IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No: 556/12

In the matter between

NEDBANK SWAZILAND LIMITED	APPLICANT
V	
NDABA GOODWILL DLAMINI	1ST RESPONDENT
NEDBANK SWAZILAND LTD PENSION FUND	2ND RESPONDENT
AON SWAZILAND (PTY) LTD	3RD RESPONDENT
THE REGISTRAR OF DEEDS	4TH RESPONDENT
THE ATTORNEY GENERAL	5TH RESPONDENT
JEROME PHAPHA KHUMALO	6TH RESPONDENT

Neutral citation: *Nedbank Swaziland Limited v Ndaba Goodwill Dlamini and 6 Others (556/12)* [2012] SZHC 158

Coram: OTA J.

Heard: 17th **July 2012**

Delivered: **27th July 2012**

Summary:- **Interim interdict – Principles applicable thereof – section 32 (2) (a) of the Retirement Funds Act, 2005, considered.**

Ota J,

[1] In this application, the Applicant contends for the following reliefs:-

1. Interdicting the second and third Respondents from paying out any pension benefit to the first Respondent, or to any of the beneficiaries of the first Respondent, pending the final determination of the action.

2. Interdicting the fourth Respondent from transferring or registering a mortgage bond over the property described as

2.1 Portion 8 of lot 229, Mbabane Extension 21 (Embangweni Township) Situate at the District of Hhohho
Pending the final determination of the action

3. That the costs of this application be costs in the action, save and in the event of any of the Respondents opposing the relief sought which costs should include costs of Counsel as certified in terms of High Court Rule 68.

4. Further and/or alternative relief.

[2] The application is predicated on a 14 paragraph affidavit, sworn to by one **Leonard Dlamini** described in that process as the Head of Central Operation of the Applicant. Exhibited to this affidavit are annexures N1 to N18 respectively. The Applicant

also filed a Replying Affidavit of 20 paragraphs, sworn to by the same deponent.

[3] This application is opposed by only the 1st Respondent, **Ndaba Goodwill Dlamini,** who swore and filed an Answering Affidavit of 25 paragraphs in opposition of same.

[4] The parties filed their respective heads of argument and their counsel tendered oral submissions in support of the respective issues raised herein, on the 17th of July 2012.

[5] I have carefully considered the totality of the affidavits filed of record, the accompanying annexures, the heads of argument and oral submissions by counsel. I have no wish to reproduce them in extenso, but I will be making references to such of them as I deem expedient in the course of this judgment.

[6] Now, by way of a starting point in the task at hand, it is apposite for me to first consider the points of law taken by the 1st Respondent in his answering affidavit, seeking to defeat this application *in limine.* These points of law appear in paragraphs 3.1 to 3.4 of the answering affidavit (pages 155 to 156 of the book) and are as follows:-

1. Existence of local and/or internal remedies
2. Striking out paragraphs 7.5 to 7.7 of the Applicants affidavit as hearsay evidence.

Existence of local and/or internal remedies

[7] The 1st Respondent contends that the Applicant has an alternative remedy embodied in section 16.2 of the Rules of Nedbank Swaziland Ltd Pension Fund, 2nd Respondent. That the Applicant was required to first exhaust that internal remedy by applying to the Trustees of the Pension Fund, to withhold 1st Respondents pension benefit in the wake of the action instituted against the 1st Respondent by the Applicant. That Applicant can only resort to the court after it has exhausted this alternative remedy. 1st Respondents counsel **Mr Bhembe,** therefore contended, that in the face of Section 16(2) which affords this internal remedy, that the Applicant clearly has an alternative and inexpensive remedy available other than this application. Therefore, so goes the argument, in the face of this fact, the Applicant has failed to meet one of the mandatory requirements for the grant of the interim interdict sought i.e. the absence of an alternative remedy and this application ought to extinguish at this juncture. **Mr Bhembe** relied on the case of **Sanele Cele and Others V University of Swaziland and Another Case No. 3749/2002 at page 16.**

[8] It was contended replicando for the Applicant by **Mr Motsa,** that Section 16(2) does not confer any power on the Employer to apply for an interdict. That the grant and application for an interdict within the terms of that statute is at the discretion of the Trustees. Therefore, Section 16 (2) is not an alternative remedy to this application. **Mr Motsa** further contended, that in any case, the principle that internal remedies must be exhausted before resort to the court, only holds sway in cases of judicial review, which was the position in the **Sanele Cele case (supra)** relied on by: 1st Respondent.

[9] **Mr Motsa** finally contended, that even if there were local or internal remedies available, that such cannot oust the jurisdiction of this court to entertain and determine this application. **Mr Motsa** relied on the following authority **Welkom Village Management Board v Leteno 1958 (1) SA 490 (A) at page 502.**

[10] Now, it is imperative for me at this juncture to recite the provisions of **Section 16(2) of the 2nd Respondents Act, as well as Section 32(2) of the Retirement Fund Act (RFA**). upon which this application is predicated.

‘‘

16 (2) Notwithstanding any other provisions of these Rules, the Trustees may, where an Employer has instituted legal proceedings in a court of law and/or laid a criminal charge against the member concerned for compensation in respect of damage caused to the Employer as contemplated in Section 32 of the Act, withhold payment of the benefit until such time as the matter has been finally determined by a competent court of law or has been settled or formally withdrawn; provided that

(a) the Trustees in their reasonable discretion are satisfied that the Employer has made out a prima facie case against the Member concerned and there is reason to believe that the Employer has a reasonable chance of success in the proceedings that have been instituted;

(b) the Trustees are satisfied that the Employer is not at any stage of proceedings responsible for any undue delay in the prosecution of the proceedings.

(c) once the proceedings have been determined, settled or withdrawn, any benefit to which the Member is entitled is paid forthwith; and

(d) the Trustees, at the express written request of a Member whose benefit is withheld, may, if applicable and practical, permit the value of the Members benefit as at the time of such request to be isolated, in whatever manner the Trustees believe appropriate, from the possibility of a decrease therein as a result of poor investment performance''

[11] **Section 32 (2) of the RFA states thus:**

''

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 acknowledgment of all liability 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 not less than eight years of formal education---''

[12] It is clear from the above that there is an internal mechanism set up via the Applicant's Pensions Fund Act, where the Trustees in their discretion may withhold an Employees Pension Benefit, where the Employer invokes Section 32 of the RFA to proceed

against the Employee in the event of loss occasioned by the Employees misconduct.

[13] I do not however agree with the 1st Respondent, that the Applicant was mandatorily required to first proceed via Section 16 (2) of the Act, before approaching the High Court. This contention clearly suggests that the jurisdiction of the High Court cannot be invoked, until the domestic remedy had been exhausted and is not sustenable.

[14] I say this because in the first place, the High Court has unlimited original jurisdiction to hear all civil and criminal causes in the land, except where that jurisdiction is removed or ousted by clear and unambiguous words of statute.

[15] This power of the High Court is constitutionally derived from Section **151 (1) (a) of the Constitution Act, 2005**, in the following words:-

‘‘

(1) The High Court has:-

(a) unlimited original jurisdiction in civil and criminal matters as the High Court possesses at the date of commencement of this Constitution’’

[16] In my decision in the case of **Sikhumbuzo Thwala V Phililе Thwala Case No. 101/12,** I had occasion to expound on this provision of the Supreme Law of the land, and had this to say in paragraphs 23 to 28 of that decision:

‘‘

23

This is the inherent jurisdiction of the High Court which entitles it to hear any matter, whether criminal or civil, except where it is expressly forbidden from doing so by clear and unambiguous words of statute.

24 *To buttress my stance on this subject matter, I call in aid the position of some of the authorities ably urged by the Respondent herein: one of which is* ***Harms: Civil Practice in The Supreme Court, page 83****, where it is stated as follows:-*

> ***''Apart from powers specifically conferred by statutory enactments and subject to any specific deprivations of power by the same source, a Supreme Court can entertain any claim or give any order which at common law it would be entitled to entertain or give. It is this reservoir of power which is referred to when one speaks of inherent jurisdiction of the Supreme Court, and which distinguishes the Supreme Courts from inferior Courts''.***

25 *Furthermore, is the case of* ***Monageng V Botswana Telecommunication Cooperation and Another 2002***

(supra) at page 201, where Mosjane J, *declared as follows:-*

''-----this Court has unlimited jurisdiction in terms of S 95 (1) of the Constitution to ''hear and determine any civil and criminal proceedings under any law and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law'' ---- 'a court may----- dismiss the case as abuse of process or for other appropriate reasons'----- but it cannot refuse to exercise its jurisdiction in favour of another court''

26 *It is worthy of note that Section 95 (1) of the Constitution of Botswana, confers unlimited jurisdiction on the High Court of Botswana in similar fashion as Section 151 (1) (a) of our Constitution.*

27 *Then there is the pronouncement of* ***Amissah JP****, in the case of* ***Botswana Railways organization V Setsogo and Others (1966) BLR (supra),*** *where his Lordship said the following:-*

'' --------in my view, the unlimited jurisdiction conferred by the Constitution on the High Court must mean that the parties can take their dispute to the High Court, if they desire, and if they think the

dispute is of a nature which is susceptible to settlement by the process of that Court.

28 It is therefore overwhelmingly evident, that the High Court has unlimited original jurisdiction over criminal and civil cases, which jurisdiction can only be taken away by clear words of statute''

[17] More to this is that jurisprudence has clearly demonstrated, that the instances where this court would submit its jurisdiction to domestic remedies are in cases of judicial review. However, it is also the judicial accord even in cases of judicial review, that an aggrieved party is barred from approaching the court until he has exhausted the domestic remedies. This position of the law was captured by **Lawrence Baxter in the text 'Administrative Law' juta and company 1st edition 1984 at page 720 under the rubrics** *''2. Duty to exhaust Domestic Reemedies''as* follows:

''

The right to seek judicial review might be suspended or deferred until the complainant has exhausted the domestic remedies which might have been created by the governing legislation. This is not automatic

''

The mere fact that the Legislature has provided an extra-judicial right of review or appeal is not sufficient to imply an intention that recourse to a court of law should be barred until the aggrieved person has exhausted the statutory remedies''

The right to judicial review will only be deferred if such intention is clearly evident from the governing legislation or, in the case of a private organization from the terms of agreement between the complainant and the association concerned'' Little difficulty arises where the legislation or the contract expressly states that recourse to the courts is precluded until the domestic remedies are exhausted, as is often the case, however, the intention is not obvious and it has instead to be constructed by the courts''

[18] It is worthy of note that two of the considerations to weigh in the mind of the courts in diciding whether domestic remedies should supercede judicial review are

(1) whether the domestic remedies are capable of providing effective redress in respect of the complaint.
(2) whether the alleged unlawfulness has undermined the domestic remedies themselves

[19] These considerations tend to cases of judicial review as can be seen from **Lawrence Baxters Administrative Law (supra), Sanele Cele and Others V University of Swaziland and**

Others (supra) See also Gulube V Oosthuizen 1955 (3) SA 1 (T) at 4.

[20] In casu, I see nothing in the provision of Nedbank Pension Fund Act that ousts the jurisdiction of the High Court until the internal remedies have been exhausted. And in any case, generally, where a particular matter is provided for in two or more laws, a party is at liberty to invoke any of those laws, except there are clear words subordinating one law to another. 1st Respondents contention on this wise thus fails and is dismissed accordingly.

2. **Striking out of paragraphs 7.5 to 7.7 of Applicants founding affidavit**

[21] These paragraphs which the 1st Respondent urges the court to strike out were deposed to by **Leonard Dlamini**, and they state as follows:-

‘‘

7.5 As a result of the above, Ernst Herbst (‘Ernst’) was instructed to conduct an investigation into these irregularities. Ernst is employed by Nedbank Limited as a specialist investigator under Nedbank Group of Forensic Services. He has Seventeen (17) years experience in relation to investigations of crimes perpetrated against banks, such as that committed by the first Respondent and his parent duties include

7.5.1 investigations of various crimes such as fraud and corruption within the banking sector.

7.5.2 interviewing witnesses and suspects in crimes reported to him, and

7.5.3 attending at court and disciplinary hearings in order to give evidence on behalf of the bank, and

7.5.4 reporting and liasing with the police and various business units within the Nedbank Group on all cases investigated by him and providing them with available information and evidence.

7.6 Ernst's Investigation revealed the following in relation to the first Respondent and the sixth Respondent.

7.6.1 That the irregularities had taken place during the period 2009 to 2011

7.6.2 The Applicant is in a position to positively attribute these irregularities to the first Respondent who he interviewed and he admitted as such:

7.6.3 The first Respondent told Ernst during the interview that Khumalo paid him some monies for the transfers he did to his account

7.7 Ernst's investigations furthermore revealed that the first Respondent had misappropriated the Applicants funds in the following manner.

7.7.1. He met the six Respondent in 2009 when the latter approached him and asked him to do transfers to his bank

account and gave him the account numbers where the money was to be transferred to and

7.7.2 The first Respondent carried out the instructions debiting the banks suspense account and crediting the accounts in the name of the sixth Respondent

7.7.3 The sixth Respondent would often call the first Respondent and enquire whether there was money and if he said yes, the sixth Respondent would then go and withdraw the funds from the different banks''.

[22] The 1st Respondent's grouse against the foregoing depositions is that they amount to hearsay evidence, because they were not privy to the deponent and the confirmatory affidavit filed by **Ernest** in support of these avernments is bereft of the material particulars required of an affidavit and therefore cannot be countenanced by the court as such.

[23] Now, the impugned confirmatory affidavit of **Ernest Herbst** is annexure 15 and it appears on pages 132-133 of the book. In it the deponent **Ernest Herbst** states as follows:-

''

1. I am an adult South African male and employed by Nedbank Limited as a Specialist Investigator in the Group Forensic Services of Nedbank and based in Sandton, South Africa.

2. *Save as otherwise stated the facts deposed to here in are within my personal knowledge and belief both true and correct .*
3. *I have read the affidavit of **Leonard Dlamini** and confirm the averments therein as they relate to me''*

[24] Having carefully persused the foregoing confirmatory affidavit, I do not think that there is anything more to add to it, as such a document. It is common cause that **Ernst** carried out the said investigations. He categorically in the confirmatory affidavit, stated that he had read the contents of the affidavit of **Leornard Dlamini** and confirms the averments therein as they relate to him. That is all that is required of **Ernst** to discharge the duty of such a confirmatory affidavit. **Mr Bhembe's** contention that **Ernst** ought to have gone the whole hog of repeating the details of the facts contained in the founding affidavit as they relate to him is not sustainable.

[25] A situation which is akin to the striking out sought *in casu,* arose in the case of **Msunduzi Municipality v Natal Joint Municipal Pension Provident Fund and Others (2006) 3B PLR 210 (N) at page 218,** wherein the 3rd Respondent and 4th Respondent sought to strike out certain reports on the basis that they were unsubstantiated hearsay. The court had this to say in paragraph 9 of that judgment:-

''

(9) The third Respondent (Applicant in the strikeout application) seeks also the striking out of all reports by auditors KPMG and any reference thereto on the grounds that they are unsupported by affidavits and accordingly

constitute hearsay evidence. The fourth Respondent (also by way of application to strike out) seeks to strike out all reference to the KPMG reports also on the basis that it is unsubstantiated hearsay.

It has been submitted on behalf of the Third and Fourth Respondents that the KPMG reports are not confirmed by ***Moodley****. The reports form the basis for the allegation that large sums of money are missing. The submission that it is hearsay is made on the purported non-attestation or irregular attestation of* ***Moodley's*** *affidavit.---In so far as it is contended by the Third and Fourth Respondents that even if* ***Moodley's*** *confirmatory affidavit is accepted, she is in no position to exclusively confirm the KPMG reports because---she is not the sole author thereof. There is no confirmatory affidavit of the report by one* ***Camilla Singh*** *who signed the reports and who* ***is Moodley's*** *senior.* ***Camilla Singh*** *leads the Forensic Unit of KPMG. In my view the objection is unhelpful and obstructive. I agree with the submission by* ***Mr Gorven*** *that what the Third and Fourth Respondents seek to do is to drive a wedge between* ***Moodley*** *and the investigators assisting in the compilation of the report.* ***Moodley*** *in clear terms says she was in charge of the investigations. She makes the report her own by confirming it. In accordance with internal procedure of KPMG, the report is signed by* ***Camilla Singh*** *the director. It is naïve to expect that every person or investigator who had anything to do with compilation of the report should depose to an affidavit. The proposition is not only an unrealistic one but the efforts to exclude it is best described as ''clutching at*

*straws''. It is a clear attempt to obfuscate the real issues in the matter. Consequently, I am of the view that there is not merit in the submission that there are unsubstantiated hearsay or that **Moodley** is in no position to confirm them''*

[26] In casu, in the impugned paragraphs 7.6 to 7.7 of the founding affidavit, the deponent **Moses Dlamini** mainly repeated what the investigator **Ernst** told him. By the confirmatory affidavit, **Ernst** made those depositions his own, thus rendering the necessity of reciting the facts all over again otiose.
See **Andries C Cillers**. **The Civil Practice Court of Appeal in South Africa, 5th edition juta 209 page 444.**

[27] I find a need to emphasize here without the necessity of belabouring this issue, that confirmatory or verifying affidavits are very much a part and parcel of our judical system, in view of the deluge of applications such as summary judgments applications, where such affidavits are mandatory. Such affidavits as demonstrated by cases like **Strydom v Kruger 1968** (**2) SA 226 (GW) and All Purpose Space Healing Co of South Africa (Pty) Ltd v Schneltzer 970 (3) SA at page 563**, need not repeat the evidence or deal with the specifics of the main affidavit.

[28] In any event, even if I were to find that these paragraphs are indeed hearsay and thus liable to be struck out, the law requires that they will be struck out only on the grounds that the 1st Respondent will suffer substantial prejudice if they are not struck out. This is because applications to strike out are not meant for

technical objections and to increase costs, but for situations where a party suffers prejudice.

[29] In this regard, I agree entirely with **Mr Motsa,** that these averments are not prejudicial to the 1st Respondent. I say this because paragraphs 7.5 to 7.5.4 relate to **Ernst's** qualifications and scope of experience as an investigator. I do not see how this is prejudicial to the 1st Respondent .

[30] Furthermore, the contention that paragraphs 7.6 to 7.7 are prejudicial cannot also stand. This is because in these paragraphs which I have detailed ante, the deponent strove to show that the 1st Respondent was among those interviewed by **Ernst** during the investigations and that he pleaded guilty. The 1st Respondent himself in paragraph 16 (I) of his answering affidavit (page 160 of the book), acknowledged the fact that he was interviewed by **Ernst** in the following words:-

*''**---**I point out that during an audit exercise, I was one of the employees confronted by **Ernst Herbst** about the fraudulent transfers in the IT and Business Department and I told **Ernst Herbst** that I was not the person responsible for the transfers''*

[31] Further the challenged paragraphs of the founding affidavit also stove generally to show that the 1st Respondent admitted his guilt to **Ernst**. It is common cause in this application that the 1st Respondent admitted his guilt at the disciplinary hearing, even though he has advanced reasons for said admission at this hearing. The paramount factor is that the 1st Respondent acknowledged the fact that he admitted his guilt in these

proceedings. This he did in paragraphs 23.3 and 24.3 of his answering affidavit as appear in pages 164 and 165 of the book I will come to these matters anon. In the circumstances, I see no prejudice suffered by the 1st Respondent by reason of the impugned depositions contained in paragraphs 7.5 to 7.7 of the founding affidavit to warrant their striking out.

[32] On these premises, I find that the point taken *in limine* on hearsay evidence fails and is dismissed accordingly.

[33] Let me proceed to the substance of this matter. It is convenient for me to demonstrate a brief resume of the history of this case at this juncture.

[34] Now, what appears to be the facts of this case as can be gleaned from the papers filed of record, is that the Applicant employed the 1st Respondent in 1997 as a bank clerk. The 1st Respondent rose to the position of IT Business support in 2004. In August 2011 the Applicant discovered a number of irregularities regarding certain transfers made between the period 2009 to 2011 without valid business reason or authorization. The Applicant discovered that the sum of E1,215,682-61 was transferred from account number 02000002772 to account number 10644686 at the Building Society belonging to the sixth Respondent. Applicant also alleges that it recovered the sum of E27,590-00 from the Swaziland Building Society with respect to the said amount. Further, that an amount of E1, 287 877-17 was also transferred to a Nedbank account number 0400000350879 also belonging to the 6th Respondent Applicant was only able to recover the sum of E21,650-59. That these misappropriated

amounts appear in annexures N13 and N14 (pages 130 and 131 of the book).

[35] Following the foregoing findings, the Applicant instructed one **Ernest Herbst** who is employed by Nedbank Limited as a specialist investigator under the Nedbank Group of Forensic Services to carry out a forensic investigation. He did carry out the investigations as is confirmed by the 1st Respondent. As a result of Ernst's investigations a disciplinary hearing was conducted and the first Respondent pleaded guilty to the charges of dishonesty, to wit, that as a result of his unauthorized transfers the bank suffered loss of E2, 496 059-78 and also of falsifying the bank records, as is evidenced by annexure *''N18''* the findings of the chairman of the disciplinary hearing.

[36] In the wake of the findings of the chairman of the disciplinary hearing that 1st Respondent was guilty, his services were terminated .

[37] It is on record that the Applicant has instituted proceedings against the 1st and 6th Respondents to recover the misappropriated funds under High Court case number 557/2011, as is evidenced by annexure *''N5''.*

[38] It is also on record that the 1st Respondent has since launched an application to the Conciliation, Mediation and Arbitration Commission (CMAC), challenging his dismissal. (See pages 169 to 173 of the book).

[39] It was against a backdrop of the foregoing facts, that the Applicant launched the application presently vexing the court,

seeking for an interim interdict against payment of the 1st Respondents pension benefit and also that the property appearing in annexure N9 is not transferred or mortgaged by 1st Respondent pending the outcome of case number 557/2011. I have hereinbefore set out the tenor of Applicants application and they bear no repetition.

[40] Now, it is common cause in this application that the requisites of an interim or interlocutory interdict are the following.

1) A prima facie right (though open to some doubts)
2) A well grounded apprehension of irreparable injury
3) The absence of ordinary or alternative remedy
4) A balance of convenience in favour of the granting of the interim relief

[41] It is the law that for an Applicant for an interim or interlocutory interdict to record victory in the application, he must demonstrate the foregoing ingredients. See **Msunduzi Municipality (supra), Webster v Mitchell 1948 (1) SA 1186 (W).**

[42] I now proceed to weigh the case advanced by the Applicant against the foregoing requirements to see if the Applicant is entitled to the orders sought.

1. <u>Prima facie right (though open to some doubts)</u>

[43] In the case of **Msunduzi Minicipality (supra)** para 13, the Court expounded the standard required in demonstrating this requirement in the following words:-

‘‘

13 The prima facie right which first needs to be identified by the Applicant is one which is, of course, in less stringent terms than one where an Applicant claims a final interdict. This means that the Applicant bears the onus to place sufficient evidence before the court to show the existence of a right even though by reason of denials by the Respondent, some doubt is thrown into the existence of that right. If on the probabilities there is doubt, then the Applicant will not be entitled to an interdict even temporary. The Applicant bears the onus to show that that right has been infringed by the Respondent’’

[44] Similary, in the case of **Webster v Mitchell (supra)** the court stated as follows:-

‘‘

If the phrase used were ‘‘prima faie case’’ what the court would have to consider would be whether the Applicant had furnished proof which, if uncontradicted and believed at the trial, would establish his right. In the grant of a temporary interdict, apart from prejudice involved, the first question for the court in my view, is whether, if interim protection is given, the Applicant could even obtain the rights he seeks to protect. Prima facie that has to be shown. The use of the phrase ‘‘prima facie ‘’ established though open to some doubts indicates, I think, that

more is required than merely to look at the allegations of the Applicant, but something short of a weighing up of the probabilities of conflicting versions is required. The proper manner of approach I consider is to take the facts as set out by the Applicant, together with any facts set out by the Respondent which the Applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the Applicant could on those facts obtain final relief at a trial. The facts set up in contradiction by the Respondent should then be considered. If serious doubt is thrown on the case of the Applicant he could not succeed in obtaining temporary relief, for his right, prima facie established, may only be open to ''some doubt''. But if there is mere contradictions or unconvincing explanation, the matter should be left to trial and the right be protected in the mean while, subject of course to the respective prejudice in the grant or refusal of interim relief''.

[45] Now **Mr Motsa** has urged two heads under which the question of prima facie right should be considered. These were the same heads identified in the case of **Msunduzi Municipality (supra)** at paragraph 13 and are as follows:-

a) The right to recover monies which the Applicant alleges was misappropriated as at the time 1st Respondent was an employee of the Applicant.

b) whether the Applicant has shown that it has a prima facie right to rely on the provisions of Section 32 (2) (a) of the RFA to receive from the 2nd Respondent payments based on a deduction from 1st Respondent.

[46] Now, the case that the Applicant makes out under (a) above is that it has a prima facie right to the interdict sought because the 1st and 6th Respondents unlawfully defrauded it of the sum of E2,461,818-69 as is evidenced by annexure N5. That in consequence of the conduct of 1st and 6th Respondents the Applicant instituted the claim pursuant to Civil Case No. 557/11 seeking to recover the misappropriated funds. Applicant predicated its claim on the admissions the 1st Respondent made to **Ernst**, as well as the disciplinary hearing annexure N18.
Annexure N18, is the outcome of the disciplinary hearing and appears on pages 142 to 149 of the book of pleadings. It cannot be gainsaid from a careful perusal of annexure N18, that the 1st Respondent indeed pleaded guilty at the disciplinary hearing and was subsequently found guilty.

[47] The 1st Respondent admitted as much in his answering affidavit, These admissions appear in paragraphs 23.3 and 23.4 of the said affidavit to be found on pages 164 and 165 of the book, in the following language:-

"

*23.3 When I obtained the services of **Sizwe Makhanya** to represent me I told him that I wanted to plead not guilty to the charges of misconduct against me. Sizwe advised me, however contrary to my intention and conviction, that I should plead guilty to the charges against me as it would result in a lenient sanction and would not result in my dismissal. Since I was not aware about the process of a disciplinary hearing and the effect that pleading guilty would have, not only for the hearing and subsequent proceedings against me, I pleaded guilty as advised. I was*

supprised when I was subsequently found guilty and dismissed from employment. When I approached Sizwe about the result of the disciplinary hearing and my wish to appeal the outcome, he was uncooperative. Subsequently after I had personally written my letter of appeal, Sizwe sent an electronic mail message to the Human Resources Manager that he would not represent me. He did not however, communicate such to me but I became aware of the message after the Human Resources Manager brought it to my attention.

23.4 I aver that when I pleaded guilty at the disciplinary hearing I did that because of the advice from my representative and not because I admitted to committing the misconduct charged. I was hoping for a prompt disposal of the disciplinary hearing and a lenient sanction which would ensure that I was not dismissed'' (underline mine)

[48] It is indisputable from the depositions ante, that the 1st Respondent indeed pleaded guilty at the disciplinary hearing, was found guilty and subsequently dismissed. It is obvious from the foregoing deposition and other portions of the answering affidavit that the 1st Respondent now strives to set up, what **Mr Bhembe** terms a *''bonafide defence''* to the action instituted by the Applicant. To this end, 1st Respondent alleges that he pleaded guilty because he was advised to do so by his shop assistant Sizwe. He alleges that he did not cause the alleged irregularities and pointed out that in the IT department where he worked, there is one universal password used when making transfers. He further alleged that in the said department files were received through a central electronic mail account from

where every staff member could process the files by causing electronic transfers to be made using the single universal password available. Therefore, he did not make the transfers as alleged by the Applicant.

[49] I find that these allegations now being advanced by the 1st Respondent on the case urged by the Applicant, do not cast considerable doubts on the Applicants case. Which version of the two cases that will be upheld as the truth, is a matter for the trial and not one that I should burden myself with in these proceedings.

[50] I thus accept that the Applicant suffered loss in the sum of E2,496,059-78 alleged and that prima facie, 1st and 6th Respondents could be held responsible for such loss.

[51] I agree with **Mr Motsa**, that the mere fact that the 1st Respondent has launched an action to the CMAC challenging his dismissal does not derogate from the above findings and cannot operate to extinguish these proceedings.

[52] On the second leg in (b) the Applicant invokes Section 32 (2) (a) RFA, as according it the prima facie right to the interdict sought. I have hereinbefore set forth that legislation in extenso.

[53] **Mr Bhembe** takes the view that the Applicant is not entitled to invoke Section 32 (2) (a), this he says is because the Applicant has failed to meet the requisites of that statute. **Mr Bhembe** says that this is because the 1st Respondent has neither admitted liability to the Applicant nor has the Applicant obtained judgment against the 1st Respondent, which are the conditions

required by Section 32 (2) (a) **Mr Bhembe** called for a literal interpretation of this legislation to exclude a situation such as the one in these proceedings, where these requirements have not been met. Learned Counsel particularly urged me to disregard my recent decision in the case of **Standard Bank Limited v Busisiwe Motsa N.O and eleven others Case No. 240/2011,** judgment of the 8th of June 2012, where I had adopted a purposive approach in interpreting that legislation and held to the contrary.

[54] I respectfully beg to disagree with **Mr Bhembe** on his stanze on this question. I say this because the judicial mood across jurisdictions is that the literal approach to the interpretation of statutes is out of date.

[55] It is now the judicial accord across national borders, that the better approach is the purposive approach in interpretation of statutes, which enjoins the court not only to gather the intention of the legislature from the literal meaning of the words of a statute, but where it deems it expedient, to go beyond that to consider the social conditions which gave rise to it, the mischief it was passed to remedy, in order to clear up any absurdity or ambiguity.

[56] I employed the purposive approach in interpreting Section 32 (2) (a) RFA, in the case of **Busisiwe Motsa (supra).** That case to my mind is authority for my conviction, that the Applicant in the present application has demonstrated a prima facie right for the interdict sought. Although in **Busisiwe Motsa,** I proceeded from the tangent that what is required from the Applicant is to demonstrate a clear right to the interdict sought, this fact does not however detract from the weight that that case must bear on

the present application. I say this because, the facts of **Busisiwe Motsa** supra are germaine to the facts of the present case, in that, the Applicant therein, who alleged that it had suffered loss due to the misconduct of one **Mavela Patrick Motsa**, a deceased employee, had not obtained an acknowledgment of liability from the deceased or a judgment against him, before it launched an application against the deceased estate, his dependants as well as the Pension Fund, to interdict the deceased's pension benefits. In considering the objections raised by the Respondents for none compliance with these requirements, I said this in paragraphs 26,30 and 31 of that decision:-

"

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 acknowledgement 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 to statutes which holds sway across jurisdictions.

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 acknowledgment of culpability will lead to an absurdity that will defeat the legislative intent.

31 This, as in more often than not the case, is because, the misconduct resulting in loss to the employer, may be discovered after the members 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''

[57] In coming to the foregoing conclusions in **Busisiwe Motsa** supra, I placed reliance on the jurisprudence of South Africa, where the courts have accorded a purposive interpretation to Section 37 D (b) of the Pension Fund Act of that country, a statute which is akin to our Section 32 (2) (a), in that it permits the withholding of the pension benefit of an employee by an employer in order to protect the right of an employer to pursue recovery of misappropriated monies by his employee. Section 37 D (b) is also conditioned on the member having admitted liability in writing or judgment having been obtained against the member. In the case of **Highveld Steel and Variation Corporation Ltd V Oosthuizen 2009 (4) SA, the South African Court** in considering this South African statute, stated as follows in **paragraphs 17 and 19**.

''

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 latters 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 favor by the time judgment is obtained against him.*

19 *Such an interpretation would render the protection afforded to the employer by Section 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 acknowledgment of such member's liability. The funds therefore had the discretion to withhold payment of the Respondent's pension benefits in the circumstances''.*

Similarly, 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 37 D (b) of the Act----- 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 **Henry Maseko v Central Bank of Swaziland and nine others Case No. 4544/2010, paragraph 31 page 12.**

[58] It is by reason of the totality of the foregoing, that I reach the conclusion, that in casu, the Applicant has demonstrated a *prima facie* right to the interdict sought in these respects. Applicant has shown that the sum of E2,496,059-78 was misappropriated from its accounts. It has shown prima facie, that 1st and 6th Respondents may be held liable for the misappropriated funds. Applicant has duly launched an action under Civil Case No. 557/2011 against the 1st and 6th Respondents, to recover the misappropriated sums.

[59] On these premises, I find that the Applicant has shown a *prima facie* right though with some doubts, entitling it to the interdict sought.

2) **<u>Irreparable harm</u>**

The Applicants position is that in the event the relief is not granted and the pension benefit is distributed, and it gets

judgment in its claim against the 1st and 6th Respondents for the sum of E2,460,818-69, such a judgment will be rendered hollow. This is because the value of the immovable property of 1st Respondent which is E520,000-00 as shown in annexures N16 and N17, does not exceed the value of the Applicants claim. The Applicant knows of no other assets owned by the 1st Respondent against which the judgment could be executed. The only major asset is the cash to be paid from the Pension Fund. The Applicant alleged the foregoing facts in paragraphs 8 to 11 of its founding Affidavit (see pages 20 to 21 of the book)

[60] I notice that the 1st Respondent gave no answer at all to the allegations contained in paragraphs 8.1 and 8.2 of the founding affidavit, wherein it is alleged that the Applicant knows of no other assets owned by the 1st Respondent against which it could proceed and that the pension benefit is the only major asset 1st Respondent owns. On the allegation in paragraph 9 of the founding affidavit that the value of the immovable property is less than the Applicants claim, the 1st Respondent merely answered that this fact is noted. (see para 22 of answering affidavit page 163 of the book). The 1st Respondent is deemed to have admitted the allegations made by the Applicant in these regards, in the circumstance.

[61] Furthermore, the 1st Respondent met the allegation in paragraphs 8 and 11 of the answering affidavit to the effect that if the interdict is not granted the Applicant will suffer irreparable loss, with the following avernments contained in paragraphs 21.1 and 24 of the answering affidavit to be found on pages 162 and 165 of the book:-

‘‘21.1 The contents hereof are denied and the Applicant is put to strict proof thereof. In particular I deny that if the interdict is not granted and the pension benefits are distributed to me I would have dissipated the benefits received by me. I aver that I am unemployed and I will use the benefits to ensure that they sustain me and those dependent on me for support.

24 The contents hereof are denied and Applicant is put to strict proof thereof. In particular, I deny that there is a well grounded apprehension of the Applicant suffering irreparable harm if the interim relief is not granted and a judgment is eventually granted in its favour. I aver that the benefits I will receive from my pension will be used profitably and saved and /or invested to ensure that they sustain me and those dependent on me for support. If payment of the benefits is interdicted, I will suffer great prejudice in that I will be unable to maintain my family as I have no other source of income following my dismissal from work. Interdicting me not to transfer or mortgage my immovable property will cause me to be unable to settle the money owing to the bank in respect of the property. I am under a contractual liability to pay monthly installments for the property of the bank which I am currently unable to make due to the fact that I am now unemployed’’.

[62] I am inclined to agree with **Mr Motsa,** that the 1st Respondents responses and non responses to the averments of the Applicant clearly show the irreparable harm that Applicant says it will suffer. I say this because, the 1st Respondents failure to answer

to the allegations that it has little or no assets to settle the judgment debt, is an admission of the Applicants allegations, that indeed it has little or no assets to settle the judgment debt save for the Pension benefits. This coupled with the 1st Respondents averments that it is unemployed, has no other source of income and will depend solely on the Pension benefits to sustain himself and his dependants, show clearly the irreparable harm anticipated by the Applicant. When one considers how long it takes for Court cases to be concluded, it becomes very apparent in these circumstances, that the Pension benefits may be dissipated leaving the Applicants victory nugatory. It is the judicial consensus as clearly demonstrated by the case of **Msunduzi Minicipality (supra) at para (17) and Miewoudt v Maswabi NO and Others 2002 (b) SA 96 (0),** that if an Applicant for an interdict against dissipation of assets fears that the Respondents would not be able to preserve their assets pending the resolution of the dispute in the main action and it is evident that they have little or no assets to satisfy the judgment debt if it goes against them, the Applicants fear of being left with a hollow judgment is well grounded. This is such a case.

3. **The absence of ordinary remedy or alternative remedy**

The 1st Respondent contends that the Applicant has an alternative and less expensive remedy provided via Section 16 (2) of the 2nd Respondent's Act. I do not want to trouble myself with this issue as I have already decided that the jurisdiction of the High Court is not ousted by the said Section 16 (2). Besides,

I align myself intoto with the statement made by the Court on this question in the case of **Msunduzi Municipality (supra) at paragraph 18**:-

‘‘

*(18) Whatever one may call the interdict sought by the Applicant., The Knox D’Arcy Interdict’’ (See **Knox D’Arcy Ltd and Others v Jamieson and others 1996 (4) SA 348 (SCA), or the ‘‘Mareva Injunction (See Mareva Compania Naviera v International BULK Carriers SA;Mareva (1980) ALL ER 213 (CA**); the purpose is to prevent an unsuccessful defendant from concealing or getting rid of funds or assets with the intention of not paying the successful plaintiff – to prevent precisely the situation in which the Applicant in casu finds itself. It is not a claim to substitute the Applicants claim for the loss it suffered, but to enforce it in the event of it being successful in the pending action so that it will not be left with a hollow judgment.’’*

[63] Therefore, whether the interdict is sought through this court or ordered by the Trustees pursuant to Section 16 (2), the end product is the same, to prevent the 1st Respondents assets from dissipation pending the outcome of the suit instituted by the Applicant. The paramount factor to my mind is that there are two separate laws on how to approach this matter. The Applicant has chosen to come under one. There is no law precluding it from chosing which of the laws to come under. It is the law that the Applicant has chosen to come under that the court is duty bound to decide this case. If the Applicant had

come under Section 16 (2), then it would be bound to exhaust the internal remedies therein before coming to court.

[64] Besides, as I have said before generally, where a particular matter is provided for in two or more laws, a party is at liberty to invoke any of those laws. In the absence of clear words subordinating one legislation to another the court cannot apply the law as if one is subordinate to the other.

[65] **Balance of Convenience**

It is common cause that there is prejudice on both sides of this application. The question of balance of convenience simply turns on who will suffer more prejudice between the two parties before court. Is it the Applicant if the interdict is not granted, or the 1st Respondent if the interdict is granted.? Let me say it straight away here, that on the facts, I am firmly convinced that the Applicant stands to suffer more prejudice if the interdict is not granted. I say this because the prejudice which the 1st Respondent demonstrates it will suffer, assuming it succeeds in the main action, is temporary. These prejudices include, the fact of his unemployment, inability to fend for his dependants or pay his mortgage. These are all temporary and will subsist only until judgment is entered for the 1st Respondent if he is the successful party. On the other hand, the Applicant will suffer astronomical prejudice if the interdict is not granted and the Pension benefit is disbursed and dissipated. I have determined already that the 1st Respondent has no other substantial assets other than the pension benefits. The value of the property mortgaged falls way below the amount alleged to have been misappropriated. In these circumstances, the prospects of the Applicant being left

with a hollow judgment if this application is not granted is palpable.

See Mzunduzi Municipality (supra)

[66] It appears to me further in the circumstances, that placing the interdict over the immovable property is to the benefit or convenience of the 1st Respondent considering his financial situation, as the Applicant cannot foreclose on the mortgage in the face of the interdict.

[67] In the light of the totality of the foregoing, this application succeeds. On these premises I make the following orders:-

1. That the second and third Respondents be and are hereby interdicted from paying out any pension benefit to the first Respondent, or to any of the beneficiaries of the first Respondent, pending the final determination of the action.

2. That the forth Respondent be and is hereby interdicted from transferring or registering a mortgage bond over the property described as

2.1 Portion 8 of Lot 229, Mbabane Extension 21 (Embangweni Township) situate at the District of Hhohho pending the final determination of the action.

3. That the costs of this application be costs in the action against the 1st Respondent, which costs should include certified costs of hiring counsel in terms of Rule 68 of the Rules of the High Court.

For the Applicant: K. Motsa

For the Respondent: S. Bhembe

DELIVERED IN OPEN COURT IN MBABANE ON THIS THE …….. DAY OF ……2012

OTA J

JUDGE OF THE HIGH COURT