

**IN THE SUPREME COURT OF  
SWAZILAND**

**CASE NO.52/08**

**HELD IN MBABANE**

**In the matter between:**

**NTOMBIKAYISE MABUZA**

**APPLICANT**

**AND**

**MUNICIPAL COUNCIL OF MBABANE**

**1<sup>st</sup>**

**RESPONDENT**

**CITY COUNCIL OF MBABANE STAFF**

**PENSION FUND & GROUP LIFE SCHEME**

**2<sup>nd</sup> RESPONDENT**

**FOR APPLICANT**

**MR. SIMELANE**

**FOR 2<sup>nd</sup> RESPONDENT**

**MR. MOTSA**

**CORA  
M**

**BANDA CJ  
EBRAHIM  
JA MAGID  
AJA**

## JUDGMENT

### MAGID AJA:

[1] On 27<sup>th</sup> January 1990, the appellant was married to Cornelius December Dlarnini ("the deceased") in accordance with Swazi law and custom. In his lifetime, the deceased was employed by the Municipality of Mbabane (the first respondent) and, in that capacity, was a member of the City Council of Mbabane Staff Pension Fund & Group Life Scheme (the second respondent).

[2] The appellant was dissatisfied with the second respondent's distribution of the amounts due to the "dependants" of the deceased and launched an application in the Court *a quo* for the following relief:

- "1. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents be ordered to release the Minutes of the Trustees of the Pension Fund dealing with the death benefits of the late Cornelius December Mabuza.*
- 2. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents be ordered to release the Dependants Nomination Card dealing with the death benefits of the late Cornelius December Mabuza.*

3. *That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents transfer the death benefits of the late Cornelius December Mabuza to the Masters office.*

4. *Costs.*

5. *Further and/or alternative relief."*

[3] The application was opposed by the second respondent. I mention in passing that I do not understand why the first respondent was joined in the case as it is quite clear that it had no independent interest (let alone a "direct and substantial interest") in the outcome of the matter.

[4] When the application came before the Court *a quo*, the applicant abandoned the relief sought in prayers 1 and 2 (quoted above) because the relevant information had been disclosed in the opposing affidavit filed on behalf of the second respondent. The applicant persisted, however, in claiming the relief sought in prayer 3.

[5] Mr. Simelane, for the appellant (then the applicant), there argued that because the second respondent had not yet been registered in terms of Section 3(1) of the Retirement Funds Act No.5 of 2005 ("the Act") it was not entitled to deal with the proceeds of the retirement and death

benefits due to the beneficiaries of the deceased which should, it was submitted, be dealt with in terms of Administration of Estates Act of 1902 ("the Estates Act"). The submission had no merit because it was common cause, or not seriously disputed that:

5.1 the second respondent had been in existence since 1965: and

5.2 had duly applied for registration in terms of Section

3(2) of the Act.

[6] Although there appears to be no provision in the Act which preserves the rights of a retirement fund such as the second respondent while it awaits its registration under the Act, it is inconceivable that the legislature could have contemplated that such a fund should have no powers and in effect be in limbo while awaiting the decision of the Registrar. Indeed such a fund is in terms of Section 3(2) of the Act given a period of 120 days after the commencement of the Act to make such application without any suggestion that it should cease to carry out its functions during that period when, *ex hypothesi*, it is not registered.

[7] It follows that, pending such registration, the second respondent was not debarred from carrying on its

functions and duties in terms of its Rules. Moreover, Section 33(1) of the Act provides:

*"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."*

[8] The provisions of the Estates Act were therefore expressly excluded in the case of "benefits payable.... in respect of a deceased member". The learned Judge *a quo* accordingly had little difficulty in ordering that the appellant's application be dismissed with costs.

[9] Before us Mr. Simelane withdrew the appeal and in a kind of plea *ad misericordiam* submitted that the appellant should not be mulcted in costs because, so he stated, she had brought the application *bona fide* in the belief that the second respondent had been wrong in treating some of the persons to whom awards had been made as dependants of the deceased. He explained that if indeed the second respondent's discretion had been wrongly exercised, the appellant and her children ought to have been awarded more than they had actually received. He therefore

submitted that there should be no order as to costs. Even if the appellant was *bona fide*, the concession that the appeal is unsound was made at an excessively late stage.

[9] Mr. Motsa, for the second respondent, submitted that costs should follow the event, and argued that if Mr. Simelane's suggestion were accepted it would mean that future potential beneficiaries of the second respondent would have to bear the appellant's costs. I agree with Mr. Motsa's submission that such a result would represent an improper exercise of this court's discretion, and consider that there is no valid reason to depart from the usual order as to costs.

[10] The Order made is therefore:

1. It is recorded that the appeal is withdrawn.
2. The appellant is to pay the second respondent's costs.

P.A.M MAGID

ACTING JUDGE OF APPEAL

R.A. BANDA

CHIEF JUSTICE

JUDGE OF APPEAL

Judgement delivered in open court on the 19 day of May 2009.