

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CIVIL CASE NO. 700/2024

In the matter between:

BHEKI CYPRIAN TSHABALALA

Applicant

And

ESWATINI BUILDING SOCIETY

Respondent

Neutral citation:

*Bheki Cyprian Tshabalala v Eswatini Building Society
(700/2024) [2024] SZHC 226 (27 September 2024)*

CORAM:

N.M. MASEKO J

FOR THE APPLICANT:

BHEKI CYPRIAN TSHABALALA IN PERSON

FOR THE RESPONDENT:

ATTORNEY MS J. DLAMINI

DATE OF HEARING:

07 JUNE 2024

DATE OF DELIVERY:

27 SEPTEMBER 2024

PREAMBLE: Civil Law – Civil Procedure – Applicant seeking an order against the Respondent whereas the aforesaid Respondent is not in possession of the deceased's monies, instead the aforesaid monies are in the possession of the Swaziland Building Society Employee Pension Fund – Mis-joinder and direct and substantial interest discussed.

JUDGMENT

MASEKO J

- [1] On the 25th March 2024 the Applicant instituted motion proceedings for an order in the following terms: -
- (1) Respondent be ordered to transfer all pension fund money belonging to the beneficiary and all monies unlawfully deducted from same, to the latter's personal account.
 - (2) Each party to bear its own costs of suit.
 - (3) Further and/alternative relief.
- [2] It is common cause that the Founding Affidavit of Bheki Cyprian Tshabalala the Applicant herein together with annexures is used in support hereof.

Applicant's Case

- [3] Applicant states that he is an adult Liswati male of Big Bend in the Lubombo Region. He states that he is the surviving parent of a minor child Nsika Msimisi Tshabalala who is a Beneficiary in the pension fund of her late mother Futhi Thando Nomusa Mdluli who passed away as a result of a motor vehicle accident

on the 16th February 2018. The Applicant states that at the time of her demise she was working for the Respondent.

- [4] The Applicant states that during her lifetime monies would be deducted from her salary and transferred into a pension fund for her retirement and for benefit of her beneficiaries In the event of her death. The Applicant states that when Futhi passed on she had nominated her minor child Nsika Msimisi Tshabalala as one of her beneficiaries.
- [5] The Applicant states further that after the passing on of Futhi he became the sole custodian of the minor child. He states further that after the passing on of Futhi there was a distribution process which resulted to her money being transferred to Likhwane Beneficiary Fund. Applicant states further that at first things were a success at Likhwane, however, as time progressed he no longer receives monies towards the maintenance of the child. He states that he has exhausted all

possible avenues without any success, and therefore he has decided to approach this Court for intervention.

Respondent's Case

[6] The Applicant's application is opposed by the Respondent, and an Answering Affidavit has been filed by the Managing Director Ms Mbali P. Sibanyoni.

[7] In its opposition to the Applicant's prayers, the Respondent states the following: -

- (i) that the deceased Futhi Mdluli was their employee during her lifetime;
- (ii) that in terms of their employment regulations it is compulsory that monies were deducted from her salary and deposited into the Swaziland Building Society Employee Pension Fund herein referred to as the Fund, and that her membership identity number is 7909041100053;

- (iii) that the Respondent as the Principal Employer was obliged to make monthly deductions from the deceased's monthly salary and remit same to the Fund;
- (iv) that the aforesaid Fund is an entity which is capable of suing and being sued in its own name separate from the Respondent, as per Clause 1.3 of its rules;
- (v) that the rules of the Fund also provide that if a member dies whilst in the service of the Respondent, it is the Fund that pays the benefits to any beneficiary in accordance with Clause 5.1.1 of the rules of the aforesaid Fund.

[8] The Respondent has annexed the Consolidated Rules of the Fund as **Annexure "SBS 1"**, for ease of reference.

[9] The Respondent argues further that the Applicant has mis-joined the Respondent instead of joining or suing the Swaziland

Building Society Pension Fund because the two are not one entity but rather two separate entities.

[10] The Respondent argues that the Applicant only has recourse against the Fund which is the administrator of the retirement or pension benefits of the deceased. The Respondent states that its duty was only to make monthly deductions from the salary of the deceased and remit those deducted amounts into the Fund, therefore it is the Fund which should be sued by the Applicant and not the Respondent as employer of the deceased during her lifetime.

Analysis of the Evidence Presented by The Parties as well as The Authorities.

[11] It is trite law that the Swaziland Building Society Employee Pension Fund (The Fund) is a separate legal entity from the Respondent the Swaziland Building Society.

[12] In his Book of Authorities pages 15-74 the Applicant has filed The Retirement Funds Act of 2005 (the Act) and this is

legislation which allows employers to register retirement funds for the benefit of their employees and their dependants.

[13] Section 5 (7) of the Act provides as follows: -

“Every retirement fund shall become a juristic person on the receipt by its Principal Officer of written confirmation of its registration by the Registrar, and shall therefore be capable of suing and being sued in its own name and doing all the lawful things in order to exercise the powers vested in it to carry out the functions ascribed to it in terms of its rules, and to carry out its duties in terms of this Act.”

[14] This section 5 (7) clearly demonstrates that the Fund in this case is the one that has to be sued by the Applicant in its own name because it has full legal capacity to sue and be sued in its own name.

[15] The Respondent filed **Annexure “SBS 1”** which are the rules of the Fund, and which clearly demonstrates as well that the Fund enjoys separate legal persona status as a juristic person capable of suing and being sued in its own name. Here are some of the important clauses: -

Clause 1.1 Name

"The name of the Fund shall be known as Swaziland Building Society Employees' Pension Fund.

The Employer is establishing a self-standing Fund and these are the Consolidated Rules of the Fund which are effective from 1st January 1997."

Clause 1.2 Object

"The object of the Fund is, in terms of these Rules, to provide retirement and other benefits for employees and former employees of the Employers, and benefits in the event of their death.

The Consolidated Rules is aimed at consolidating the Fund Rules with all the amendments to the Rules."

Clause 1.3 Legal Status

"The Fund shall be capable in law of suing and of being sued and of acquiring, holding and alienating property, movable and immovable."

Clause 1.4 Registered Office

"The registered office of the Fund is 2nd Floor, Sales House Building Swazi Plaza at Mbabane Swaziland P.O. Box 3159 Mbabane Swaziland H100."

Clause 5.1.1 Death Benefits. Benefit upon death in service on or before reaching age 60 years.

"If a member dies while in service on or before reaching age 60 years, the following lump sum benefit shall be payable from the fund: -

- (a) a multiple of his annual salary, as determined by GLA contract with insurer as at the date of his death;
plus
- (b) his Fund Credit."

[16] It is my considered view that the Respondent's case has merit that the Applicant is guilty of mis-joinder in these proceedings. Instead of suing the Swaziland Building Society Employee Pension Fund which is in law the administrator of the deceased Futhi Mdluli's pension and retirement benefits the Applicant has decided sue the Respondent despite being aware that the funds were invested with Likhwane Beneficiary Fund, and further that the said Likhwane Beneficiary Fund had previously disbursed some monies to the Applicant on behalf of the minor child.

[17] Even Clause 5.1.1 is very clear that if a member dies before reaching age sixty (60) his/her retirement package is payable from the Fund and not from the Respondent. The Respondent performed its functions of making the monthly deductions from the deceased's salary and remitted same into the Fund, and therefore it is the Fund now which has to be sued and not the Employer (i.e. Respondent). The Applicant is therefore suing

the wrong entity and in the process unfortunately attracting legal costs.

[18] The correspondence between the Applicant and Respondent found at pages 1-6 clearly demonstrate that the Applicant is very much aware that the funds were under the administration of Likhwane which is currently facing some cash-flow difficulties which are not caused by the Swaziland Building Society. The Applicant has made the wrong choice of suing the Swaziland Building Society yet he is very much aware that Likhwane has the deceased's funds. The correspondence clearly explains how Likhwane came to be involved in the administration of the deceased's pension benefits and this is clearly and fully appreciated by Applicant who, however, has chosen to drag the Respondent to Court.

[19] The case of **Tek Corporation Provident Fund and Others v Lorentz 1999 (4) A11 SA 297 (A)** referred to by Ms J. Dlamini for the Respondent clearly demonstrate the role played by the

Fund in the administration of a pension and/or retirement benefits on behalf of the beneficiary. At **paragraph 15 pg. 305** this is what Marias J stated: -

“A number of propositions are either axiomatic or not in dispute. The pension fund, the powers and duties of its trustees, and the rights and obligations of its members and the employer are governed by the rules of the fund, relevant legislation and the common law. The fund is a legal persona and owns its assets in the fullest sense of the word “owns”. The object of the fund is to provide retirement and other benefits for employees and former employees of the employers in the event of their death. The trustees of the fund owe a fiduciary duty to the fund and to its members and other beneficiaries--- The employer is not similarly burdened but owes at least a duty of good faith to the fund and its members and beneficiaries...”

[20] In these proceedings the Respondent discharged its duty of deducting the contributions from the monthly salary of the deceased and remitted same to the Fund. This is a demonstration of good faith even more so the Respondent engaged the guardians of the beneficiaries when Likhwane started having cash-flow problems, again this is acting in good faith. It must be borne in mind that there are no allegations levelled against the Respondent that it squandered and/or misappropriated the deceased's death gratuity, that is not the case here, but the Applicant has clearly stated in his letter of demand found at pgs. 4-5 of his Book of Authorities that he is

only suing the Respondent because he is not satisfied with the treatment he is receiving from the service provider meaning Likhwane Beneficiary Fund. Unfortunately this has resulted to the mis-joinder of the Respondent and which the Respondent has pleaded.

[21] Mis-joinder is defined as having joined a party in litigation which is not supposed to be joined or cited because no competent order can be or would be obtained from joining that party. For example in this case the Applicant has joined Swaziland Building Society when no order can be obtained against the Swaziland Building Society because the funds in issue in this case are with the Swaziland Building Society Employee Pension Fund which in turn invested the funds with Likhwane Beneficiary Fund, after being instructed to invest such funds by the Financial Services Regulatory Authority FSRA in the year 2013.

[22] In these proceedings the Applicant has mis-joined the Swaziland Building Society because the aforesaid Swaziland Building Society is an unnecessary party and thus improperly cited in these proceedings because the funds in issue are not in the possession of the Swaziland Building Society but are in the possession of the Swaziland Building Society Employee Pension Fund.

[23] **Herbstein and Van Winsen** in their book *THE CIVIL PRACTICE OF THE HIGH COURTS OF SOUTH AFRICA VOL 1 Juta 2012 Ed* state as follows at pg. 240 when dealing with mis-joinder: -

“The principles stated above are of equal application in the case of misjoinder if the objection is that the party concerned has been joined as a necessary party when he is not a necessary party. The test to determine whether there is a misjoinder is whether or not the party has a direct and substantial interest in the subject-matter of the litigation which might be affected prejudicially by the judgment of the Court. The only distinction between the two is that in the case on non-joinder a necessary party is omitted, whereas in the case of misjoinder an unnecessary party is improperly added.”

[24] It is trite law that the prime factor in matters of joinder, non-joinder and mis-joinder is whether a party has a direct and substantial interest in the subject matter before Court. In this

case before Court the Swaziland Building Society has no direct and substantial interest because it does not have the monies in issue but such monies are in the possession of the Swaziland Building Society Pension Fund which had invested them in Likhwane Beneficiary Fund in 2013 pursuant to a directive from the regulator FSRA.

[25] In the case of **Songo v Minister of Police & Others (63867/17) [2020] ZAGPPHC 673 (17 November 2020)** Sardiwalla J stated as follows at para 27: -

“Harms (CIVIL PROCEDURE IN THE COURTS, FEBRUARY 2019 VERSION) dealt with the law in detail and with reference to case law: -

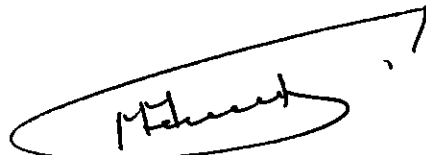
(a) If a party has a direct and substantial interest in any order the Court might make in proceedings, or if such order cannot be sustained or carried out into effect without prejudicing that party, he is a necessary party and should be joined in the proceedings unless the Court is satisfied that he has waived his rights to be joined.”

[26] In this case the Swaziland Building Society does not have a direct and substantial interest and any order issued by this Court directing it to pay the Applicant would be incompetent of enforcement because the monies in issue are vested with the Swaziland Building Society Employee Pension Fund and

Likhwane Beneficiary Fund, and not in the possession of the Swaziland Building Society.

[27] In the circumstances, I hereby hand down the following order:-

1. The application filed by the Applicant Bheki Cyprian Tshabalala is hereby dismissed.
2. The said Applicant Bheki Cyprian Tshabalala is hereby ordered to pay costs of suit.

A handwritten signature in black ink, appearing to read 'N.M. Maseko', is enclosed within a hand-drawn oval. The signature is written in a cursive style.

N.M. MASEKO
JUDGE