IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CASE NO.741/2023**

In the matter between:

PUBLIC SERVICE PENSIONS FUND **Applicant**

And

OMBUDSMAN OF THE FINANCIAL SERVICES **1st Respondent**

BUSISIWE K.DLAMINI -MHLONGO **2nd Respondent**

JUDGEMENT

Neutral citation: *Public Service Pensions Fund and Ombudsman of the Financial Services& Busisiwe K.Dlamini-Mhlongo (741/2023) SZHC 14 (14th February 2024).*

Coram: *S.M. MASUKU J*

Date of heard: *28th November 2023*

Date delivered: *14th February 2024*

Summary: *Administrative Law – An application for the review and setting aside of the Ombudsman's decision mainly on the*

basis that it is fraught with errors of law, that she failed to apply her mind to relevant issues and considered irrelevant issues resulting in an unreasonable finding against the Applicant.

Considered: *Whether it is appropriate for an administrative or statutory functionary to defend her decisions ex post facto in review proceedings, considered further is whether a bona fide mistake of law is reviewable.*

Held: *The Ombudsman failed to exercise her discretion fairly and reasonable. She did not take into account in her determination of what is fair and reasonable, the law, regulations, industry practice and her own precedents. The review is allowed and her decision quashed.*

The facts

[1] The late Samuel Mbongeni Mhlongo ("the deceased") was a member of the Applicant ('the Fund') and had applied for membership of the Fund on the 4th August 1992, wherein he nominated **Amy Mhlongo**, Siyabonga Mhlongo and Dumsani Mhlongo as his benefiaries.

[2] The deceased reached the compulsory retirement age and he was as a result paid his retirement benefits presumably following Regulation 8 of the Public Service Pensions Regulations 1983 ('the Regulation or Rules').

[3] The deceased passed on in April 2021. The Applicant was advised accordingly. The Applicant convened a next-of-kin meeting for purpose of determining who was entitled to receive the deceased benefits/annuity. It was during this meeting that the Applicant established that the deceased had

married one Amy Thulile Dlamini ("Amy") in terms of Civil Rights on the 17th November 1967 and had four children with her. The deceased had further built her a home in the Republic of South Africa and maintained her until his demise.

[4] In addition, the Applicant also established that on the 15th September 1984 the deceased notwithstanding the fact that he had not divorced Amy, purported to contract a second marriage in terms of Eswatini Law and Custom with the 2nd Respondent ('the Complainant') and continued to live with her until his demise.

[5] The Applicant advised the 2nd Respondent that the marriage she purported to contract with the deceased was unlawful, bigamous and invalid (in light of the fact that the deceased was still married to Amy in September 1984). She was therefore not a spouse of the deceased, hence not entitled to annuity payments.

[6] The Applicant proceeded to make payments to Amy from October 2021,by virtue (as it alleged) of being a lawful wife and legal dependant. The deceased's children were excluded from the annuity payment because they had passed the ages of majority.

[7] On the 6th January 2022 the 2nd Respondent filed correspondence to the 1st Respondent ("the Ombudsman"), expressing her dissatisfaction for being disallowed the annuity as a 'surviving spouse'. The Ombudsman considered the complaint and determined it under section 75 (1) of the Financial Services Regulatory Authority Act 2 of 2010 ("the FSRA Act).

[8] The Ombudsman made the following finding and order:

1. The Ombudsman finds that the management board of the Respondent acted outside the discretion accorded to it by the law in excluding the

complainant as a beneficiary on the basis that her marriage with the deceased was bigamous and unlawful.

2. *The Ombudsman further finds that the allocation was not fair to the complainant*

The order:

3. *The Complaint is upheld.*
4. *The Respondent is ordered to reconsider her decision, and consider complainant in the distribution based on the factual dependency that existed between the complainant and the deceased.*

[9] On the 23rd March 2023, the Applicant instituted this Review Application seeking an order in the following terms.

1. *Reviewing and setting aside the finding and the order issued by the first Respondent contained in the first Respondent's determination.*
2. *Substituting the finding and the order of the first Respondent with an order dismissing the complaint filed by the second Respondent in November 2021 with the first Respondent and upholding the Applicant's initial decision not to grant any annuity to the second Respondent...*

[10] The Applicant seeks to review the findings and the order of the Ombudsman on the basis that it is fraught with errors of law, that she failed to apply her mind to the relevant issues and considered irrelevant issues resulting in an unreasonable finding against the Applicant.

[11] The grounds on which the Applicant relied on for the review are espoused in the founding affidavit in not so tidy fashion; by this I mean they have not been elegantly fashioned but in essence are;

11.1 In the *first* and *second* ground of review the Applicant contended that for the Ombudsman to assess the 'reasonableness' of Applicant's conduct in not awarding the annuity to the 2nd Respondent, she should have looked at the rules of the Fund, which she actually confirmed they were relevant in the interpretation in the conduct of the Fund in distributing the annuity. The Applicant argued that the Ombudsman being a creature of statute is guided by regulations as promulgated by Parliament that are not only binding to the Fund but also to the members beneficiaries and anyone claiming from the Fund.

11.2 The *third* ground is that, in law and in the pension industry, dependency (as determined by section 33 of the RFA/only applied in the distribution of lump sum benefit not in the payment of the spouse's pension annuity. This position (it was averred) had been confirmed in previous cases by the Ombudsman (see Ndumiso Sibanyoni v Public Pensions Fund RF/M/9/208). In this regard the Applicant submitted that the Ombudsman made an error of law in determining that factual dependency should have entitled the 2nd Respondent to annuity. The consequence of which she misconstrued the applicable law to reach a wrong and unreasonable determination.

11.3 The *fourth* ground raised by the Applicant is that, the fact that the 2nd Respondent lived with the deceased for 37 years should not automatically entitle her to a dependant annuity. The Applicant contended that the Ombudsman's decision was unreasonable when in the past she held that:-

"In reading the Fund's regulations as well as the Retirement Funds Act, 2005 ('the RFA), it is apparent that dependency does not automatically entitle a dependant to annuity. "She held that the legislation specifically provides for payment of an annuity to the surviving spouse or child under Regulation 17 or 18 respectively." *see Ndumiso Sibanyoni (supra).*

[12] The Ombusdman's reasons for the impugned decision lies in the following excerpt:- *" It is important for the Ombudsman to answer the question of whether the complainant was dependant on the deceased at the time of his death. In Aswering this question the Ombudsman will ascertain whether Respondent brought his mind to bear on whether complainant was dependant on the deceased at the time of death? Complainant submitted that... " as we lived as husband and wife for 37 years, built a home at Mahlanya and I bore three kids for him. He was also dependant on me for physical, emotional and other needs for 37 years." The above is proof that Complainant and the deceased lived together and that Complainant was factually dependant on deceased. Respondent in her submissions stated that, "...there is no basis for the relief sought against the Respondent as the complainant does not qualify as a surviving spouse because her purported Swazi Law Custom marriage with the deceased was bigamous and unlawful.* ***Respondent based her decisions on the validity of the marriage and never brought her mind to bear on the question of dependency between complainant and the deceased. Based on the submission of the parties, The Ombudsman finds that there was actual dependency between the complainant and the deceased. The Regulations and Rules of the Respondent should be read together with the Retirement Funds Act, which provides guidance on dependency and the level of dependency. In the circumstances, there is sufficient evidence to warrant interference with the discretion and decision of the Respondent".*** **(see paragraph 20 of the decision) (emphasis).**

[13] It will be apparent later on in this judgement why the Ombudsman's ratio for the decision is relevant to quote verbatim and in full.

Ombudsman chose to defend her decision in this Review.

[14] The Ombudsman chose in this matter to defend her decision *ex post facto* by personally deposing to an answering affidavit Her affidavit has not been supported by the Complainant (2nd Respondent herein). At the hearing of the matter , the court enquired from her counsel if it was appropriate for an administrative or statutory functionary to defend her decisions *ex post facto* in review proceedings. Counsel defended her participation in the litigation by informing the court that there is paucity of review decisions in this jurisdiction on this field, hence the Ombudsman took it upon herself to defend her decision in order to develop the jurisprudence.

[15] However well meaning these sentiments may have been, there are a number of reasons why it is inappropriate or even undesirable for an administrator or statutory functionary to defend her decision *ex-post facto.*

[16] I deal with two reasons hereunder:- The first is that allowing an administrator or statutory functionary to defend her reasons for her decision *ex post facto* permits (in some instances like in *casu)* administrators to invoke belated justifications that can upset the orderly functioning of the process of review, forcing litigants and courts to chase a moving target. In other words it is tantamount to allowing administrators to put up reasons or formulate reasons after the fact. (What is referred to as a *post hoc* rationalism) (*see* the work of Max Du Plessis SC, in the case of Forum De Monitoria Do Orcamento Manuel Chang, Minister of Justice and Correctional Sevices and Others, Case No. 4044/21 Hig Court SA Gauteng Division JHB.

[17] The Courts in other jurisdictions have constantly frowned upon a decision maker, in review proceedings providing *post hoc* rationalization. A number of decisions for example by the High Courts of South Africa have said it is an impermissible practice. *See,* for example The Commissioner, South African Police Service v Maimela 2003 (5) SA 480 (T) AT 486 F-H. *See also,* Mobile Telephone Networks (pty) Ltd vs Chairperson of the Independent Commissions Authority of South Africa, In re: Vodacom (pty) Ltd v Chairperson of Independent Communications Authority of South Africa[2014] ZAGPJHC5;[2014] 3 All SA 171 (GT) (31March 2014).

[18] The Supreme Court of Appeal for example in rejecting the NPA's revisional efforts to justify withdrawal of charges against President Jacob Zuma in the case of Zuma v Democratic Alliance [2017] ZASCA 146 [2017] 4 all SA 726 (SCA) (13 October 2017) at paragraph 24 had this to say;

'On 6th April 2009 Mr Mpishe announced publicly that he had made the decision to discontinue the prosecutions of Mr Zuma and issued a detailed media statement providing the reasons for the decisions, ***It is against those reasons alone that the legality of Mr Mpshe's decisions to terminate the prosecutions is to be determined."*** *(underlining added).*

[19] The South African Constitutional Court has also twice so held and affirmed recently that:-

"It is true that reasons formulated after decisions has been made cannot be relied upon to consider a decision rational, reasonable and lawful"

see National Regulatory of South Africa v PG Group (pty) Limited [2019] ZA CC 28;2019 (10) BCLR ``85 (CC; 2020 (1) SA 450 (CC) at paragraph 39.

[20] The US Supreme Court came to a similar conclusion in the case of The Department of Homeland v Regents of the University of California 59 U.S 13 [2020] where the decision-maker urged the court to consider an additional memorandum that had been drafted after the decision was taken. The court refused to do so because the reasons were a *post hoc* rationalization. The court held:-

20.1 *"It is a foundational principle of administrative law that judicial review of agency action is limited to the grounds that the agency invoked when it took the action.*

20.2 *Considering only contemporaneous explanations for agency instils confidence that the reasons given are not only convenient litigation positions.*

20.3 *Permitting agencies to invoke belated justifications can upset the orderly functioning of the process of review, forcing both litigants and court to chase a moving target.*

20.4 *Any reasons provided after a decision is taken must be viewed critically to ensure that the decision is not upheld on the basis of impermissible post hoc rationalization.*

20.5 *The new reasons provided by the Administrator differed so much from the original reasons could only be a post hoc rationalization".*

The court concluded with this statement in that case:-

"*An agency must defend its actions based on the reasons it gave when it acted. This is not the case for cutting corners to allow [the decision maker] to rely*

upon reasons absent from its original decisions." (See the work of Max Dup Plessis SC,(*supra).*

[21] The reasons for the Ombudsman to turn the decision of the Applicant have been quoted berbatim above. The *ratio decindendi* seem to be that the 2nd Respondent lived as husband and wife with the deceased for 37 years, built a home and bore three children. He was dependant on him for physical, emotional and other needs for 37 years. This she said was proof of factual dependence. The Ombudsman seem to have accepted without questioning that the deceased did marry her first wife Amy in terms of civil rites she expressed the view that it was for the courts and not her office to pronounce the validity of the marriage.

[22] The Ombudsman's stance of defending her decision on review, placed her in a position of justifying her decision by introducing new reasons when she stated in her answering affidavit at paragraph 35.2 that:-

"35.2 It is worth noting that Applicant does not mention whether the evidence included a marriage certificate to show where it took place, by whom it was conducted so as to determine its validity. In so doing, Applicant ignored the principle of equity. Applicant rushed to exclude the Second Respondent from distribution even though she produced a marriage certificate validated by the Registrar of Birth, Marriages and Deaths and which marriage had not been declared bigamous by a court of law. In doing so, there was no clear evidence as to whether the first marriage was conducted in terms of the Marriage Act of 1964. Applicant merely relied on the say so of those present in the meeting".

[23] These are certainly not the contemporaneous explanation the Ombudsman relied on in her reasons in the impugned decision as set out in paragraph 20.

She then sought (in the answering affidavit) to rationalize and to embed her reasons *post hoc*. This is impermissible in review proceedings.

[24] The second reason why an administrative or statutory functionary must be discouraged from setting out to defend their decisions on review is simple that, they are custodians of the public interest to undo illegalities. The opposite is that our courts, (just like the South African courts) should allow administrators to apply to court to have their own unlawful decisions set aside. This is impelled by the principle of legality as defined in modern national constitutions.

[25] The point being made is that an official who has gone to court to defend a prior decision that is clearly unlawful should be prevented from doing so. Why prevent her from undoing a prior decision she has made or why prevent her from defending a decision she has made when that decisions is on review?.

[26] Leo Boonzaier, a D Phil candidate, faculty of law, University of Oxford in an article entitled The 'Good Reviews, Bad Actors', Constitutional Court's Procedural Drama' wrote as he discussed some South African decisions on this topic. He argued that both majority and dissenting judgements when discussing this topic strenuously invoked the rule of law. (See Pepcor Retirement Fund and Another v Financial Services Board and Another [2003] ZASCA 56,2003 (6) SA 38 (SCA) (PEPCOR),Municipal Manager: Qaukeni Local Municipality and Another v f v General Trading CC [2009] ZASCA 66,2010 (1) SA 356 (SCA). 'Some judges say the rule of law gives them reasons to allow officials to undo unlawful acts; some say it gives them reasons to prevent their undoing. After all he says, the rule of law paradigmatically includes the principle of legality, which says that unlawful conduct must be undone. And yet officials could flout the rule of law by

acting improperly or arbitrarily in their very attempt to undo unlawful conduct'.

[27] I should add, officials in the shoes of the Ombudsman in *casu* could flout the rule of law by acting improperly or arbitrarily in their very attempt to defend and preserve what may turn out to be an unlawful conduct, should they be allowed to defend their decisions.

[28] Leo Boonzaier (*supra*) continues to state that 'the fundamental principle as we know it is that all unlawful administrative acts are void. This however remains a theory than a practical proposition until there is an authoritative judgment of a court of law'. The doctrine of *fuctus officio* which prevents adjudicators to re-open their decisions will-nilly still reigns supreme in our jurisdiction. It is mutually exclusive the notion of *post hoc* rationalization of decisions. Courts in the South African jurisprudence have embedded the notion that an administrator may not approach a court to either have his or her decision set aside (see Mining Commissioner of Johannesburg v Getz 1915 TPD 323. Some other interested party with a direct or indirect interest brings or defend the administrator's decision in review proceedings. The signs are however that in the constitutional era, courts are impelled by the principle of legality and are inclined to decide otherwise. (*see* generally, DM Pretorius "The Origins of the *Functus Officio* Doctrine, with Specific Reference to its Application in Administrative Law"(2005) 122 South African Law Journal 832 also cited by Leo Boonzaier (*supra*) who cites Mining Commissioner of Johannesburg v Getz TPD 232.

[29] I should make it apparent that the above synopsis constitute is in passing on how undesirable it is for an administrator to defend her decision *ex post facto* in review proceedings.

The Relevant Regulatory Framework Applicable in *casu*.

[30] The Fund is established by the Public Service Pensions Order 1993 ('The Order") and its operations are regulated by the Public Service Pensions Fund Regulations, 1993 (the "Regulations").

[31] In 2005 the Kingdom's Parliament ('Parliament') passed the Retirement Funds Act, 2005 (the 'RFA') which in terms of section 74, stipulates that the Applicant is also subject to the operation of the RFA. Despite the promulgation of the RFA, Parliament neither repealed the Order nor the Regulations hence they contined to bind the operations of the Applicant.

Office of the Ombudsman

[32] The office is established in terms of section 74 (1) of the Financial Regulatory Authority Act 2000 (the 'FSRA Act") and its purpose is to resolve certain disputes arising in the financial services industry (which includes retirement funds); and

[33 If a complaint is placed before the Ombudsman, the latter is entitled to determine it on the standard of what is *fair* and *reasonable* in her opinion (the "standard of review").

[34] In Swaziland Building Society v Nondumiso Simelane (1228/20) [2021] SZHC (58) paragraph 15,Mlangeni J when referring to how the Ombudsman determines complaints held that:-

" The remedies that are dispensed by the Ombudsman are largely equitable rather that purely legal. The Ombudsman resolves complaints by reference to what is, in the opinion of the Ombudsman fair and reasonable in all the circumstances of each case." (emphasis added)

[35] I should add, the rules covering the operations and jurisdiction both in the United Kingdom and in the Republic of South Africa contained in the FCA handbook under the section "Dispute Resolution Complaints in the forma and the FSA handbook in the latter case stipulate that;

' In considering what is fair and reasonable in all the circumstances of the case, the Ombudsman will "take into account the relevant law and regulations, regulator's rules, guidance and standards, relevant codes of practice and where appropriate, what he considers to have been good industry practice.' (Emphasis added).

[36] I am of the view that the Ombudsman cannot consider what is fair and reasonable in all circumstances of each case in isolation, and without taking into account the relevant laws, regulations, regulator's rules, guidance and standards relevant codes of practice and good Industry practice.

Test to be applied in the Review Proceedings

[37] This court has to determine whether the Ombudsman exercised her discretion fair and reasonable and if this matter has to be remitted back to her office. The court will have to determine if the Ombudsman exercised its discretion as envisaged by section 75 (1) of the FSRA Act. The test is whether or not the Ombudsman acted rationally and arrived at a proper and lawful decision (*see* for example paragraph 10 of the Financial Services Tribunal decision in Fakazile Anna Khwela and Toyota SA Provident Fund, ABC Holdings (pty) Ltd, The pensions Fund Adjudicator.

[38] Put differently, the court has to consider whether the Ombudsman exercise its discretion reasonably, that is not arbitrary, capriciously or unreasonable.

[39] The central thrust of the debate between the parties was whether the Ombudsman committed an error of law by basing her decision on the application of section 33 (2) of the RFA rather than to have relied on the Rules and Industry practice.

[40] Mistake of Law as a common law ground for review is aptly articulated by Herbastein and Van Winsen "The Civil Practice of The High Courts in South Africa" 5th edition, Vol.2 at page 1273 where they express the following when dealing with a mistake of law in a judgment from a lower court:-

"A bona fide mistake of law usually gives grounds for appeal only not for review. Where, therefore, by mistake a Magistrate refuses to allow an amendment or strike out an alleged defective portion of a plea, the matter cannot be taken on review. The same applies to an incorrect decision as to the party on whom the onus of proof lies. The consequences of a mistake of law will, however , amount to a gross irregularity if a judicial officer, through a mistake of law, does not direct his mind to the issues and so prevents the aggrieved party from having a case fully and fairly determined. In that event, the proceedings are reviewable. A mistake of law is reviewable also if it prevents the exercise of the discretionary powers entrusted to the body or person making a mistake".

[41] In this matter the Applicant argued that the Ombudsman's decision is fraught with errors of law and ought to the reviewed.

[42] The Ombudsman argued that her determination of the complaint was based on the application of Section 33 (2) of the RFA when the Applicant made a decision excluding the second Respondent as a beneficiary without having seen Amy Mhlongo or her marriage certificate. That there was no sufficient

evidence before the Applicant to conclude that there was a valid marriage between the deceased and Amy.

[43] The Applicant argued that this was incorrect because the 2nd Respondent in the proceedings before the Ombudsman did not contradict the deceased children's evidence that their mother and father had entered into a civil marriage in November 1967. Amy also deposed to an affidavit explaining that her marriage certificate had been lost.

[44] The Applicant averred further that the Ombudsman's decisions is reviewable because she ought to have relied on the Rules of the Fund which are supreme and binding to its officials, shareholders and benefiaries as well as anyone claiming from the Fund. (Making reference to the case of Tek Corporation Provident Fund and Others v Lorentz 2000 3 BPLR 227 (SCA) at paragraph 28.

[45] The Applicant argued further that sections 33 (2) of the RFA only applied to members. The deceased was no longer a member at the date of death. The Ombudsman was bound to Regulation 17 (2) which states that " *if a member dies after separation from the Fund and while he is entitled to, or in receipt of a pension from the Fund, his surviving spouse, if any, shall be entitled to a pension to one-half the amount of pension which the member was receiving, or was entitled to receive*".

[46] The examination of the regulatory regime as proposed by the Applicant appeals to me. The Ombudsman relied on section 33 (2) as her basis for her decision. Section 33 (2) reads as follows:-

... Death of a retirement Fund Member..

> *'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.

Applicant argued that the application of the subsection above is triggered upon the death of a member. The Ombudsman assumed wrongfully that the deceased was a member upon his death when he was not for the reasons below:-

Section 2 defines a member as:

[47] '*Any person whose membership of the fund has been established in terms of the rules of the Fund* ***and has not yet been terminated in terms of the provisions of the rules*** *and shall include a person entitled to or receiving a benefit under the rules of the Fund.'*

The argument is that whether a person's membership has been terminated must therefore be determined with reference to the rules of the Fund. The Act does not prescribed the circumstances under which termination takes place. It defers to the rules of each Fund to establish.

[48] The submission by the Applicant is that one must then have regard to the Public Service Pensions Order of 1993 ('the order') which applies to every public officer who holds a pensionable office in the public service. Section 2 is to be read as including a member of the Police Force for which, the deceased was a pensionable permanent employee. In terms of the Regulations accompanying the Order serving the same purpose as pensions rules, membership to the Public Service Pensions Fund shall cease upon the member's separation or death (Regulations 2 (3). Membership of the Fund can accordingly terminate either on death or separation.

[49] "**Separation** 'in turn is defined in Regulations 2 to mean when a member ceases to be employed in a pensionable office. Retirement it was argued,

constitutes an act which give rise to separation since a member is no longer employed in the Public Service on a permanent basis from the date of retirement. In other words a pensionable office is no longer held.

[50] The deceased joined the Fund on the 1st September 1961 and retired on the 22nd February 2000. Upon his retirement, it is argued was no longer a member of the Fund and he was formally separated from the Fund from this date in terms of Regulations 2 (3).

[51] The definition of member in section 2 of the RFA excludes from the ambit of the terms 'member' any person who has been terminated in terms of the provisisions of rules. The deceased was no longer a member of the Fund with effect from the 22nd September 2000 in terms of the Regulations accompanying the order.

[52] From the aforesaid it was argued for the Fund that as section 33 (2) of the RFA only applied to members, the Fund was not obliged to consider the sub-section for purposes of deciding how his pension benefit has to be distributed. The deceased was not a member and section 33 (2) applies only where the deceased person is still a member at the date of death.

[53] The reliance by the Ombudsman on that the sub section applies nonetheless having regard to the definition of a member which includes **'a person entitled to or receiving a benefit under the rules of the Fund".** The Applicant argued that the part of the definition the Ombudsman relies upon is located after the words **'and has not yet been terminated in terms of the provisions of the rules which disqualifies a person from the definition of "members"** if that person had his membership terminated in which event, he is not longer deemed to be a member.

[54] It was argued further by the Applicant that the definition of member in the Regulations does not include part members as the term 'member' is

specifically defined as "an individual who meets the membership requirements outlined in regulation 2 who is contributing to the Fund according to regulation 2" (see Regulations 1). The use of the word 'is' suggest that if retired persons were intended to be treated as members, the section would have catered for individuals who 'had' contributed to the Fund in accordance with regulation 3 because retired persons no longer actively make contributions once retired.

[55] In contract with the definition in section 1 of the South African Pension Funds Act 24 of 1956 it was argued that it specifically provides that those said to be former members are considered members until they have received all the benefits due to them from the Fund. It was argued for the Applicant that neither the Order and the Regulations nor the Retirement Funds Act go so far and instead treat those who have retired no longer as members irrespective of whether they receive all the benefits due to them from the Fund. The deceased was no longer a member.

[56] The Ombudsman's arguments *per contra* was simple that her determination was correctly arrived at since she was entitled to rely on section 33 (2) of the RFA. The Applicant argued that is incorrect because the Regulations are Supreme and binding on its officials shareholders and beneficiaries as well as those claiming from the Fund (*see* Tek Corporation Provident Fund (*supra*)

[57] It was argued further that the Ombudsman could not rely on section 13 (2) of the RFA which holds that no rules shall be of any force and effect unless approved and endorsed by the Registrar after consultation with the Minister. First, it was argued, that in this case we are not dealing with pensions funds in the private sector but with a Fund created by legislation and its rules promulgated in terms of the Order as part of an Act of Parliament. It carries the force of law. It could never have been the intention, and it would be

unconstitutional for a Registrar to overrule Legislation and Regulations promulgated by the legislature of the Kingdom. The Supreme legislative authority vests in the King-in-Parliament who may make laws for peace, order and good Government of Eswatini (as expressed in section 106 of the constitution and not the Registrar.

[58] The Ombudsman had also submitted that the RFA should prevail in the event of a conflict between it and the Order read with the Regulations. The Applicant *per contra* submitted that this is incorrect, the Ombudsman arrived at this conclusion based on section 74 of the RFA which provides that any Fund established under the order must comply with the provision of the RFA.

[59] The Applicant argued correctly in my view that this is inconsistent with section 11 of the Order which provides that any law in force after the commencement of the order shall be deemed to have been amended.

[60] The Applicant's argument was that, first the provisions of section 74 were deemed to have been amended the moment the RFA came into operation by virtues of the fact that Sections 11 of the Order was enacted first in time. The Order it was argued trumps the RFA.

[61] A further proposition made by the Applicant was that section 22 of the Interpretation Act of 1970 holds that where a law amends or adds to a law, the amending law shall, so far as it consistent with the tenor thereof, and unless contrary intention appears, be construed as one with the amending law, supports this construction. Section 74 of the RFA must therefore be construed in a manner consistent with section 11 of the Order and that can only be done if section 11 is deemed to have amended section 74. If section 74 is allowed to trump the Order and Regulations, then one would not be construing the two "as one" which section 22 of the interpretation demands so the arguments goes. The Order and the Regulations must therefore prevail over the RFA.

Rules of the Fund

[62] The court observes that there has been a number of complaints that have come before the Ombudsman where she had unequivocally held that the rules of a Fund are supreme and binding on its officials, members, shareholders and beneficiaries and anyone claiming from the Fund (*see* Vusi Simelane and Public Service Pension Fund Case No. RFA/H/10/2023. She went on to add that the rules amount to the Fund's constitution at paragraph 6.9 of that decision. *See* also Zodwa Mashwama and Public Service Pension Fund Case No. RF/SA/24 2019 at paragraph 12 where she stated that the Fund's Board supervises the operations and Management of the Fund. In doing so the Management board is guided by the rules of the Fund or the Order as the case may be, In terms of Section 13 (3) the rules of the Fund shall be binding on the fund and its members, employer and officers and any person who has a claim on the fund.."

Dependency factor

[63] In considering the dependency factor, the Ombudsman has observed in the past matters similar to this one where the issue pertains to the validity of the spouses marriages that; *"In reading the Fund's Regulations as well as the RFA, it is apparent that dependency does not entitle a dependant to annuity. The legislation specifically provides for the payment of an annuity to the surviving spouse or child under Regulation 17 and 18 respectively". See* Nondumiso Sibanyoni and Public Service Pensions Fund case RF/M/9/2018 paragraph 44 at paragraph 4.4 she stated that a spouse as defined by the Black

Law (Garner,2009) is *"One's husband or wife by lawfully marriage; a married person'. This she said basically supports the idea that a lawful marriage must exist for one to qualify as a spouse."*

Spousal Recognition

[64] The Ombudsman's precedents on matters where the contention lied in respect of spousal entitlement of the deceased benefits holds the view that Regulation 17 (1) (4) of the Pensions Fund Order applies. She pronounced in Lindiwe T.Maseko and Public Service Pension Fund Case No.RF/M/20/2018 paragraph 5.24 and 5.25 that, *"where the Fund receives proof of marriage between deceased and spouse/s, such person or persons are eligible/entitled to the amount... In the present case (she has said) complainant's marriage to the deceased is not challenged. She is the deceased first wife. As matter stands, it would mean that the spouse's pension will be paid in terms of subsection 17 (4)*".

[65] In Zodwa L.Mashwama and Public Pension Services Pension Fund case No.RF/SA/24/2019 Paragraph 36 in determining who the legal spouse to the deceased was, she noted as she did in *casu* that, that the determination falls outside the Ombudsman's jurisdiction, but it was for the courts. In the absence of the court's decision she proceeded without hesitation and stated that the Fund has to rely on evidence available at the time in the exercise of its discretion in accordance with the law.

Conclusion

[66] It seems to me to be unreasonable and arbitrarily for the Ombudsman to have held (in the impugned decision) that factual dependency, arising from the

fact that that the 2nd Respondent lived with the deceased for 37 years should override the evidence of Amy's marriage with deceased prior to marrying the 2nd Respondent in this matter. The Ombudsman did not question the evidence provided by Amy's children and the affidavits filed in support of the marriage when making her decision as she did in her answering affidavit *post facto.* The cases she had decided in the past in this subject matter as demonstrated above suggest that she had considered first, spousal marriages before the defendency factor. She concluded that in reading the Fund's Regulations as well as the RFA, it is apparent that dependency does not automatically entitle a dependant to annuity. The legislation she said, specifically provides for the payment for annuity to the surviving spouse or child under regulation 17 and 18 respectively. *See* Nondumiso Sibanyoni (paragraph 4.5 *supra*).

[67] The court concludes further that the Ombudsman committed a *bona fide* mistake of law by applying section 33 (2) of the RFA Act instead of Regulation 17 (1) and (4) of the Pension Funds Regulations. The error so committed amounts to gross irregularity that prevented the Ombudsman to exercise her discretion fully, fairly and reasonable in the determination of the complaint before her. The Ombudsman's failure to follow the Regulations in *casu* resulted in the application of her mind to irrelevant issues instead the relevant ones.

[68] The Ombudsman also failed to take into account the principle that in considering what is fair and reasonable, she will take into consideration the relevant law and regulations, regulator's rules, guidance and standards, relevant codes of practice and where appropriate, what she considers to have been good industry practice. She did not go beyond what she said she considered fair and reasonable.

[69] In light of the findings above the ombudsman failed to exercise her discretion fairly and reasonable and did not take into account the law, regulations, industry practice and her own precedents. The decision that the Applicant acted outside its discretion accorded by law in excluding the 2nd Respondent as beneficiary on the basis of her 'marriage' with the deceased is itself arbitral and unreasonable.

[70] The review is therefore allowed and her decision is quashed. For the sake of getting finality to litigation, and to the fact that sufficient facts exist before this court to determine this matter on review, the court makes the orders below:-

[71] **Orders of the court;**

1. The Ombudsman's decision and order issued on the 28th March 2022 is reviewed and set aside.
2. The Ombudsman's decision and order is substituted with an order dismissing the complaint filed by the 2nd Respondent in November 2021 with the Ombudsman.
3. The Applicant's initial decision refusing to grant the 2nd Respondent is upheld.
4. Costs of the application is granted infavour of the Applicant including certified costs of counsel.

S.M. MASUKU

JUDGE - OF THE HIGH COURT

For the Applicant: C.Bester instructed by K.Motsa of Robinson Betram.

For the 1st Respondent; Z.Shabangu of Magagula & Hlophe Attorneys.