which caters for government employees. According to the applicants, all the pension entitlements at the time had to be transferred to the second respondent which was established in April 1999.

[3] They argued that the pension scheme under PSPF entailed that the government would pay a pension benefit on behalf of the employees of the Water and Sewerage Board without deducting a pension contribution from their salaries; they argued that the pension money cannot be allocated to other people. The pension scheme under the second respondent entails a

contribution by both the employer and employee. They alleged that some of their pension benefits were not paid over to the second respondent due to a lack of funding; and, that an agreement was made between PSPF and the second respondent that the outstanding transfer values would be paid at a later date.

[4] The applicants alleged that between 1999 and 2010 the remaining transfer values had accrued to E43, 629, 104.00 (Forty three million six hundred and twenty nine thousand one hundred and four emalangeni); and that the respondents now seek to distribute indiscriminately among all members of the second respondent. They alleged that this amount has since been transferred to the second and/or fourth respondent; and, that the first respondent has unlawfully categorised the transfer values together with the accrued value as surplus belonging to the second respondent. They argued that this has a tendency of depriving the former employees of the Water and Sewerage Board of their entitlements in respect of the transfer values. They referred to a letter written by PSPF stating that the amount is for the former employees of the Water and Sewerage Board.

[5] They also alleged that the trustees of the second respondent intend to distribute the amount across the board inclusive of new members of the second respondent pursuant to a directive by the first respondent issued on

the 21st December 2011; they argued that the first respondent misdirected himself and acted *ultra vires* his powers in terms of the Retirement Funds Act of 2005 as read together with the Insurance Act of 2005 thereby committing a gross irregularity. The second respondent had to report to the first respondent that it would abide by the directive by the 12th January 2012. They alleged that the first respondent further directed that the transfer values should be distributed by an actuary whose report they were not privy to it and couldn't challenge it. They argued that the directive was grossly unreasonable, unfair, unjust and irregular insofar as it sought to benefit undeserving people who were not employees of the Water and Sewerage Board.

[6] The applicants further alleged that the first respondent failed to give them a hearing prior to making the decision notwithstanding that the decision was prejudicial to them; they argued that the first respondent did not have the powers as alleged in terms of the Retirement Funds Act of 2005 or the Insurance Act of 2005.

[7] They argued that they have proved that they are entitled to the prayer relating to the declaration that the money belongs to former employees of the Water and Sewerage Board by establishing the existence of a dispute, and, that the rights to be determined are not academic but relate to an

existing dispute. They further argued that they satisfy the requirements for the grant of an interdict that they have a clear right to the money which is being infringed by the respondents who seek to distribute their money to non-deserving employees, and, that they have no alternative remedy other than to seek the interdict pending the review. They further argued that the balance of convenience favours the grant of the interdict because the prejudice to be suffered by the applicants if the interdict is not granted far outweighs any prejudice if the interdict be granted.

[8] They argued that they had engaged the second respondent for an amicable solution but this did not succeed inclusive of a consultative meeting of the 12th March 2012 where the second respondent's Board of Trustees confirmed that the distribution would proceed on the 15th December 2011, hence the urgent application.

[9] They further alleged that they had initially approached the office of the Retirement Fund Adjudicator for intervention on the 15th December 2011 but they were advised that the office has no jurisdiction because it was repealed by section 83 (4) of the Financial Services Regulatory Authority Act of 2010.

[10] On the 16th March 2012 this court granted a Consent Order interdicting the respondent from proceeding with and/or finalizing the distribution of E43, 629, 104.00 (Forty three million six hundred and twenty nine thousand one hundred and four emalangeni) received by the second and/or fourth respondents from the Public Service Pension Fund pending finalization of the matter.

[11] This application is opposed, and, the first respondent alleges that he was requested by the second respondent to approve a surplus apportionment of funds received from PSPF. He sought clarification from the second respondent if there had been adequate consultations with members of the Fund; he further sought clarification why the payment from PSPF was classified as surplus as well as the basis for inclusion of new workers who were not former employees of the Water and Sewerage Board. The second respondent provided the requisite clarification.

[12] He argued that they further received a letter from applicants' attorneys addressed to the third respondent; and, that he applied his mind to the issues raised. He argued that he engaged the assistance of actuarial experts in order to take cognisance of all the concerns that had arisen. He also alleged that on the 20th December 2011, he wrote a letter to applicants' attorneys advising them that there had been an extensive engagement process

between his office and the second respondent culminating in the approval of the distribution; that the distribution method was informed by advice he had received from an independent actuary to ensure that the distribution was done in a fair and equitable manner.

[13] He further argued that in the exercise of his powers in terms of the Retirement Funds Act No. 5 of 2005, the regulations that he makes do not become effectual until they have gone through the Minister, the Attorney General and subsequently tabled in parliament before publication in the Gazette. He reiterated that the industry has a Board of Trustees who are elected representatives of members of the Fund, and the board looks after the interests of both employees and employers as well as those of the Fund. He denied that in executing his duties, he doesn't uphold the principles of Natural Justice before making his determination; he confirmed that he is obliged to give a hearing to the Trustees. He denied that he had an obligation to grant a hearing to individual members of the Fund. He argued that the individual members by establishing the Board of Trustees waived their right to make direct representations to him.

[14] He further argued that the method of distribution of the money inclusive of non-members of PSPF is equitable on the basis that it was approved by the Board of Trustees in consultation with the membership; and that the method

is based on expert advice by actuaries. He further argued that the classification of the money as "surplus" is in accordance with section 2 of the Retirement Fund Directive of 2008 which defines a surplus to mean the amount by which the assets of a retirement fund exceeds its liabilities. He concluded by stating that when receiving the E43, 629, 104.00 (Forty three million six hundred and twenty nine thousand one hundred and four emalangeni) from PSPF, the assets of the Fund exceeded its liabilities; hence, the amount was deemed to be a surplus in terms of the provisions of the Act.

[15] The third respondent who is the chairperson of the Board of Trustees of the Fund has deposed to an Answering Affidavit on behalf of the Fund as well as herself. She stated that on the establishment of the fourth respondent by Parliament, the Water and Sewerage Board ceased to exist; the contracts of employees of the Water and Sewerage Board were transferred and taken over by the Corporation and were never terminated. For this reason, they did not receive their terminal and pension benefits. The Corporation engaged both pensionable and non-pensionable employees who were referred as temporary employees; however, only the pensionable and/or permanent employees were members of PSPF. Since the Corporation did not have a pension fund scheme, it was resolved that the pension

entitlements of the employees would continue to be under the auspices of PSPF and that their contributions to PSPF would continue.

[16] The third respondent stated that in 1998 the Corporation established its own pension fund, and, the members of PSPF were given an option to join the new fund or remain with PSPF; some did join the new fund whilst others remained with PSPF. The Corporation then engaged PSPF with a view to transferring the funds in respect of employees who had joined the Fund. An actuarial evaluation conducted by PSPF found that the liability to permanent and pensionable members of the Water and Sewerage Board stood at E27 million and that PSPF was liable for 36.8% of this amount, namely E9.7 million, and, the balance of 63.2% deficit was due from the government as the employer. Due to the shortfall, it was resolved that the balance standing to the credit of each employee would be transferred to the Fund.

[17] She alleged that the government contributed E18.1 million to cover the deficit in respect of the temporary employees who were transferring to the Corporation but PSPF did not transfer the E9.7 million; and, that the Fund on being established in April 2000 accepted the full transfer values for all employees who elected to join the Fund. She argued that since employees did not transfer at the same time, transfer values had to be recalculated each

time employees were transferred; and that subsequent transfers were effected without the additional funds to cover the increase in transfer values that had accumulated; and that the transfer values were financed by the Fund, and that the E9.7 million was reflected as a debt in the books of Fund.

[18] She argued that the credit balances were transferred in full but the actual money was not transferred; and, that members received statements reflecting their full transfer value and as such they were not prejudiced. She argued that the Fund honoured obligations to pay pension benefits in full when they fell due inclusive of retirement benefits, retrenchment benefits, terminal benefits, death benefits or disability; that this obtained notwithstanding that E9.7 million from PSPF had not been paid to the Fund and means were being made to have PSPF remit the balance of E9.7 million. She argued that the Fund had to utilise available funds in order to meet the obligations of those who were exiting the Fund. She reiterated that no funds can vest in any member of the Fund until a condition set out in the rules of the Fund has been fulfilled.

[19] In 2010 PSPF transferred the E9.7 million together with interest calculated from 1998 up to 31st December 2009 amounting to E43.6 million to the Fund; thereafter, an actuary was engaged for advice on the most equitable

way of distributing the funds, and that members were consulted extensively on the proposed distribution.

[20] She explained that the Fund is a corporate body established in terms of its rules, with powers to sue and be sued; its executive body is the Board of Trustees which comprises management and employees' representatives. She argued that both the union and staff association are represented, and that the Board of Trustees is independent of the Corporation; that the Fund has rules to resolve disputes which encompass the requirement that there should be exhaustion of domestic remedies. She argued that the Fund complied with the law by obtaining the approval of the Registrar of Insurance before effecting the distribution in accordance with the advice of actuaries.

[21] She stated that the receipt of the E43.6 million created a surplus in the Fund which was subsequently invested in a separate bank account of the Fund on the advice of the Registrar of Insurance. She further stated that in addition to consulting actuaries and approval by the Registrar, they consulted widely with the membership, the trade union and staff association. They were advised that members of the Corporation who had not been part of the Water and Sewerage Board had suffered a loss since their Fund values had not grown at the expected rate because of the previous deficit caused by

PSPF. In addition, members were advised that the E43.6 million received from PSPF was not a bonus or personal entitlement; and that they could only access the funds on termination of employment in terms of the rules either on retirement, retrenchment, disability or any other lawful method of termination of employment.

[22] According to her, consultative meetings were held with members throughout the country and that the applicants were among the minority who did not accept the explanations and walked out of the meetings; she denied that the applicants were not consulted and argued that they waived their right to consultation. What was central to some members was that the distribution of the E43 million should exclude those who were not PSPF members.

[23] She stated that pursuant to the approval to distribute from the Registrar of Insurance, an amount of E7.9 million has been distributed to at least ninety four employees of the Corporation inclusive of members of the former Water and Sewerage Board and those who joined the Corporation in 1994. The Trustees have made the distribution to members who have retired or were retrenched or left on grounds of disability, resigned or dismissed; and that active members have been given interim statements showing their allocations from the Fund. She further stated that the Trustees have in

addition paid the normal operational expenses including actuarial fees, tax liabilities and other disbursements. She further alleged that the trustees have published adverts in the local media calling upon the beneficiaries of deceased members to come and receive their share of the distribution.

[24] In conclusion the second and third respondents argued that the deponent to the applicant's founding affidavit lacks the necessary *locus standi*, to institute the application and that the matter ought to have been dealt with in terms of section 58 of the Act with the applicants challenging the decision of the Adjudicator. They denied that the E43, 629, 104.00 (Forty three million six hundred and twenty nine thousand one hundred and four emalangeni) vests in the applicants and argued that a pension amount can never vest on a member until the conditions set out in the rules of the Fund have been fulfilled.

[25] They further argued that the money was lawfully credited to the Fund in order to enable it to compensate members who did not receive their full entitlement due to adjustments made in order to meet obligations by the PSPF. They further argued that the directive issued by the Registrar of Insurance was lawful and in terms of Legal Notice No. 56 of 2008 under section 69 of the Act and complied with all procedural requirements. They denied that the registrar was obliged to give the applicants a hearing before

his approval; and they argued that it is the trustees who are obliged to give members a hearing.

[26] Jethro Ndlangamandla, the Operations Manager of PSPF deposed to an affidavit clarifying the transfer of the E43, 629, 104.00 (Forty three million six hundred and twenty nine thousand one hundred and four emalangeni) from PSPF to the Fund and stating that he did not wish to take sides in the dispute. He stated that the amount of E27 million was arrived at as a result of an actuarial valuation exercise that was undertaken to determine the transfer values and that this represented the total of pension benefits that were due to the members; it constituted the total of the transfer values. He further stated that the balance of E9.7 million due from PSPF represented the portion of the transfer values that could not be paid because of the funding deficit that existed at the time. He also stated that the amount of E43, 629, 104.00 (Forty three million six hundred and twenty nine thousand one hundred and four emalangeni) is in respect of transfer values of former members, and, that PSPF obtained an actuarial valuation to arrive at the transfer values of E43, 629, 104.00 (Forty three million six hundred and twenty nine thousand one hundred and four emalangeni).

[27] The applicants filed a Replying Affidavit deposed to by the first applicant in which they denied that they are the only former members of PSPF who

do not agree with the decision of the Registrar of Insurance to categorise the E43.6 million as surplus as well as his directive that the money be distributed to all present and former employees of the Corporation who are not former PSPF members; they alleged that they are about forty former PSPF members who are also employees of the Corporation. However, they concede that they have not cited such members or filed confirmatory affidavits to that effect.

[28] They reiterated that the first respondent is a public official exercising administrative or statutory authority, and that he made an arbitrary decision which adversely affected their rights without giving them a hearing. They argued that the first respondent misdirected himself and exercised his discretion improperly thereby committing a gross irregularity all of which render his decision reviewable and liable to be set aside.

[29] They argued that the first respondent's discretion related to the distribution of surplus; they denied that the amount of E43.6 million was a surplus but that it was transfer values of former PSPF members previously under the employ of the Water and Sewerage Board. They argued that the money has already been allocated to specific persons and that it could not be distributed to other persons and that doing so constitutes a gross irregularity.

[30] They further argued that the decision of the first respondent was prejudicial to them since the monies due to them were drastically reduced. They also argued that when the Water and Sewerage Board ceased to exist, its former employees were not paid their terminal benefits in full including their pension entitlements and severance pay; and, that these amounts were paid over to the Fund which now intends to distribute these transfer values to everyone and not just former PSPF members. They argued that when the Water and Sewerage Board ceased to exist, it should have paid terminal benefits of its former workers.

[31] During 1994 the legislature established the Swaziland Water Services Corporation and effectively replaced the Swaziland Water and Sewerage Board which ceased to exist as a legal entity. Employees of the Water and Sewerage Board had their contracts of employment transferred to the Corporation together with their benefits and status at the time; the employees consisted of those who were pensionable and others who were non-pensionable, and the latter group were also classified as temporary employees.

[32] It is common cause that the former employees of the Water and Sewerage Board were never paid their terminal benefits because their contracts of employment were not terminated but transferred to the new entity being the

Corporation. It is not in dispute that at the time of the transfer, the permanent and pensionable employees continued to be members of the Public Service Pension Fund (PSPF) because the Corporation did not have a pension fund; and, they continued to make their contributions to the PSPF even though they were no longer public officers.

[33] Furthermore, it is not in dispute that in 1998 the Corporation established its own pension Fund, Swaziland Water Services Corporation Pension Fund (The Fund). Some employees transferred to the Fund whilst others continued to be members of PSPF; the transferred employees were staggered as and when a member decided to transfer. It is implicit in the evidence that when a member transferred, a transfer value was determined and the Fund credited each member with that transfer value; however, there was no transfer of a cash equivalent because PSPF was under-funded.

[34] The PSPF commissioned an actuarial evaluation to determine its funding level, and, the result was that PSPF level of funding was at 36.8% which translated to a deficit of 63.2% in monetary terms. The actuarial evaluation also established that the liability to the permanent and pensionable members of the Water and Sewerage Board stood at E27 million and PSPF was liable for 36.8% of this amount being E9.7 million; and the balance

constituting the 63.2% deficit was due from the employer, being the Swaziland Government.

[35] This evidence is supported by Jethro Ndlangamandla, the Operations Manager of PSPF. In his affidavit, he stated that the E27 million was arrived at as a result of an actuarial evaluation that was undertaken by PSPF to determine its funding level, and, that this amount represented the total of the pension benefits and/or transfer values due to the members. He further stated that the balance of E9.7 million due from PSPF represented the portion of the transfer values that could not be paid because of the funding deficit that existed at the time.

[36] It is common cause that the Government of Swaziland as the employer subsequently paid E18.1 million to the Fund which amount represented the deficit of 63.2% as well as the severance allowance in respect of temporary employees. This payment meant that the government had met the full extent of its liability towards the transferring employees and what remained was the E9.7 million to be paid by PSPF.

[37] It is apparent from the evidence that any employee who was a member of the Fund became entitled to their pension benefits inclusive of retirement benefits, retrenchment benefits, terminal benefits, death benefits or

disability upon the fulfilment of these conditions. The Fund honoured these obligations in full notwithstanding that PSPF had not paid the E9.7 million to the Fund. The trustees of the Fund had to utilise available funds in order to meet its obligations to members who were leaving the Fund; and, they received their full benefits at the expense of current members. The funds only vested on individual members upon the fulfilment of the conditions set out in the Fund.

[38] It is apparent from the evidence adduced that the transferring members were not prejudiced because they received their total benefits when leaving the Fund; at the same time, it is clear that money belonging to the new employees who joined the Corporation since 1994 was used to make good the shortfall caused by the non-payment of the E9.7 million by PSPF. The money of the new members of the Corporation did not grow because it was used to subsidize pension benefits of transferring members who were leaving the Fund; to that extent, it is the new members of the Corporation who were prejudiced because the Fund utilized returns made on their investments to make good the payment of pension benefits.

[39] It is common cause that in January 2010 PSPF transferred an amount of E43.6 million to the Fund, and, this money was in respect of the shortfall of E9.7 million together with interest calculated from 1998 up to 31st

December 2009; there is evidence that the Fund on receipt of the money engaged an actuary for advice on the distribution of the money. It is also clear from the evidence adduced that the Fund consulted the membership widely on the proposed distribution. In addition the Union and Staff Association are represented in the Board of Trustees of the Fund; hence, the argument by the applicants that they were not given a hearing is misconceived.

[40] In addition applicants' attorney made a submission to the first respondent where all the concerns of the applicants were outlined. The first respondent inturn engaged actuarial experts to consider the distribution including the concerns raised by the applicants; he further considered submissions made by the Board of Trustees. I am satisfied that the concerns of the applicants were taken on board when the first respondent arrived at the decision to approve the distribution. Similarly, the categorization of the money received as surplus by the second respondent is in accordance with the definition of a surplus in section 2 of the Retirement Fund Directive of 2008; it simply means the amount by which the assets of a retirement fund exceeds its liabilities.

[41] As stated in the preceding paragraphs, the contracts of the transferring employees were not terminated when the Water and Sewerage Board

ceased to exist but were transferred to the Corporation; hence, their pension benefits had to be transferred from PSPF to the Fund and not to the individual members. The money transferred became an asset of the Fund pending the fulfilment of certain conditions and/or the insured events. It is not denied by the applicants that on receipt of the E43, 629, 104.00 (Forty three million six hundred and twenty nine thousand one hundred and four emalangeni) from PSPF, the assets of the Fund exceeded its liabilities and thus created a surplus. The fact that the operations Manager of PSPF Jethro Ndlangamandla listed the names of the transferring employees when transmitting the money does not detract from the fact that the money was an asset of the Fund.

[42] The applicants do not have *locus standi* to institute the present proceedings on the basis that the decision to declare the amount as a surplus was made by the second respondent after receiving expert advice from actuaries; furthermore, the applicants are represented in the Board of Trustees of the second respondent by people they elected in trade unions and staff association.

[43] The applicants seek to review and/or set aside the decision of the first respondent of the 15th December 2011 to have the amount of E43, 629, 104.00 (Forty three million six hundred and twenty nine thousand

one hundred and four emalangeni) distributed across the board to all members of the second respondent in the employ of fourth respondent including those who were not previously employed by the Swaziland Water and Sewerage Board. They further seek a declaration of rights to the effect that the amount of E43, 629, 104.00 (Forty three million six hundred and twenty nine thousand one hundred and four emalangeni) vests only on the former employees of the Swaziland Water and Sewerage Board; I have dealt with this aspect in the preceding paragraphs that the amount is an asset of the Fund and that members can access the money once the insured events have materialised.

[44] With regard to the review, the Supreme Court of Swaziland in the case of *Takhona Dlamini v. the President of the Industrial Court and Another* Appeal Case No. 23/1997 approved and applied the decision of *Corbett JA* in the case of *Johannesburg Stock Exchange v. Witwatersrand Nigel Ltd* 1988 (3) SA 132 at 152 A-D where he stated the following:

> **"Broadly, in order to establish review grounds it must be shown that the President failed to apply his mind in the relevant issues in accordance with the behest of the Statute and the tenets of natural justice…. Such failure may be shown by proof, *inter alia*, that the decision was arrived at arbitrarily or capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior motive or improper purpose; or that the President**

misconceived the nature of the discretion conferred upon him and took into account irrelevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated."

[45] In light of the Common Law principles outlined in the Johannesburg Stock Exchange case and approved by the Supreme Court of Swaziland, the applicants have not shown that the decision of the first respondent is reviewable and therefore ought to be set aside for the reasons that the concerns of the applicants were considered by the first respondent acting on the advice of actuarial experts; the transferring employees inclusive of the applicants were represented in the Board of Trustees of the second respondent which applied to the first respondent for leave to distribute the surplus it had declared; the second respondent conducted countrywide consultations on the distribution of the surplus, and the first respondent complied with the law when making his decision with regard to the distribution of the surplus.

[46] The first, second and third respondents have also argued that the applicants are not without a remedy since they could appeal to an appropriate forum in terms of the Financial Services Regulatory Authority Act No. 2 of 2010; and that they have not exhausted internal remedies as required by section 80 of the Act. Section 80 of the Act provides that a person aggrieved by a

decision of an authorised financial services provider may within thirty days after that person is notified of the decision appeal to the Appeals Tribunal. A person aggrieved by the decision of the Tribunal may appeal to the High Court.

[47] In the case of *Koyabe and Others v. Minister of Home Affairs 2010* (4) SA 327 CC at para 35, 36 and 38:

> **"35. Internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanism, rectifying irregularities first, before aggrieved parties resort to litigation. Although courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost-effective internal remedies cannot be gainsaid.**
>
> **36. First, approaching a court before the higher administrative body is given the opportunity to exhaust its own existing mechanisms undermines the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and functions. The scope of administrative action extends over a wide range of circumstances, and the crafting of specialist administrative procedures suited to the particular administrative action in question enhances procedural fairness as enshrined in the Constitution…**
>
> **38. The duty to exhaust internal remedies is therefore a valuable and necessary requirement in our law. However, that requirement**

should not be rigidly imposed. Nor should it be used by administrators to frustrate the efforts of aggrieved persons or to shield the administrative process from judicial scrutiny."

- ***Swaziland Electrical Company v. Cebsile Msibi Supreme Court of Swaziland*** **case No. 13/11 page 8.**

[48] However, section 80 of the Financial Services Regulatory Authority is not mandatory with regard to the Exhaustion of Internal Remedies; it gives the aggrieved party an option whether or not to exhaust internal remedies or to institute review proceedings. If the applicants had *locus standi*, they could have been perfectly entitled to institute the review proceedings without exhausting internal remedies.

[49] The application is dismissed. No order as to costs.

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M.C.B. MAPHALALA

JUDGE OF THE HIGH COURT