



**IN THE HIGH COURT OF SWAZILAND
JUDGMENT**

Case No 2401/2011

In the matter between

STANDARD BANK SWAZILAND LIMITED

1st Applicant

and

**BUSISIWE MOTSA N O
Respondent**

1st

MESHACK SIMELANE NO

2nd Respondent

STANDARD BANK SWAZILAND

3rd Respondent

PENSION FUND

4th Respondent

AON SWAZILAND (PTY) LIMITED

5th Respondent

SWAZILAND BUILDING SOCIETY

6th Respondent

BUSISIWE MOTSA

7th Respondent

BUSISWA MOTSA

8th Respondent

MBUSO MOTSA

9th Respondent

LUNGELO MOTSA

10th

Respondent

XOLANI OLIVER MOTSA

11th

Respondent

TIKHETSELE NOSIMILO MOTSA

12th

Respondent

Neutral citation: *Standard Bank Swaziland Limited vs Busisiwe N O and eleven others (2401/2011)[2012 SZHC 124*

Coram: OTA J.

Heard: 23rd April 2012

Delivered: 8th June 2012

Summary: **Interim interdict: Principles thereof: Pension benefit of a deceased member: Whether interdict tenable: Interpretation of section 32 (2) (a) and (3) of the Retirement Funds Act, 2005**

OTA J.

[1] The Applicants, Standard Bank of Swaziland Limited, commenced this application by way of Notice of Motion, filed on the 17th of November 2011, wherein they prayed for the following reliefs:-

1. Interdicting the first, second and third Respondents from liquidating or distributing any assets of the estate of the late Mavela Patrick Motsa (*“the deceased estate”*) pending the final determination of the action instituted by the Applicant against the deceased estate, issued out of this court under case number 2335/2011 (*“the action”*)
2. Interdicting the fourth and fifth Respondents from paying out any pension benefit to the first and second Respondents or to any of the beneficiaries of the deceased estate, pending the final determination of the action.
3. Interdicting the fifteenth Respondent from transferring or registering a mortgage bond over the properties described as,
 - 3.1 Lot 2408 Mbabane Extension 21 (Embangweni Township) situate in the District of Hhohho; and
 - 3.2 Lot 149 situated in Mankayane Township, Extension 2 in the District of Manzini.

Pending the final determination of the action;

4. That the seventh Respondent deliver up to the Applicant each of the motor vehicles particularized in the schedule annexed hereto marked "X" (insofar as she is in possession of same), which motor vehicles are then to be stored by the Applicant within a place of safekeeping, pending the final determination of the action;
5. Alternatively and in the event of the seventh Respondent failing to comply with the provisions of paragraph 4 above, authorizing the sheriff of this court to enter the premises of the seventh Respondent (or wherever the motor vehicle might be found), to attach and remove same and to then deliver same to the Applicant, to be stored by the Applicant within a place of final safekeeping pending determination of the action
6. That the costs of this application be costs in the action, save in the event of any of the Respondents opposing the reliefs sought
7. Further and / or alternative relief.

This application is founded on a 55 paragraph affidavit, sworn to by one Sagaria Rudolph Malan, described in the process as the Director: personnel banking of the Applicants. Exhibited to this affidavit are annexures FA1 to FA21, respectively

[2] Applicants also filed a replying affidavit, sworn to by the same deponent. Exhibited to this affidavit is annexure RA1.

[3] There is an affidavit in opposition of the reliefs sought by the Applicants, which opposing affidavit is filed by the 1st and 7th Respondents. Notwithstanding the opposing affidavit, it is however evident from the record of these proceedings, that the Respondents are not opposed to the relief sought in prayer one of the Notice of Motion, to wit interdicting the executors and Master from liquidating or distributing any assets of the deceased estate, pending final determination of the action. This is subject to the proviso that the 1st Respondent be allowed to continue to utilize the income generated from the rental of one of the immovable properties for the upkeep of the deceased dependants. The Applicants it would appear are agreed to this proviso.

[4] Also both the 1st Respondent and the Registrar of Deeds, have consented to the relief sought in paragraph 3 of the Notice of Motion, that the Registrar of Deeds be interdicted from transferring or registering a mortgage bond over the two immovable properties pending the final determination of the action.

[5] Similarly, the 1st Respondent has consented to the relief sought in paragraph 4 of the Notice of Motion, that she delivers up certain motor vehicles to the Applicant.

[6] The only prayer which is opposed in the circumstances, from the record, is that sought in paragraph 2 of the Notice of Motion, to wit: interdicting the fourth and fifth Respondents (the pension fund and the fund administrator) from paying out any pension benefit to either the executors or to any beneficiaries of the deceased estate, pending the final determination of the action. It is common cause that this relief is opposed only by the 1st , 7th and 8th Respondents.

[7] Before proceeding to ascertain whether or not the Applicants are entitled to this interdict, it is apposite for me at this juncture to first detail a brief resume of the history of this case, to forster a better understanding of my reasoning and conclusions reached.

[8] History

What appears to be the story as told by the papers filed of record, is that one Mavela Patrick Motsa (deceased), was employed by the Applicants. At the time of his death he was a member of the pensions fund and was entitled to certain benefits from the fund at his death.

[9] The Applicants claim that during the course of the deceased's employment with them, that the deceased fraudulently misappropriated the sum of E5,561,610.46 from the Applicants. By reason of the alleged misappropriation, the Applicants as Plaintiffs, sued out combined summons against the deceased estate, dependants of the deceased, and the Swaziland Pension fund as Defendants, in a suit styled Civil Case No. 2335/11, claiming several reliefs. For the purposes of this exercise, I will constrain myself only to the reliefs sought in claims A and B of Civil Case No 2335/11, as appear on pages 55 and 56 of the book of pleadings. They are as follows:-

“

CLAIM A

At all material times hereto, more particularly at the time of the death of the deceased, he was employed by the Plaintiff.

During the course of the deceased's employment with the Plaintiff, he unlawfully and intentionally misappropriated the sum of E5,561,610.46 from the Plaintiff.

Annexed hereto marked "POC1" and "POC3 are three schedules reflecting the calculation of the sum of E5,561,610.46

In the premises, the first and second Defendants are indebted to the Plaintiff in the sum of E5,561,610.46 which amount is now due owing and payable.

CLAIM B

At all material times hereto, more particularly at the time of the death of the deceased, the deceased estate was entitled to the payment of a pension benefit by the fourth Respondent, which amount as at 21 October 2011 was the sum of E2,793,439.41 ("the pension benefit")

The first and second Defendants have laid claim to the deceased's pension benefit.

In the premises and in the event of the relief sought in claim A being granted, the Plaintiff is entitled to an order that the fourth and fifth defendants pay the proceeds of the pension benefit to the Plaintiff."

[10] It is a background of the foregoing claim that informed the interdict which the Applicants seek herein, against payment of the pension benefit of the deceased, pending the finalization of same.

[11] The question here is whether the Applicants are entitled to the interdict sought upon the facts and circumstances of this case.

[12] Since a determination of this issue hinges on a consideration of the interpretation that must be accorded to section 32 (2) (a) and (3) of the Retirement Funds Act, 2005, I deem it expedient to regurgitate that legislation at this juncture. It states as follows:-

“32(2) A retirement fund may deduct an amount from the members benefit in respect of

(a) An amount representing the loss suffered by the employer due to any unlawful activity of the member and for which judgment has been obtained against the member in a court or a written acknowledgement of culpability has been signed by the member and provided that the aforementioned written acknowledgement is witnessed by a person selected by the member and who has had not less than eight years of formal education.

(3) If for any reason, except death, a member is unable or willing to acknowledge any debt contemplated in sub-section (2) (a), then the employer shall apply to the court for an order authorizing him to

make a deduction from the member's benefit up to an amount equal to the debt."

Interdict

Now, the principles that must guide the court in ordering an interdict, whether interim or final, was laid down in the celebrated case of **Setlogelo v Setlogelo 1914 AD 221**, and have since been adopted and applied consistently in the courts in the Kingdom thus rendering them sacrosanct. It is now therefore judicially settled that for an Applicant for an interdict to succeed, he must demonstrate the following via his affidavit:-

- 1) A clear right
- 2) Injury actually committed or reasonable apprehended
- 3) The absence of similar protection by any other remedy or irreparable harm.

See **Daniel Didabantu Khumalo v The Attorney General Civil Case No 31/2010, Mhlatsi Howard Dlamini v Mhlatsi Dlamini & 2 others Civil Appeal No 15/2010, Ndzimandze Thembinkosi v Maziya Ntombi & another Case No 394/10, Swaziland Electricity Company v John Young and another Civil Case No 2382/11.**

[13] It is now imperative for me to proceed to determine whether if the facts of this case are juxtaposed with the above detailed principles, justify a grant of the interdict sought.

In the first instance, **Setlogelo (Supra)** requires that the Applicant must demonstrate that he has a clear legal right to the subject matter of the interdict. In the case of **Minister of Law and Order v Committee of the Church Summit 1994 (3) SA 89 at 98**, the court said the following:-

“Whether the applicant has a right is a matter of substantive law. The onus is on the Applicant for a final interdict to establish on a balance of probabilities the facts and evidence which he has, a clear and definitive right in terms of substantive law. The right which the Applicant must prove is also a right which can be protected. This is a right which exists only in law, be it at common law or statutory law”

[14] In casu, the Applicants contend that they have a right to the interdict sought pursuant to section 32 (2) (a) and (3) of the Retirement Funds Act 2005. Applicants take is that this portion of our legislation is designed to protect an employer from loss suffered due to the

misconduct of his employee. Therefore, since the Applicants suffered loss in the amount allegedly misappropriated due to the alleged fraud of the deceased whilst in their employment , the Applicants are entitled to interdict the deceased pension benefit, pending the outcome of the suit they launched to recover the amounts allegedly misappropriated.

[15] For their part the 1st, 7th and 8th Respondents (hereinafter called Respondents) who are opposed to this interdict, contend that the Applicants are not entitled to interdict the pension benefit of the deceased. Their stance is that the suit instituted by the Applicants is against the deceased estate, and that by virtue of section 33 (1) of the Act, the Pension benefit of the deceased does not form part of the deceased estate.

[16] The Respondents also contend that section 32 (2) is only applicable where an action is sought by an employer against a member, but not in the situation instant where the member is already deceased and the action is against his estate or beneficiaries.

[17] Now, I must say that after a very mature consideration of the entire matrix of papers serving before court, I have reached the conclusion, that the position adopted by the Respondents is clearly misconceived. The myopic interpretation of section 32 of the Act, which they advance, is not sustainable.

[18] In the first instance, the action launched by the Applicants under suit number 2335/11, to recover the funds allegedly misappropriated is not against the estate of the deceased alone. That action is also brought against the 4th and 5th Respondents, which are the Pension Fund and the Pension Fund administrator respectively, as well as the defendants of the deceased. Claim B of suit number 2335/11, which I have already detailed above, directly affects the 4th and 5th Respondents.

[19] It appears to me therefore in the circumstances, that the provision of section 33 (1) of the Act, which postulates that pension benefits do not form a part of the deceased estate, cannot be invoked to defeat the interdict sought against the 4th and 5th Respondents. This is because the interdict is clearly informed, or, and founded on claim B launched against those Respondents.

[20] Furthermore, I find Respondents contention, that since the deceased has passed away, and thus no longer a member of the fund, therefore, the Applicants cannot be availed of section 32 (2) (a) and (3) of the Act, untenable. This is because their argument calls for the interpretation of the word “*member*” as appears in section 32 (2) (a) to be restricted to the actual member registered by the fund. In my considered view, this argument is clearly for another day. I say this because the Act in clear and unambiguous words in its interpretation section, extended the meaning of the term “*member*” beyond the actual established member of the fund, to include “*a person entitled to or receiving a benefit under the rules of the fund*”. For the avoidance of doubts that portions of the Act provides as follows:-

“Member” means any person whose membership of the fund has been established in terms of the fund and has not yet been terminated in terms of the provisions of the rules and shall include a person entitled to or receiving a benefit under the rules of the fund ” (underline mine)

[21] It appears to me from a close reading of the legislation ante, that the intent of the legislature in extending the meaning of the word “*member*” to include a person entitled to or receiving a benefit under the rules of the fund, is to ensure that the object and purpose of the

Retirement Fund itself is not defeated. It was to ensure that the benefits, obligations and liabilities of the member under the fund, are not lost in the event of the members dismissal, retirement or death. In my considered view, the need for this extension becomes more heightened in the event of the death of a member, which is the scenario we are faced with in casu. The event of death is so final, that the fund itself set up structures to ensure that the benefits, obligations and liabilities of a deceased member, are not defeated by it. The fund in my view, achieved this object in one fell swoop by extending the meaning of the term “*member*” to include “*a person entitled to or receiving a benefit under the rules of fund*”. It is in an apparent effort to realize this object, that section 32 (2) to (6) of the Act, details the persons “*entitled to or receiving a benefit under the rules of the fund*”, in the event of the death of a retirement fund member. That legislation provides as follows:-

“

(2) *If, within twelve months from the death of the member, the fund becomes aware of a dependant or dependants of the member, the benefit shall be paid to such dependant or dependants in a manner that is deemed equitable by the management board.*

- (3) *If the fund does not become aware of or cannot trace any dependant of the member within twelve months from the death of the member, and the member has designated in writing to the fund a nominee who is not a dependant of the member, to receive the benefit, the benefit or such portion of the benefit shall be paid to such nominee provided that where the aggregate amount of the debts in the estate of the member exceeds the aggregate amount of the assets in his estate, an amount of the benefit equal to the difference between the aggregate amount of debt and the aggregate amount of assets shall be paid into the estate of the member and the balance of the benefit or the balance of such portion of the benefit as specified by the member in writing to the fund shall be paid to the nominee.*
- (4) *If a member has a dependant and the member has also designated in writing to the fund a nominee to receive the benefit or a specified portion of the benefit, the fund shall within twelve months from the death of such member pay the benefit or such portion thereof to such dependant or nominee in such proportions as the board may deem equitable.*
- (5) *If the fund does not become aware of or cannot trace any dependant of the member within twelve months of the death of the member, and if the member has either not designated in*

writing to the fund a nominee or if the member has designated a nominee to receive a portion of the benefit, the benefit or the remaining only portion of the benefit after payment to the designated nominee, shall be paid into the estate of the member, or, if no inventory in respect of the member has been received by the court, the fund shall pay the monies into the insurance and retirement benefit trust account.

(6) For the purposes of this section, a payment by a registered fund to a dependant shall, be deemed to include a payment made by the fund to a trustee for the benefit of a dependant contemplated in this section”

[22] It is beyond controversy from the foregoing, that the entities entitled to benefit by the rules of the fund and in the event of the death of a member, are, the dependants of the member, which includes the trustees for the benefit of the dependants, a nominee designated in writing by the member as well as the members estate or deceased estate. These are the beneficiaries of the pension benefit of a deceased member. The meaning of the word “*member*”, in the event of death, must therefore be statutory extended to include these entities or beneficiaries. Little wonder then, that the legislature deemed it fit, to include beneficiaries as amongst does who are liable

to be deducted from by the fund. This, the legislature did via rule 11.1 of the Pension Fund Rules in the following words:-

“The Trustees shall have the right to make such deductions from the benefit which a member or other beneficiaries is entitled in terms of the Rules as are permitted in terms of section 32 of the Act”

[23] In casu, it is common cause that the executors of the deceased estate have laid claim of the pension benefit of the deceased. It appears to me therefore, that the suit launched in civil case number 2335/11 against the deceased estate as well as his dependants and beneficiaries to mention but a few, is a suit which is by necessary implication against the member.

[24] It seems to me in the light of the foregoing, that civil case number 2335/11 commenced by the Applicants to recover the sums allegedly misappropriated by the deceased's misconduct, falls within the purview of those contemplated by section 32 (2) (a) and (3) of the Act. It is my opinion, that the Applicants were well within their rights to proceed against the estate of the deceased and his dependants. Therefore, notwithstanding the language of section 33 (1) of the Act, once the Applicants have proceeded against the deceased estate and

his dependants to obtain judgment for the sums allegedly misappropriated by the deceased, the Applicants in my view have a clear right to the interdict sought against the 4th and 5th Respondents.

[25] The question at this juncture is, can this court properly order an interdict, in view of the fact that section 32 (2) (a) advocates a deduction from the pension benefit and not an interdict, as well as the fact that there is no written acknowledgement of debt and no judgment obtained as required by the Act?

[26] It is by reason of these indisputable facts, that the Respondents call for a literal or restricted interpretation of section 32(2) (a), to exclude a situation such as the one in this case, where there is no acknowledgment of liability or judgment against a member prior to his death. I am however firmly convinced, that section 32(2) (a) of the Act, must be interpreted to include a situation as the one we are currently faced with. This is to ensure that the legislative intent of that statute, which is to secure an avenue of redress for an employer put out of pocket by the misconduct of his employee, is not defeated. The statute must therefore be interpreted according to the mischief which it was passed to remedy irrespective of what circumstance shrouds that

mischief. This is in line with the purposive interpretation of statutes, which holds sway across jurisdictions.

[27] As **Lord Denning MR** said in the case of **Seaford Court Estate Ltd v Asher (1949) 2 QB 481 at 488.**

“Whenever a statute comes up for consideration, it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and even if it were, it is not possible to provide for them in terms free from all ambiguity----- A Judge must not alter the material of which it is woven, but he can and should iron out the creases”

[28] Then there is the pronouncement of the court in the case of **Northman v Barret London Borough Council (1978) 1WLR 220 at 228,**

“

The literal method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the “purposive approach”----- In all cases now in the interpretation of statutes we

adopt such a construction as will “promote the general legislative purpose” underlying the provision. It is no longer necessary for the Judges to wring their hands and say: “There is nothing we can do about it”, whenever the strict interpretation of statute gives rise to an absurd or unjust situation, the Judges can and should use their good sense to remedy it by reading in, if necessary, so as to do what parliament would have done, had they had the situation in mind”

See Phumzile Myeza and others v The Director of Public Prosecutions and another, Case No. 928/2009, Sikhumbuzo Masinga v Director of Public Prosecutions and others Case No. 21/1007 at para 14, Philisiwe Gumedze v Public Servants Pensions Fund and others Case No. 336/10

[29] Judges in interpretation therefore, look for the intention or purpose of the legislature, from the language of the statute. If the words are clear and cover the situation at hand, then there would be no need to go further. If the words are however unclear, ambiguous or doubtful, the Judges do not stop at the words of the section. They call for help in every direction open to them. They look at the statute as a whole. They look at the social conditions which gave rise to it. They look at the mischief which it was passed to remedy. They look at the *“factual*

matrix". They use every legislative end. By this means they clear up many things which would be unclear, ambiguous, doubtful or absurd.

[30] It thus appears to me, that to accord section 32 (2) (a) an interpretation restricted to a situation where judgment has been obtained against a member or where the member has signed an acknowledgement of culpability will lead to an absurdity that will defeat the legislative intent.

[31] This, as is more often than not the case, is because, the misconduct resulting in loss to the employer, may be discovered after the member's retirement, his dismissal or upon his death, when the employer has had no opportunity to obtain judgment or extract an acknowledgement of culpability from the member. A restricted interpretation of that statute would thus shoot the statute squarely on the foot, defeating the legislative intent. I apprehend that it is in the bid to preserve this legislative intent that section 32 (3), empowers an employer faced with a recalcitrant member, who refuses to acknowledge indebtedness to apply to the court to order payment of the members benefit which equals the debt. I hold the view, that this provision must be extended to a scenario such as the one in casu, where a member has died without acknowledging his culpability or

without a judgment against him, and his employer proceeds against his estate, dependants or beneficiaries who are by the rules of the Act liable to be deducted from.

[32] A purposive interpretation of the Act therefore demands, that pending the finalization of the action launched by the employer against the member's dependants and estate, that payment of the pension benefit be withheld or interdicted in the interest of justice. This is to prevent it from dissipation thus defeating the object of the statute. This is because in the event that the pension benefit is not interdicted and ends up being dissipated, it will reduce the judgment obtained to "*empty sheaves of papers*" in the hands of the employer, a pyrrhic victory. The legislature could not have intended such a result.

[33] Since my search for local case law in support of this proposition proved abortive, I am constrained to cross the border to the neighbouring Republic of South Africa for help. I count it now judicially settled, that not only are the statutes of South Africa largely in *pari materia* with our own, but the case law of that country is of high persuasive authority in this jurisdiction.

[34] The courts in South Africa have in a plethora of cases, accorded a purposive interpretation to section 37 D (b) of the Pensions Fund Act, to include a right of the trustees to withhold payment of the Pension benefit pending determination or acknowledgement of liability of the member. It is worthy of note that section 37D (b) of the Pensions Fund Act of The Republic of South Africa, is akin to our Section 32 (2) (a) of the Act.

[35] For the avoidance of doubts section 37 D (1) (b) of the Pension Funds Act

of South Africa provides as follows:-

“

(1) A registered fund may:-

(b) Deduct any amount due by a member to his employer on the date of his retirement or on which he ceases to be a member of the fund, in respect of

(1)-----

(11) compensation (including any legal costs recoverable from the member in a matter contemplated in sub paragraph (bb) in respect

of any damage caused to the employer by reason of any theft, fraud or misconduct by the member of which :-

(aa) the member has in writing admitted liability to the employer, or

(bb) judgment has been obtained against the member in any court including a Magistrates court,

From any benefit payable in respect of the member or a beneficiary in terms of the rules of the fund, and pay such amount, to the employer concerned.”

[36] Though couched in different phraseology, it cannot however be gainsaid, that the foregoing statute, exudes an object which is akin to the object of our own statute, which is to protect the right of an employer to pursue recovery of misappropriated monies by his employee.

[37] In interpreting the legislation ante in the case of **Highveld Steel & Variation Corporation Ltd v Oosthuizen 2009 (4) SA**, the South African Court held as follows, in paragraphs 11, 16, 17, 18 and 19:-

“

- (16) *It has been stated in a number of cases that the object of S 37 D (1) (b) is to protect the employer's right to pursue the recovery of money misappropriated by its employees. This approach is, in my view, supported by the plain meaning of the section and is, with respect correct.*
- (17) *However, a practical problem threatens the efficacy of the remedy afforded by the section. In many a case employers only suspect dishonesty on the date of termination of an employees service and fund membership with the consequence that pension benefits are paid before the suspected dishonesty can be properly investigated furthermore, it has been accepted as a matter of logic that it is only in a few cases that an employer will have obtained a judgment against it's employee by the time the latter's employment is terminated because of the lengthy delays in finalizing cases in the justice system. The result, therefore, is that an employer will find it difficult to enforce an award made in its favour by the time judgment is obtained against him.*
- (18) *These practicalities leads me to disagree with the submissions for the respondent, inter alia, that the tense used by the legislature in S 37D (1) (b) (11) and (bb), in the words "has in writing admitted liability and judgment has been obtained",*

reflects an intention that either proof of liability must be available on termination of the employment contract.

(19) Such an interpretation would render the protection afforded to the employer by S 37 D (1) (b) meaningless, a result which plainly cannot have been intended by the legislature. It seems to me that to give effect to the manifest purpose of the section, its working must be interpreted purposively, to include the power to withhold payment of a member's pension benefits pending determination or acknowledgement of such members liability. The Funds therefore had the discretion to withhold payment of the respondent's pension benefits in the circumstances -----"

[38] Furthermore in the case of **Appanna v Kelvinator Group of SA Provident Fund, [2000] 2BPLR 126 (PFA)** the court held as follows:-

"The purpose of the relevant rules and statutory provisions was to protect an employers right to recover misappropriated funds. The rules and provision should therefore be interpreted to imply a right to withhold payment pending determination or acknowledged of liability, in order to render them effective"

[39] Also in the case of **Twigg v Orion Money Purchase Pension BPLR 2870 (PFA)**, the court held

“----- The crux of the matter was whether the fund had the power to withhold the benefit to allow the second Respondent an opportunity to obtain a court order or a written admission of liability as contemplated in section 37D(b) of the Act ----- held that in the absence of any rule expressly regulating this power, the First Respondent had the implicit power to withhold the benefit. However, the power of withholding had to be exercised reasonably and not indefinitely.”

See **Charlton and others v Tongaat-Hulett Pension Fund and others (2006) 2 BPLR 94 (D)**

[40] I am highly persuaded by the foregoing authorities. Though they deal with situations where members were still alive, they however go to demonstrate that the pension benefit of a member can be withheld to enable his employers obtain a judgment or an admission of liability. I see no reason why these authorities cannot apply with equal force in casu, where the Applicants have embarked upon obtaining judgment against the deceased estate, his dependants and beneficiaries, to

recover the funds allegedly misappropriated by the deceased's misconduct.

[41] From the papers it is obvious to me that the deceased estate per se, cannot off set the amount of E5,561.610.46, which the Applicants claim in suit number 2335/11. There is therefore a need to withhold payment of the pension benefit, which as at the date of the letter contained in annexure FA7, the 21st of October 2010, was to the tune of E2,793,439.41, to prevent it from dissipation. This will enable the pension benefit to be used in off setting the amount claimed by the Applicants, and in line with the objects of Section 32(2) (a) of the Act, in the event of Applicants success in suit no 2335/11.

[42] In the light of the totality of the foregoing, this application has merits. It succeeds. I hereby make the following orders:-

1. (a) The 1st , 2nd and 3rd Respondents be and are hereby interdicted from liquidating or distributing any assets of the estate of the late Mavela Patrick Motsa (the deceased estate), pending the final determination of the action instituted by the Applicant

against the deceased estate, issued out of this court under case number 2335/2011

- (b) 1 (a) above is subject to the proviso and as agreed by the parties, that the 1st Respondent be and is hereby authorized to continue to utilize the income generated from the rental of one of the immovable properties of the deceased estate, for the upkeep of the deceased dependants
2. The 4th and 5th Respondents be and are hereby interdicted from paying out any pension benefit to the first and second Respondents or to any of the beneficiaries of the deceased estate, pending the final determination of the action.
3. The fifteenth Respondent be and is hereby interdicted from transferring or registering a mortgage bond over the properties described as:-
- 3.1 Lot 2408 Mbabane Extension 21 (Mbangweni Township) situated in the District of Hhohho, and

3.2 Lot 149 Situated in Mankayane Township, Extension 2 in the District of Manzini.

Pending the final determination of the action.

4. The seventh Respondent be and is hereby ordered to deliver up to the Applicant each of the motor vehicles particularized in the schedule annexed to this application marked "X" (insofar as she is in possession of same), which motor vehicles are then to be stored by the Applicant within a place of safekeeping, pending the final determination of the action.

5. Alternatively and in the event of the seventh Respondent failing to comply with the provisions of paragraph 4 above, that the sheriff of this court, be and is hereby authorized to enter the premises of the seventh Respondent (or wherever the motor vehicles may be found), to attach and remove same and to then deliver same to the Applicant to be stored by the Applicant within a place of safekeeping, pending the final determination of the action,

6. That the costs of this application be costs in the action against, the 1st, 7th and 8th Respondents, which costs shall include certified costs of hiring counsel in terms of Rule 68 (2) of the rules of this court.

For the Applicant:

Adv. Alan James Eyles

Instructed by K. Motsa

For the Respondent:

B Zwane

DELIVERED IN OPEN COURT IN MBABANE ON THIS

THE DAY OF2012

OTA J.

JUDGE OF THE HIGH COURT