IN THE HIGH COURT OF ESWATINI

CASE NO. 516/2023

HELD AT MBABANE
In the matter between:

NONTOBEKO FAKUDZE NEE MBINGO N.O
(Cited herein in her capacity as Executor of 2nd Plaintiff) **1ST PLAINTIFF**
ESTATE LATE GCINITHEMBA FAKUDZE **2ND PLAINTIFF**

And
LIBERTY LIFE ESWATINI LIMITED **DEFENDANT**

NEUTRAL CITATION: *NONTOBEKO FAKUDZE NEE MBINGO AND ANOTHER VS LIBERTY LIFE ESWATINI LIMITED (516/2023) [2023] SZHC - 186 (18/07/2023)*

CORAM: **BW MAGAGULA J**

HEARD: **16/06/2023**

DELIVERED: **19/07/2023**

SUMMARY: *The Defendant has taken a special plea to the Plaintiff's particulars of claim. The basis being that the matter was previously reported to the office of the ombudsman under the Financial Services Regulatory Authority Act No 2 of 2010 (the FSRA ACT), who determined the issue. The Plaintiff has further raised the issue of absence of legal personality of the 2nd Plaintiff and the absence of locus standi of the 1st Plaintiff.*

HELD: *The FSRA ACT did not oust the unlimited and inherent jurisdiction of the High Court to hear and determine all civil and criminal cases in the land, which power is derived from Section 151 (1) (a) of the Constitution Act, 2005.*

JUDGMENT ON SPECIAL PLEA

BW MAGAGULA J

BACK GROUND FACTS

[1] The present proceedings call for an adjudication of a special plea filed by the Defendant arising out of combined summons filed by the Plaintiff for the payment of an Insurance Claim amounting to **E2 000 000.000 (Two Million Emalangeni).**

The points raised by the Defendant in the Special Plea are as follows;

a) *Irregular* Duplication of Proceedings

b) Absent of legal Personality of the 2nd Plaintiff and

c) Absent of *Locus* of the 1st Plaintiff.

[2] The Defendant contends that the present proceedings is a duplication in that the matter has been dealt with by the Financial Services Regulatory Authority (FSRA) and that Plaintiff should either have filed an appeal or review of the FSRA decision. It is contended that as a result the matter is *Res Judicata*.

[3] There is also a second leg of the special plea which pertains to absence of legal personality of the 2nd Defendant and absence of *locus standi* in respect of the 1st Defendant.

The Defendant's arguments in support of the special plea;

[4] The Defendant's arguments are as follows;

4.1 This matter was reported to the office of the ombudsman of financial services (the Ombudsman) under the **Financial Services Regulatory Authority Act No. 2 of 2010 (the FSRA ACT).** The beneficiary's claim was dismissed and the determination was issued out on the 28th July 2021 by the Ombudsman[1].

[1] See Page 31 of the Book of Pleadings

4.2 The Ombudsman is authorized by Section 75 of the FSAR Act[2] to adjudicate and determine disputes within the none-bank financial sector. The ombudsman is the appropriate statutory authority and therefore has the jurisdiction competence to preside over and dispose of the matter. The Ombudsman determined the rights and obligations of the parties in her determination and the final word was spoken in that connection.

4.3 The present action constitutes an unlawful and /or irregular duplication of proceedings in that the Court is now being asked to determine the matter as though no adjudicatory authority has issued a ruling on the respective rights of the parties. This is wholly irregular as it has the invidious potential to result in two conflicting decisions on the same subject matter.

4.4 Section 152 of the Constitution of the Kingdom of Eswatini provides as follows;

The High Court shall have and exercise review and supervisory jurisdiction over all subordinate courts and tribunals or any lower adjudicating authority, and may, in exercise of that jurisdiction, issue orders and directions for the purpose of enforcing or securing the enforcement of its review or supervisory powers.

[2] See Page 112 of the Defendant's Book of Authorities

4.5 The Constitution provision support the notion that when the nominated beneficiary lodged a complaint with the office of the ombudsman resulting in the determination, the original jurisdiction of the above Honourable Court was taken away. With that, Court has only review and supervisory jurisdiction to hear this matter. Not any other jurisdiction particularly as a Court of first instance.

4.6 The Plaintiffs ought to have, if they are aggrieved by the determination, either appealed the Ombudsman's decision in terms of Section 79 of the FSRA Act[3] or alternatively proceeded to file a review of the Ombudsman's determination in terms of the common law and / or Constitution. In that way, the Court would have been properly invited to consider the validity of the Ombudsman's determination. The Court as matters stand, is precluded from determining this matter as a Court of first instance under the doctrine of *res judicata.*

4.7 The court has been referred to the case of *Kareem Ashraf and Another vs Gigatech (Pty) Ltd*[4] where the following was said;

The requisites of a plea of lis pendens are the same with regard to the person, cause of action and subject matter as those of a plea of res judicata, which, in turn, are that the two actions

[3] See Page 114 of the Defendant's Book of Authorities
[4] (High Court) Case No. 2199/2010 found at page 55 of the Defendant's Book of Authorities

must have been between the same parties, or their successors in title, concerning the same subject matter founded upon the same cause of complaint...

The defendant argues therefore that; It follows from the foregoing exposition, that three ingredients must be evident in both claims to sustain a successful plea of *lis pendens*, namely:-

1. ***The parties must be the same***
2. ***The subject matter of the claims must be the same***
3. ***The cause of action must be the same*** (My Emphasis).

4.8 In light of the above authority, the Defendant further argues that all the elements of res judicata are present in the matter at hand. In that, the parties, subject matter and cause of action are the same. In this regard the Court is urged to uphold the point.

4.9 The court was also referred to a decision whereby The High Court sitting as a Constitutional Court in the matter of **Robert Mabila vs The Director of Public Prosecutions**[5] **pronounced as follows;**

For a party to successfully raise the plea of lis pendens - that the matter is duly pending before another competent forum, he must satisfy the Court that it is the same matter; between the same parties; for the same relief and based on the same cause of action and that it is before a competent forum.

[5] Case No. 1531/2016 found at page 99 of the Defendant's Book of Authorities

In other words, that forum must be competent to grant or award the relief sought, so argues the Defendant.

4.10 The point advanced by the Defendant is that the ombudsman of the financial services was the competent authority to deal with the dispute of the parties and duly made a determination. The matter is now *resjudicata*. The only remedy available to the nominated beneficiary is an appeal or review and not to start the matter *de novo* as it has been the case.

[5] In support of the second leg of the special plea, the Defendant argues as follows;

5.1 The 2nd Plaintiff is cited as the Estate of the late Gcinithemba Fakudze. The estate has no legal personality in law and may not therefore sue or sued in its own name. In terms of our law a deceased person's estate may only act through its Executor or Executrix as the case may be.

5.2 The above Honourable Court in the matter of **Eunice Nokulunga Mabuza and Others vs Estate Late George Enock Mbodi and Others**[6] stated as follows;

It is imperative that I highlight a legal misnomer in the manner the applicants have cited some "parties" herein. An estate is not a legal persona. It cannot sue or be sued. It is only the executor

[6] Case No. 1858/2019 found at Page 3 of the Defendant's Book of Authorities

who has the legal capacity to sue and be sued on behalf of the deceased's estate. In other words, the applicant ought to have cited the executors of the estate and pointed out that they are so cited in their nomiee efficio capacity and not cite the estate together with the file numbers.

5.3 With the above authority, it is submitted on behalf of the Defendant that the 2nd Plaintiff has been cited in these proceedings as the Executor of the 2nd Plaintiff. The citation of the 2nd Plaintiff is nothing but superfluous to say the least.

[6] In support of the *locus standi* argument, the Defendant argues as follows;

6.1 The 1st Plaintiff is the Executrix of Estate late Gcinithemba Fakudze. The contract under which the action is brought is between the late Gcinithemba Fakudze (the proposer) and the Defendant. In terms of the contract the proposer nominated a Third Party, Nontobeko Fakudze, as the beneficiary. The contract is therefore a *stipulatio alteri*. Upon the death of the proposer the beneficiary is expected to accept the contract at which point the rights emanating therefrom would vest in the beneficiary.

6.2 It is then the beneficiary that has standing to enforce and / or claim under the contract and not the estate of the proposer. The

estate would have standing had the proposer contracted with the Defendant for his own benefit, which is not the case in the present matter.

6.3 The Supreme Court of Eswatini in the case of *George Edward Green V Swaziland Royal Insurance and Another*[7] pronounces as follows;

The stipulatio alteri was not generally recognized in Roman Law: alteri nemo potest. But it was recognized by the Dutch jurists of sixteenth and seventeenth centuries; extraneo potest stipulari. The institution is established in South African Law, one part to a contract may promise another that he will confer some benefit on a third person who is not party to the contract. In Crookes NO v Waston, Schreiner JA said: ***the typical contract for the benefit of a third person is one where A and B make a contract in order that C may be enabled, by notifying A, to become a party to a contract between himself and A. Broadly speaking the idea of such transactions is that B drops out when C accepts and thenceforward it is A and C who are bound to each other.***

[7] Case No. 48/2014 found at Page 32 of the Defendant's Book of Authorities

Plaintiff's arguments in response

[7] The Plaintiff insists that there is nothing irregular about the Plaintiff approaching this court despite the fact that the ombudsman has already decided the issue. The Plaintiff contends that the Defendant's argument to the effect that the matter has already been dealt with by the Financial Services Regulatory Authority (FSRA), and that the Plaintiff should have either filed an appeal or review of the FSRA decision is incorrect. It is the Plaintiff's argument that the High Court has original and unlimited jurisdiction over all matters, Civil and Criminal. Further, no party is limited or precluded from approaching the High Court for any remedy. It does not matter that any other forum has in terms of a statute creating it, been vested in powers to adjudicate over such dispute.

[8] The Plaintiff continue to argue that there is absolutely nothing that shuts the doors of the court to any litigant to approach the court for any remedy. To buttress this argument the Plaintiff has cited the decision of **Sandile Myalo Dlamini vs Major General Jeffry Shabalala and Another Civil Case No. 4227/10**.

[9] The Financial Service Regulatory Authority (The FSRA ACT) states that a party to whom a decision has been given against has the election to either write and accept the decision or not. Where the party does not accept the decision of the adjudicator, he has the right to approach the Court for an appropriate relief, so the argument goes.

The FSRA Act it must be stated, does not close or require a litigant to exhaust its internal remedies unlike the requirements of Section 7 (2) of the Promotion of Administrative Justice Act (PAJA Act) in South Africa which requires the exhaustion of all internal remedies before a matter can be brought to Court. The Section states as follows;

> *"Subject to paragraph (c), no Court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted". See GEO QUINOT, Administrative Law, page 634 Cases and materials 2008.*

[10] Unlike the South African position as expounded in their PAJA ACT, which requires the exhaustion of all internal remedies before an action can be taken in Court, nothing in our jurisprudence forbids a party from approaching the Court for relief, it must follow then from the above that nothing closes the doors of a Litigant in approaching the Honourable Court as it has, the Plaintiff continues to argue.

[11] In respect of the *Res Judicata* point, the Plaintiff contends that the Defendant is not correct. The very fact that the Defendant itself submit that the Plaintiff should have either approached the High Court on Review or Appeal, suggests that the Defendant admit that the *lis* is still alive and has not been finally determined. Res Judicata is therefore incompetent in present circumstances. One of the elements of Res Judicata is that the Judgment pleaded must be a final or a definitive decision. In so far as this decision is concerned, the

judgment of the Res Judicata was final. Even by the Defendants admission, the Plaintiff should have filed a Review or an Appeal. That suggests that the Defendants themselves realize that the matter is not Res Judicata. See Joubert The Law of South Africa Volume 9, paragraph 3, 4.2 at page 178.

[12] The Plaintiff further contend that decisions of statutory bodies do not become *Res Judicata* unless the Statute creating them expressly states so. Thus a judgment only becomes *Res Judicata* if issued by a competent Court and not a statutory body. The FSRA Act in this regard does not have a provision that gives decisions by statutory bodies the effect of *Res Judicata*.

[13] With regard to the Defendant's special plea on the absence of legal personality of the 2nd Defendant and absence of *locus standi* the Plaintiff responds as follows;

In terms of Section 37 of The Administration of Estates Act the duty of an Executor is to collate and bring together all the assets of the deceased person. Once brought together, the executor then distributes to the beneficiaries. Unless expressly excluded by a statute, a Life Policy forms part of an estate to which the executor has power to deal with. The Insurance Act of 2005 does not exclude such policies from the estate, therefore the executor can deal with and collect the proceeds of such a Policy on behalf of the estate. Gordon and Gertz, The South Law of Insurance, 3rd Edition, Page 267 has been cited to support the proposition, in particular where the learned authors state the following;

"In the absence of an enternuptial contract, marriage creates a community of property and of profit and loss between the spouses. The property of each whenever acquired falls into a common estate owned by both of them in equal undivided shares".

Issues for determination

[14] The court is called upon to determine whether there has been an irregular duplication of the proceedings. Further, whether the 2nd Plaintiff has legal personality and also whether the 1st Plaintiff has *locus standi*.

Common Cause Facts

[15] It is common cause that the late Gcinithemba Fakudze is the deceased concluded contract of insurance with the Defendant to the effect that in the event of his death, the sum of E2 000 000.00 (Two Million Emalangeni) should be paid to one Nontobeko Fakudze, who was the nominated beneficiary.

[16] It is also not in contention that in concluding the contract, the deceased did not disclose that he was diabetic. The Defendant upon discovering the non-disclosure resiled from the contract of insurance and repaid all the premiums paid by the deceased.

[17] The nominated beneficiary Nontobeko Fakudze being aggrieved with the Defendant's decision to cancel the insurance contract, lodged a complaint with the Ombudsman of the FSRA. The Ombudsman ruled on the by holding the decision of the Defendant. The Plaintiff subsequently instituted action proceedings before this court, claiming payment in the sum of E2 000 000-00 (Two Million Emalangeni) in respect of the claim. It is part of the Defendant's response to those action proceedings, that a special plea has been raised.

Adjudication

[18] It is apposite that prior to grappling with the competing arguments by the respective parties, one should outline the legal position in respect of the jurisdiction of this court.

[19] Section 151 (1) (a) of the Constitution Act of 2005 states as follows;

> **(151 (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).**

[20] **The Financial Service Regulatory Authority (FSRA Act)** states that a party to whom a decision has been given against has right to accept the decision or not.

[21] There is no mandatory provision that explicitly state that or compels a party to exhaust all internal remedies before approaching this court. The court is persuaded by the submission made on behalf of the Plaintiff that **Section 7 (2) of the Promotion of Administrative Justice Act (PAJA Act in South Africa)**, especially requires the exhaustion of all the internal remedies before a matter can be brought to court.

[22] **PAJA Act** states that subject to paragraph (C), no court or tribunal shall review an administrative action interms of this act unless all internal remedies provided for in any other lawless first ben exhausted.

[23] I have taken guidance from the case of **Botswana Railways Organisation vs Setsogo and Others (1996) BLR 76 3 CA** where **Amisa TP,** espoused the legal position as follows;

> ***"..In my view, the unlimited jurisdiction conferred by the constitution of the High Court must mean that the parties can take their dispute to the High Court if they desire, I think their dispute is of a nature which is acceptable to settlement by the process of that court".***

[24] I accept that it is the unlimited jurisdiction of this Court which clothes it with powers to hear any matter unless excluded by statute. Whether Criminal or Civil, except where the jurisdiction of this Court is expressly excluded by

clear and ambiguous terms of a statute[8]. I have taken time to look at the provisions of the FSRA Act, I have not seen a clause the jurisdiction of this court is expressly excluded in clear and unambiguous terms.

[25] My view is further fortified by the decision **of Commissioner of Customs and Excise vs Cure and Dilley Ltd (1962) 14B 340 at 357** cited with approval by **Otta J** in the matter of **Swaziland National Provident Fund Staff Pension Fund vs The Insurance and Retirement Fund Adjudicator and 5 Others Civil Case No 1055/2013** where the court held as follows;

> ***"It is an important rule of interpretation of statutes that a strong leaning exist against constructing a statute so as to oust or restrict the jurisdiction of the superior courts. It is also a well-known rule that a statute should not be construed as taking away the jurisdiction of this courts, in the absence of a clear and ambiguous language to that effect".***

[26] There is absolutely nothing in the FSRA Act to indicate that the internal processes afforded by the Ombudsman and the appeals tribunal, must first be exhausted before one can approach the courts. A party that is dissatisfied by the action of the authority is therefore entitled to pursue the issue directly to court.

[8] See Skhumbuzo Thwala vs Phindile Thwala Civil Case No 101/12 para 13

[27] I align myself with the position taken by **Her ladyship Otta J** in the **Swaziland National Provident Fund** judgment (*supra*) at para 36. She stated that the Ombudsman and the appeals tribunal are just internal mechanisms put in place to forge a more expeditious and *lis pendens* dispute resolution. It does not detract from the original jurisdiction of the High Court in terms of **Section 151 (1) (a) of the Constitution.**

[28] In respect of the absence of the legal personality of the 2nd Plaintiff and the absence of the *locus standi* of the 1st Defendant, I have considered **Section 37 of the Administrative of the Estate Act**. The Act states that it is the duty of an executor to collate and bring together all assets of the deceased person. Once brought together, the executor then distributes to the beneficiaries.

[29] The above Section presupposes that it is the assets of a deceased person that must be collated. This begs the question whether the anticipated proceeds from an insurance policy would belong to the deceased or the nominated beneficiary in the policy. The nature of the contract is a *stipulatio alteri*. In as much as it was entered into by the deceased and the Defendant it was for the benefit of Nontobeko Fakudze in her personal capacity. The contract was against the happening of uncertain future event, which in that case would be the death of the deceased, a certain specified amount of money would be payable to the Insured. The Insured being the 1st Plaintiff. So on face value, the Defendant in principle is correct that proceeds of an insurance claim are not transmitted to the Master of the High Court or Executor. They are paid to the beneficiary directly.

[30] The fact that the policy appoints a specific beneficiary, settles the argument. However, the issue here is that the matter is at a point where the money has not been paid to the appointed beneficiary. The person who in his lifetime was a party to the contract that has now been repudiated by the Defendant, is the deceased. It is that contract that is now subject of the current litigation. Who steps into the shoes of a deceased person? It is the Executor. It is therefore my view that whilst the decision of the Defendant will be subjected to scrutiny, the interests of the deceased in the process of litigation are best represented by the Executor. Depending on how the trial court will determine the matter, once the contractual issue have been determined, if there will be certain payments emanating thereafter, then the Executor may not have a role to play.

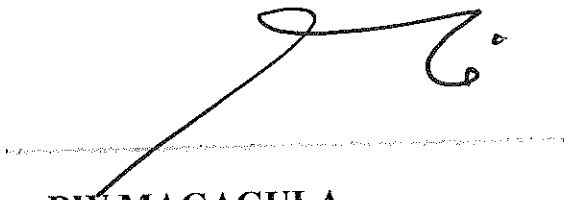
[31] The matter has not reached to the stage of payment. If it did, I would probably accept that at that stage if the contract specified a particular beneficiary, then it is that beneficiary that would be entitled to the payment.

[32] There is merit in that the deceased was a party to the contract that has now been repudiated by the Defendant. I therefore, come to the conclusion that there is nothing untoward in citing the Executor of the deceased's estate. It is the insurance contract of which the deceased person was a party to, that is in dispute.

[33] In the totality of the aforegoing, I come to the conclusion that the special plea is not meritorious and it must fail.

ORDER

The special plea is dismissed and costs will be costs in the course.



BW MAGAGULA

JUDGE OF THE HIGH COURT OF ESWATINI

For the Plaintiffs: Mr S Maseko (S.M Maseko Attorneys)

For the Defendants: Mr W. Maseko (Maseko Tsambokhulu)