

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO. 1255/19

In the matter between: -

NELISIWE VALERIA DLAMINI

Applicant

and

MONDELEZ (PTY) LIMITED

1st Respondent

WILSON DLAMINI

2nd Respondent

EASTHER DLAMINI (NEE MAKUWA)

3rd Respondent

Neutral citation: *Nelisiwe Valeria Dlamini vs Mondelez (pty) ltd & 2 others (1255/19) [2023] SZHC 305 (30 October 2023)*

CORAM:

N.M. MASEKO J.

FOR APPLICANT:

T. FAKUDZE

FOR 1ST RESPONDENT:

H. MAGAGULA

FOR 2ND & 3RD RESPONDENTS:

S. ZWANE

HEARD:

17/08/2020

DELIVERED:

30/10/2023

- PREAMBLE:** *Civil law- Civil Procedure- Point in limine on Non-Joinder of essential party who has direct and substantial interest- Retirement Funds are governed by board of trustees and in accordance with the Retirement Funds Act of 2005- Court has no jurisdiction to deal with retirement funds proceedings since it's the prerogative of the Fund in terms of the Act to determine a dependant who is deemed equitable to benefit from a pension and/or death gratuity of a member.*
- HELD:** *Point in limine on non-joinder upheld. Point in limine on jurisdiction upheld.*

JUDGMENT

- [1] On the 6th August 2019, the Applicant launched urgent motion proceedings to interdict the 1st Respondent from paying out any monies from the pension and/or death benefits of Madoda Simeon Dlamini to the 2nd and 3rd Respondents and that such monies should be deposited to the Applicant through her Attorneys.
- [2] In the alternative the Applicant prays for an order that if the monies had already been paid to the 2nd and 3rd Respondents then they be ordered and directed to reverse payments to the 1st Respondent to enable the said 1st Respondent to pay the aforesaid monies to her account. The Applicant further seeks to have the decision of the 1st Respondent of the 5th August 2019 granting the 2nd and 3rd Respondent 95% and granting the Applicant 5% from the pension benefits of the aforesaid Madoda Simeon Dlamini set aside, and instead an Order be issued directing the 1st Respondent to distribute the pension benefits as per the nomination form of the said Madoda Simeon Dlamini, and in the absence of the said nomination form, this Court is then urged to order that the Applicant is entitled to the entire pension benefits of the deceased, Madoda Simeon Dlamini. Further she prays for an Order that the 2nd and 3rd Respondents are not entitled to the

benefits from the pension and/or death benefits of the said Madoda Simeon Dlamini.

- [3] The Applicant also seeks for an interim Order operating with interim and immediate effect pending finalisation of these proceedings as well as costs at attorney and own client scale against the Respondents in the event of unsuccessful opposition.

THE APPLICANT'S CASE

- [4] The Applicant and the late Madoda Simeon Dlamini were married by civil rites on the 30th September 2007. At the time of the death of the deceased on the 27th October 2018 the parties were still married although they were no longer staying together. The deceased was staying at his parental homestead where he was being cared for by his parents during his long illness.
- [5] The Applicant states that after the death of her husband she prepared the death certificate and presented same to the 1st Respondent who promptly made a payment of E20,000.00 (Twenty Thousand Emalangeni) into her bank account for funeral expenses. She states that she also received a sum of E15, 000.00 (Fifteen Thousand Emalangeni) from Swazi med also for funeral expenses, and she eventually purchased a coffin for E30, 000.00 (Thirty Thousand Emalangeni).
- [6] Applicant states that at the 1st Respondent's place of business she was attended by the Human Resources Manager, Ms. Penelope Magagula and she was accompanied by her in-laws the 2nd and 3rd Respondents. The Applicant further alleges that the 3rd Respondent was instrumental in having the deceased to leave their matrimonial home and return to his parental home where he lived until his death.

- [7] I must state though that these allegations that the 3rd Respondent did not want the Applicant and that she (3rd Respondent) was also the cause of the marital problems between the Applicant and her deceased husband are denied by the 3rd Respondent and she is supported by her husband the 2nd Respondent.
- [8] The Applicant states further that before his demise, her husband had completed the pension nomination form wherein he had nominated her as the sole beneficiary of his death and/or pension benefits and he submitted same to the 1st Respondent. However, she states that when she later checked with the Human Resources Manager at 1st Respondent's business premises, she discovered that the nomination form was not there, but only the marriage certificate was there.
- [9] Applicant states that on the 4th August 2019, she received a call from her father-in-law the 2nd Respondent informing her that 1st Respondent had scheduled a meeting for the distribution of the benefits of her husband for the 5th August 2019 at 0900 hours.
- [10] She states that on the 5th August 2019 she duly attended the meeting together with the 2nd and 3rd Respondents. During the meeting the Human Resources Manager duly informed them that the 1st Respondent has decided to grant her 5% of her husband's death/pension benefits and grant 95% to the 2nd and 3rd Respondents. Applicant states that she advised the Human Resources Manager that she was going to seek legal advice and challenge the 1st Respondent's decision because she is the surviving spouse. She states further that the Human Resources Manager advised her that they have awarded her 5% because they carried out their own investigations both internally and outside the 1st Respondent and came to the view that she was not entitled to any payment other than the 5%.

[11] The Applicant states that the matter is urgent because the 1st Respondent intends to make payment to the 2nd and 3rd Respondents or has already made the aforesaid payment to the 2nd and 3rd Respondents. She argues that the payment must be interdicted by this Court because if it is made then she would suffer irreparable harm since the 2nd and 3rd Respondents may spend the money by the time the matter is finalised.

[12] Applicant states further she is the rightful beneficiary of her deceased husband's pension/death benefit and that if the interim interdict is not granted her rights may be infringed. Further that she has no other remedy other than to approach this Court to safe guard her rights to benefit from the entire death benefits of her late husband.

THE 1st RESPONDENT'S CASE

[13] The 1st Respondent opposes the application and has filed an Answering Affidavit deposed to by Ms. Penelope Mkhwanazi, the Human Resources Manager.

[14] At the outset, the 1st Respondent has raised the following points *in limine*: -

- (i) **Non-joinder of Silulu Retirement Fund; and**
- (ii) **Lack of urgency;**
- (iii) **This Court does not have original jurisdiction to deal with this matter.**

[15] The 1st Respondent states that the Trustees of Silulu Retirement Fund (the Fund) exercise its discretion in accordance with the provisions of Section 32 (2) of The Retirement Funds Act of 2005 (RFA). The 1st Respondent argues that the Fund is a separate and distinct legal entity from it, and is established in terms and in accordance with its own constitution, capable of being sued and suing in its own name.

- [16] The 1st Respondent argues that the application before Court is fatally defective because the Fund has not been joined as a party to the proceedings and furthermore that the 1st Respondent has not been correctly cited in these proceedings. The 1st Respondent argues further that the decision sought to be set aside or impugned was made by the Fund and not the 1st Respondent.
- [17] Ms. Penelope Mkhwanazi states that the communications attributable to her were made in her capacity as Principal Officer of the Fund.
- [18] In my view the point in limine on lack of urgency does not advance the case of the 1st Respondent more particularly because this Court in this particular instance had already dealt with the matter and issued an interim order. I am aware that urgency can be pursued at any time during the proceedings.

ANALYSIS OF THE POINT IN LIMINE

- [19] In my view the point in limine on non-joinder disposes of this matter. It is common cause that when the Applicant filed her Replying Affidavit and dealt in particular with the non-joinder of Silulu Retirement Fund, she denied knowledge of the Silulu Retirement Fund and in fact went on to argue that it does not exist and that the 1st Respondent's Human Resources Manager cannot wear two coats because when she addressed them during the meeting to discuss the benefits on the 5th August 2019, she did not introduce herself as a Principal Officer of the Silulu Retirement Fund.
- [20] The 1st Respondent states that the deceased was a member of the Silulu Retirement Fund by virtue of his employment contract with the said 1st Respondent. On what basis does the Applicant state that Silulu Retirement Fund does not exist remains a mystery. The fact that the Human Resources Manager is a Principal Officer of the Fund does not create a conflict of interest. A retirement fund is administered by

“trustees of the fund” and is established in terms of The Retirement Funds Act of 2005 (the Fund).

- [21] All retirement funds are regulated by the Retirement Funds Act. Section 3 (1) (2) of the Act provides as follows: -

3 (1) After the expiry of a period of 12 months after the commencement of this Act, no person who was carrying on business of a retirement fund at the commencement of this Act, shall carry on the business of a retirement fund in terms of Section 5 of this Act.

(2) Every retirement fund which was in existence at the commencement of this Act shall within 120 days after the commencement of this Act, apply to the Registrar for registration in terms of Section 5 of this Act.

- [22] Section 4 (1) of the Act provides for the office of the Registrar of Retirement Funds and Retirement Funds Board as follows: -

4. (1) The person appointed as Registrar in terms of the Insurance Act, 2005, shall also be the Registrar of Retirement Funds and the powers vested in him and his office for purposes of insurance business shall also vest in him for purposes of retirement fund business as applicable.

- [23] Section 5 (1) of the Act deals with the manner of registration of retirement funds as follows: -

“5. (1) An application for registration of a retirement fund under this Act shall be made to the Registrar by the Principal Officer in terms of the regulations and prior to submitting any such application to the

Registrar for consideration the principal officer shall ensure that his application is complete in that his application complies with Regulations and any omissions have been explained by way of a note.

(2) The Registrar may request an Applicant to provide further details which the Registrar considers necessary for him to make a decision regarding registration of the retirement fund and the Registrar may refuse to consider an application solely on the grounds of inadequate or incomplete information.”

[24] I have referred to these important sections in the Retirement Funds Act to demonstrate that retirement funds are by their nature clothed with locus standi, they can sue and can be sued because they are separate legal entities which are regulated by the Act. It is my view that in casu the Silulu Retirement Fund should have been joined by the Applicant, even at the time when the Applicant was made aware through the Answering Affidavit filed by the 1st Respondent.

[25] The Applicant was under a duty to join and cite Silulu Retirement Fund because it is the fund which administers the pension and/or death benefits of its members. The Silulu Retirement Fund has a direct and substantial interest because it is the administrator of the 1st Respondent's employees' pension and/or death benefits. Any order which this Court will make has a direct effect on the Silulu Retirement Fund, and therefore the Applicant should have joined the Silulu Retirement Fund. In my view it is easy to confirm whether a particular retirement fund exist or not by simply approaching the Registrar of the retirement funds as per the Retirement Fund Act of 2005. As I said earlier the position adopted by the Applicant of an outright denial of the existence of Silulu Retirement Fund is in my view not helpful to the advancement of the case of the Applicant.

- [26] It must be borne in mind that benefits that have accrued to a deceased member of a retirement fund do not form part of the estate of such deceased member. Instead, the distribution of the said benefits is the prerogative and at the discretion of the board of trustees of that particular fund. In this regard I refer to Section 31 (1) (2) and (3) of the Retirement Funds Act which provides as follows: -

“31 (1) Save to the extent permitted by this Act and the Income Tax Order, 1975, no benefit or right thereto which arose in respect of contributions made by or on behalf of a member of a retirement fund, shall be capable of being reduced, transferred, ceded, pledged or hypothecated or be liable to attachment or subject to any form of execution under a judgment or order of Court or be capable of being taken into account in the determination of a judgment debtor’s financial position.

(2) If a person attempts to transfer, cede, pledge or hypothecate a benefit or right thereto, the benefit shall as the management board may direct, be withheld thereto or suspended: -

Provided that the management board may direct that the benefit or part thereof be paid to one or more of the member’s dependants or to a guardian or trustee for the benefit of such dependants during the period as they may determine.

(3) A person who contravenes the provision of this section commits an offence and shall on conviction be liable to the general penalty in terms of Section 68 of this Act.”

[27] I have referred to Section 31 above herein to demonstrate the importance of the joinder of Silulu Retirement Fund in these proceedings to demonstrate that the control of benefits of members of a Retirement Fund is the sole prerogative of the board of trustees who exercise their discretion to determine a dependant who deserves to benefit from the pension and/or death benefits.

Section 33 (1) of the Retirement Funds Act states as follows: -

33 (1) Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund any benefit payable by such a fund in respect of a deceased member, shall, subject to any guarantee issued or loan made in terms of Section 19 of this Act, not form part of the assets in the estate of such a member, but shall be dealt with as in this section.

[28] At page 215 of Herbstein and Van Winsen in their authoritative textbook titled The Civil Practice of the High Court of South Africa Vol 1, 5th Edition, 2012 Juta, states as follows when dealing with joinder of necessity: -

“A third party who has, or may have, a direct and substantial interest in any order the Court might make in proceedings or if such an order cannot be sustained or carried into effect without prejudicing that party, is a

necessary party and should be joined in the proceedings, unless the Court is satisfied that such person has waived the right to be joined. Such a person is entitled to demand joinder as a party as of right and cannot be required to establish in addition that joinder is equitable or convenient. In fact, when such person is a necessary party in this sense the Court will not deal with the issues without a joinder being effected, and no question of discretion or convenience arises.”

[29] At page 217 – 218 the Learned authors, describe what direct and substantial interest entails and I quote: -

“A direct and substantial interest has been held to be an interest in the right which is the subject-matter of the litigation and not merely a financial interest which is only an indirect interest in such litigation. It is a legal interest in the subject-matter of the litigation, excluding an indirect commercial interest only. The possibility of such an interest is sufficient, and it is not necessary for the Court to determine that it in fact exists. For joinder to be essential, the parties to be joined must have a direct and substantial interest not only in the subject-matter of the litigation, but also in the outcome of it.”

[30] It is my considered view that it would not be in the interest of justice for this Court to deal with this matter in the manner it is because this Court cannot at this stage exercise its jurisdiction over retirement funds. The Retirement Funds Act make it very clear that it is the Fund that has the prerogative and discretion to determine which dependant deserves to be granted the pension and/or death benefits of a deceased member and also most important how much each dependant is going

to be awarded. All these criteria and other formalities are sanctioned by the Retirement Funds Act.

- [31] In the case of **MAVIS MHLANGA v. PUBLIC SERVICE PENSION FUND (APPEAL CASE NO. 42/2006)** Tebbutt JA stated as follows at paragraphs 9 – 10: -

“9. It is well established that a dependant or respondent has the right to demand the joinder of another party where the latter has a direct and substantial interest in the issues involved and in the order which the Court might make (see Amalgamated Engineering Union v. Minister of Labour 1949 (3) SA 637 (A); Henrie Viljeon (Pty) Limited v. Awerbuck Brothers 1953 (2 SA 151 (0); Smith v. Conelect 1987 (3) SA 689 (WLO); Reckson Mawelela v. Association of Money Lenders and Another Civil Appeal 43/99 (Court of Appeal).

It should also occur where the legal right of a party could be prejudicially affected by the judgment of the Court (See Henrie Viljeon case supra at 167) or where such order cannot be sustained or carried out without prejudicing that party (see the Reckson Mawelela case, supra).

10. In the present case it is clear that the Government has a direct and substantial interest in the issues involved and in the order which the Court might make. Should the Court order payment of E6, 941.46 to the Appellant, it is obvious that it is the Government which will have to pay it to her. A pension (or no doubt part thereof) can in terms of regulation 23 of the Fund be attached, ceded or transfer to satisfy a debt to the Government of Swaziland. Should the amount the Government claimed as an overpayment, and thus be a debt to it, be held to have been wrongly deducted, the

Government would obviously be prejudiced by that judgment. The Learned Judge a quo was therefore correct in upholding the point in limine on non-joinder.”

[32] This authority again clearly demonstrate that the Applicant should have joined the Silulu Retirement Fund in these proceedings because whatever order which this Court may issue would be prejudicial to the said Silulu Retirement Fund. The 1st Respondent also raised the issue of a wrong citation of the 1st Respondent, and this too was not attended to or rectified by the Applicant. A wrongly cited party may result to the unenforceability of a Court Order, it is therefore desirable that a party is correctly cited otherwise it renders the proceedings flawed and the party who has been wrongly cited can refuse to comply with an Order of Court and it would be impossible to pursue any further processes because of that wrong citation. It is advisable that when parties launch proceedings, they must ensure that all parties are correctly and accurately cited in Court proceedings to enable the Court to issue judgments or orders that will be enforceable.

[33] The Applicant alleges that as the surviving spouse she is entitled to a large portion of the deceased's pension and/or death benefits, however the 1st Respondent argues that even though she is the surviving spouse, the Silulu Retirement Fund has a discretion to determine a beneficiary in terms of Section 32 (2) of the Retirement Fund Act which provides as follows: -

32 (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. (my emphasis)”

[34] I have underlined this caption that the benefit shall be paid to such dependant or dependants in a manner that is deemed equitable by the management board to demonstrate that in such matter it is not a foregone conclusion that retirement funds pay benefits to certain designated individuals, like the surviving spouse, that is not the case, instead retirement funds pay to a dependant **who is deemed equitable by the management board**. This means that where the management board has concerns about a certain dependant, it has a right to carry out an investigation in order to pay the aforesaid benefits to a dependant who is deemed equitable by the said management board. This is what the 1st Respondent alleges was done by Silulu Retirement Fund, and because Silulu Retirement Fund has not been joined in these proceedings it complicates the matter for the Applicant since this Court cannot make a pronouncement which will definitely affect Silulu Retirement Fund. Section 33 (2) read together with Section 2 wherein “dependant” is defined as follows: -

“dependant in relation to a member: -

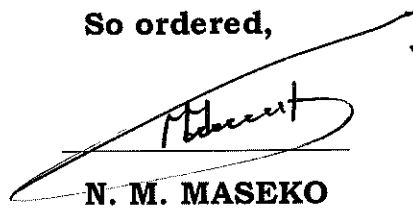
- (a) a person in respect of whom the member is legally liable for maintenance;***
- (b) a person in respect of whom the member is not legally liable for maintenance if such person –***
 - (i) was in the opinion of the management board dependant on the member for maintenance;***
 - (ii) is the spouse of the member and shall include a spouse as a result of any customary and religious union;***
 - (iii) is a child of the member and shall include a posthumous child, an adopted child and an illegitimate child;***

(iv) a person in respect of whom the member would have become legally liable for maintenance, had the member not died.

[35] Having fully considered the submission from all Counsel and taken into account the legal authorities referred to, I hereby grant the following Order;

- 1. The point in limine on non-joinder of Silulu Retirement Fund is hereby upheld.**
- 2. The point in limine on lack of jurisdiction is also upheld.**
- 3. Consequently, the application is dismissed.**
- 4. The Consent Order of the 6th August 2019 that the funds be deposited into the First National Bank Account No. 622 44 399 409 Branch Code 280164 is hereby rescinded and such monies are to be paid to Silulu Retirement Fund.**
- 5. The Applicant is granted leave to file a fresh application with correct citation of all the parties who have a direct and substantial interest in the matter.**
- 6. Each party to pay its costs.**

So ordered,



N. M. MASEKO

JUDGE