IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO. 994/2018

In the matter between:

Maria Hoffman — **1st Applicant**

David Mncina — **2nd Applicant**

and

Ombudsman of the Financial Services Regulatory Authority — **1st Respondent**

Nedbank Swaziland Limited — **2nd Respondent**

Neutral citation : *Mariah Hoffman & Another vs Ombudsman of the Financial* Services & Another 994/18[2018]SZHC 136(16/07/2020).

Corum : Maphanga J

Date heard : 10th August 2018

Date delivered: 16/07/2020

Summary : ***Civil Law*** - ***Application for review and setting aside of Determination of First Respondent*** - **a** ***statutory tribunal of*** **a** ***financial services regulatory authority*** - ***Sections 74 and 75 of The Financial Services Regulatory Authority- Applicant aggrived with tribunals dec;ision in*** **a** ***claim for retirement benefits brought by various former members of***

a pension fund; Applicants former employees of a financial institution which is cited* as *a 2nd respondent in the proceedings - 2nd Respondent raising a series of legal points in limine- Joinder issue raised on account of applicants failure to cite and join the retirement fund and administrator in the proceedings - Respondent contending also that reliance by applicant on on Section 80 of the Act* as *opposed to ss74 and 75 of the Act misplaced - Points of Law upheld

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JUDGMENT

JUDGMENT:

[1] This is an application in terms of what the applicant seek the review and setting aside of the 1st Respondent's determination of a joint complaint brought by various former employees of the said Respondent of which the present applicants were a part. As their ground for the said review the applicant assert
that the said determination is liable to be set aside on account of the tribunal's errors of law in the determination of the complaint in so far as it allegedly misconceived the basis of the complaint.

[2] I must say that application itself is quite paltry in the statement of the cause for review and is founded on a very tensely composed founding affidavit of no more than 5 pages. The apparent difficulties however do not end there. There are certain disquieting features that confront the reader at first blush of the founding affidavit. In it the 1st Applicant Ms. Mariah Hoffman; purports to make and swear an affidavit in support of the application (ostensibly the founding affidavit) upon the authority of various persons listed and subscribing to their respective names agreeing in the said list which is annexed as MH1 to Ms. Hoffman affidavit. However, there is nothing further said to indicate the relevance of the said list or to establish any other connection between herself, the present application and the listed persons she described as members. Having said that there is scarcely any connection on the face of the affidavit, between her and the 2nd applicant, a certain David Mncina save that the latter has deposed to a so called confirmatory affidavit which she has annexed to her affidavit. Mr. Mncina's affidavit does not

clear the mystery in so far as it does no more than seek to confirm the contents of Ms. Hoffman affidavit.

[3] Clearly Ms. Hoffman's affidavit does not indicate that she acts in any other capacity than as a litigant bringing the application in her own right for her own personnel purposes and relief. In addition it surely does not indicate or affirm that in so doing she does for in a representative capacity for and on behalf of the various listed persons including the 2nd Applicant. The headings or citation in designating the parties does not assist either as the standard appellation *"nominee ofliricio"* or "N.O" is not so fixed to her name nor is there an indication of the 25 other making common cause with Ms. Hoffman.

[5] In the absence of anything affirming that the 1st Applicant's acts in a representative capacity as suggested by her attorneys in their submissions and implied in her papers the application is not satisfactory and evinces a clear lack of the requisite locus standi she seems to assert. A word about the background for there is more to the matter than meets the eye.

BACKGROUND

-[6] Applicants are former employees-of 2nd Respondent (the bank). They are apart of a collective of 27 erstwhile employees who subscribed to an early voluntary exit or redundancy scheme proposed by the ban as part of its strategy to pare down its personnel. Upon accepting the VRS proposal the applicants and their colleagues also terminated and withdrew their membership of the Staff Pension Fund of the bank. (The Nedbank Swaziland Retirement Fund). It is common cause that upon this event the administrations of the fund calculated the various employees' individual retirement benefits in terms of the Fund Rules and the applicant were offered the retirement fund *quanta* of benefits yielded by the computations rum by the administrators.

[7] It is clear from the papers that the pension exit benefits the employees were offered did not meet their expectations due to certain tax deductions applied against of the lump sum benefits and the pay-out figures generated by the final account. In addition to that issue, the former employees took up a series of other queries in a formal complaint brought before the 1st Respondent- the Ombudsman of the Financial Services (Ombudsman); the nub of which complaint was that the Fund had miscalculated, misconstrued and or underpaid the relative retirement benefits due to the exiting members.

[8] It is common cause that the complaint by the various affected former employees was lodged with the 1st Respondent on the 1st June 2009. At the time the prevailing regulatory regime providing for the adjudication of pension or retirement claims or disputes was governed by Part VIII of Retirement Funds Act 2005. In the intervening period a new overriding regulatory statutory regime had come into force via the enactment of Part XII of the Financial Services Regulatory Authority Act of 2010; the effect of which was to create a new adjudication framework under the *aegis* of the Ombudsman of the Financial Services in terms of the FSRA Act (the ombudsman) and transfer existing and pending disputes to this new mechanism.

[9] The office of the Ombudsman only came into service in August 2011 and at inception 'inherted' this and other extant or unresolved complaints previously lodged before the defunct adjudicator's office. There was thus a regrettable time lag (as in the operations of the statutory disputes mechanism resulting in the delayed inclusion of the complaint in 2016.

[10] The material point in the process is that in its determination, the Ombudsman's office dismissed the Applicant's and the other affected employees' claims as having no merit or substance. From the filed papers certain threshold issues have been surfaced by the Respondents which warrant foremost consideration._

POINTS IN LIM/NE.

[11] Both the 1st and the 2nd Respondents have raised certain points in limine on the basis of which they urge the applicants ought to be unsuited and their application dismissed.

[12] One point on which they make common cause is the lapse on the applicants part to join the other material parties also have been involved in the dispute subject to this review before the Ombudsman; namely, the Nedbank Swaziland Retirement Fund; the fund administrator and the Swaziland Employee Benefits Consultants. I intend to deal with this point shortly but firstly the 1st Respondents other preliminary points.

The 1st Respondents' case in Limine.

The effect of section 75 (2) of the Financial Services Regulatory Authority Act.

[13] The first Respondent urges a jurisdictional point arising from its interpretation of Section 75(2) of the Act to the effect that in view of the applicants non acceptance of the Ombudsman's determination or their failure to formally give notice of such acceptance, thus has the effect of rendering the decision a nullity as if it was non-existent; a non sequitur. In effect the determination, so the argument goes, makes it not only non-binding but also purely "academic".

[14] I am unable to follow the logic of this reasoning. Firstly because a plain reading of the subsection cited has no such bearing on the matter as suggested by the 1st Respondent. Neither did Mr Tsambokhulu assist in illuminating this aspect in his oral submission. The section merely directs the decision by the Ombudsman and alternate procedures to be followed by the complainant in either accepting or rejecting the decision.

[15] In fact far from the non-acceptance implying that the decision is inconsequential, a critical consequence of the acceptance or rejection of the determination by the complainant made plain by section 75(3) is that of finality or otherwise - in that if accepted by the complainant the decision becomes final and presumably not if it has not been accepted. That this is so becomes obvious if regard is had to the provisions for appealing an impugned determination envisaged in section 80 of -the Act. I therefore cannot accept the 1st Respondents' pointin this regard. It is thus dismissed.

Locus Standi

[16] I have alluded to the question of locus standi in so far as a collective application is implied by the 1st Applicants opening statement in her founding affidavit which seems to suggest a representative capacity. In fact contrary to the 1st Respondents' submission, the 1st Applicant does not expressly aver that she is acting in this supposed capacity. However I do not accept the argument that the papers do not disclose her own interest in the matter at all. Her interest is clearly inferable from the rest of her affidavit in so far as her grievance with the decision hence her desire to have is set aside is evident. That she has not established locus standi to act in a representative capacity seems clear to me for the reasons I state earlier.

Merits on Review

[17] The final point made by the 1st Respondent presents as a preliminary point in so far as it is submitted the application should be dismissed for failure to disclose a

proper and legitimate review borders on the merits. It is unnecessary for me to deal with this aspect at this time.

2nd Respondents points

[18] Other than the issue of non-joinder. The 2nd Respondent raises the issue of absence of proper grounds for review in the applicant's papers on which do not intend to venture at this time for the above reasons.

The only other point is that of unreasonable delay on the part of the applicants in bringing the application.

Delay

[19] It is common cause that the determination sought to be impugned was rendered by the Ombudsman in August 2016 and the review application was only brought before us on the 3rd of July 2018.

Almost two years after the decision was made. It is common cause that there has been an inordinate hence unreasonable delay in bringing this application.

[20] The applicants seek to justify and plead the condonation therefore of this delay, merely on the basis that the delay or inaction was occasioned by the neglect by their erstwhile attorney and their union, that cannot be proper grounds for condonation even if this court were to be open to that consideration.

[21] The mechanism for adjudicating pension/retirement disputes was introduced precisely as part of a policy to provide speedy specialist resolution of retirement or pension related complaints, for drawn out litigation would stultify the administration and operations of pensions and retirement practice. A delay of 2 years after a decision has been made before a party launches a challenge in this context is an antithesis the noble ethos of the ombudsman's statutory mandate of seeking time and cost effective settlements.

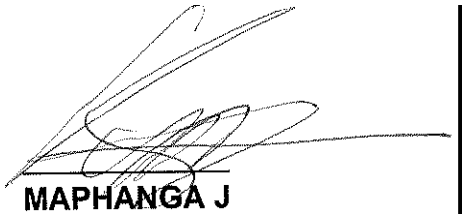
However, the issue of delay is but only one of the problems presented by this review. I now turn to the question of joinder that has been raised by both Respondents.

Joinder

[22] Mr. Jele who appeared before me for the 2nd Respondent impressed upon us the pertinent authorities to do with the principles and rules on joinder. I think the principles outlining the legal standard for determining whether a party ought to be joined in legal proceedings as a necessary party are well known and have almost become trite. But I think there is another dimension to this matter that could not have escaped the applicants - it is simply that the issues on which they seek to impugn the Ombudsman decision arise from proceedings wherein both the Fund and its administrators were cited as key parties and respondents. Moreover the very issues which were subject to the complaint arose out of a decision of the Fund - the primary (or principal) respondent in the pension benefit dispute. That this is so should be obvious. The 2nd Respondent was but only an employer.

[23] Further the pension or retirement fund benefit claims the applicants are pursuing are primarily a matter between them *qua* 'members and the Fund. It is a matter incidentally involving the Swaziland Employee Benefit Consultants in their capacity as the administrators and the consultant that carried out the computation of the benefits. I cannot think of parties more central and necessary who bear an abiding a direct and substantial in the entire pension benefit saga and to the cause from inception than the Fund.

[24] In my mind it is quite clear that the Fund and its administrators were not only necessary parties in the application but also that the applicants' decision not to join them is disingenuous if not irresponsible. For this much account lies in their attorneys. For this and the other reasons alluded to herein I have no hesitation in upholding the points on non-joinder and dismissing this application with costs.



MAPHANGA J

Appearances:

For the Applicant:	Mr. S. Nhlabatsi
For the 1st Respondent:	Mr. L. Tsambokhulu
For the 2nd Respondent:	Mr. Z. Jele