THE HIGH COURT OF SWAZILAND

HLALELENI REJOICE NKAMBULE (NEE HLATSHWAYO)

Applicant

And

MAVIS VILANE

1st Respondent

THOKO BO AMAH

2nd Respondent

JOSOAS MASEKO

3rd Respondent

ANDILE FAKUDZE

4th Respondent

SWAZI BANK PENSION FUND

5th Respondent

SWAZILAND DEVELOPMENT & SAVINGS BANK

6th Respondent

AON SWAZILAND (PTY) LTD

7th Respondent

Civil Case No. 3054/2005

Coram: S.B. MAPHALALA - J

For the Applicant: MR. MDLULI

For the Respondents: MR. M. SIBANDZE

RULING

(On points of law in limine) (31st August 2005)

The relief sought.

[1] Serving before court is an application brought under a certificate of urgency for an order, inter alia, that a rule nisi, operating with interim and immediate effect do issue, interdicting and restraining the Respondents from distributing and/or making payments, from Swazi Bank Pension Benefits to any person other than the Applicant who is the surviving spouse, beneficiary and/or dependant and executrix of the Estate of Late Thomas S. Nkambule pending the finalization of this matter. In prayer 3 thereof directing the Respondents to forthwith remit the aforesaid Pension Benefit to the office of the Master of the High Court to be dealt with in terms of the Administration of Estates Act No. 28 of 1903 on the basis that no dependants were nominated by the deceased

and as such the proviso to Rule 8.1 of the Swazi Bank Pension Rules applies. Further, other forms of relief as sought under prayers 4, 5 and 6 ancillary to prayer 3 cited above. Under the alternative prayer the court is asked to declare the Swazi Bank Pension Fund Rules to be null and void in so far as they contravene the provisions of the Administration of Estates Act No. 28 of 1902.

[2] The Founding affidavit of the Applicant is filed in support thereto. A confirmatory affidavit of one Dianah Lomhlolo Hlatshwayo is also filed. A number of pertinent annexures are filed including the Letters of Administration appointing Applicant as executrix dative (filed as annexure "HI"); annexure "H2" being a Marriage Certificate evidencing the civil marriage between the Applicant and the deceased Thomas S. Nkambule; Death Certificate filed as annexure "H4"; annexures "H5 to H7" being Birth Certificates in respect of their children; annexure "H8" being an order of this court interdicting certain people from interfering with the burial of the deceased; from annexure "H9 to HI6" are various letters of correspondence from the Applicant to the management of the Swazi Bank pertaining to the issue of the pension

Points of law in limine

[3] In view of the short service given to the Respondents in this matter, they have not filed any opposing affidavits. However, Mr. Sibandze who appeared for the 5th, 6th and 7th Respondents has raised certain points of law in limine from the bar. I heard long arguments on Friday the 19th August 2005, and then reserved my ruling to Wednesday 24th August 2005. However, on this date I was not ready with the ruling and postponed the matter in absentia to Friday 26th August 2005. Following is the ruling as aforementioned.

[4] The points of law in limine can be summarised as follows: i) the notice of motion is defective in so far as a

proper form has not been used; ii) Applicant has not complied with Rule 6 (25) (a) and (b) as to urgency; iii) the requirements of an interlocutory interdict have not been fulfilled and iv) a necessary party has not been cited. I shall address these points ad seriatim hereunder as follows:

i) Whether or not the notice of motion is defective.

[5] In this regard Mr. Sibandze contended that instead of bringing this application in conformity with Form 3, the applicant herein brought the same in accordance with Form 2, which is expressly designed for ex parte application. Indeed, it appears that the Applicant has not used the correct form and this much is conceded by Mr. Mdluli for the Applicant who however, argued that this defect is cured by what is averred in prayer 1 thereof "that the Honourable Court dispenses with the time limits, forms and provisions as required in terms of the Rules of this Honourable court that this matter be heard as one of urgency"

[6] Mr. Sibandze in support of this point cited the local decision in the case of Ben M. Zwane vs The Deputy Prime Minister and another, Civil Case No. 624/2000 (unreported) (per Masuku J).

[7] After hearing all the arguments in this regard I will, in exercise of my discretion condone the non-compliance in this application regard to be had to prayer 1 for condonation, as follows: "forms and provisions as required in terms of the rules" has been made unlike in the Ben Zwane case (supra) where the learned Judge said "the proper form was not used and condonation for not using it was not prayed for regard being had to prayer 1" (at page 7 of the judgment). In coming to this conclusion I also took refuge in what is said by the author Erasmus, Superior Court Practice, Juta at Bl - 43 that "the provisions of the sub-rule are peremptory but in appropriate circumstances the use of a wrong form may be condoned. The use of form 2 in circumstances where form 2 (a) is appropriate will not necessarily result in the Notice of Motion being a nullity which cannot be condoned {vide Mynhardt vs Mynhardt 1986 (1) S.A. 456).

[8] For the afore-going reasons I have come to the conclusion that this point of law in limine cannot be sustained.

ii) Whether the provisions of Rule 6 (25) (a) and (b) as to urgency have been satisfied.

[9] It was contended for and on behalf of the Respondents that the Applicant sat on her rights as the cause of action in this matter arose as far back the as the 24th February 2005. To this end the court was referred to a number of letters of correspondence evidencing this aspect of the matter. The court was referred to annexure "H9" being a letter from Applicant's attorneys to the Senior Human Resources Manager dated 28th February 2005, requesting a meeting over the matter of the deceased death benefits. In annexure "H10" being a letter from the Swazi Bank dated 5th April 2005 replied stating, inter alia, that according to the Swazi Bank Pension Fund Rules any benefit payable by the fund to a deceased member does not form part of his/her estate but payment should be made into the estate where there is no dependant entitled to benefit. Then on the 11th August 2005, the attorneys for the Applicant again wrote to the Senior Human Resources Manager on 11 August 2005 putting on record certain anomalities in the manner the Board of trustees were handling the issue of the deceased pension. In that letter Applicant intimated that in view of this anomalities she had no option but to seek legal redress.

[10] In annexure "H13" being an undated letter from the Swazi Bank (Principal Officer) the Applicant is informed that the distribution of the death benefit to the beneficiaries has been finalized. The distribution due to each dependant will be communicated directly to them. If there are minor dependants, the communication regarding their shares will be via their natural guardians, mothers where applicable, trust funds will also be set up for the benefit of the minor children.

[11] In annexure "H14" dated 16th August 2005 the Applicant's attorney addressed an "urgent" letter to the Managing Director of the Swazi Bank in a last bid effort for his intervention on the perceived anomalies allegedly committed by the Board of Trustees.

[12] In annexure "HI5" dated 2nd August 2004 from the Swazi Bank to the Applicant the actual distribution is outlined in details. This letter was received by Applicant's attorneys on the 18th August 2005. This is the last straw that broke the camel's back, so to speak, and propelled the Applicant to launch this application on the same day the 18th August 2005.

[13] The question therefore which arises from the above outline of what has transpired between the parties is whether or not the actions by the Applicant of bringing an urgent application on 18th August 2005 was an "illogical knee-jerk reaction" mentioned by Fleming DJP in the case of Gallagher vs Norman's Transport Lines (Pty) 1992 (2) S.A. 500 at 502 E to 503A. Mr. Sibandze contends that it was whilst Mr. Mdluli for the Applicant contends otherwise. The latter has argued that in looking at these events it should be borne in mind that the Applicant was only appointed executrix of the estate on the 29th June 2005, and therefore could not have pursued this matter as she now does prior to this date. The gravamen of the argument is that she could not have made such an application regard to the fact that she could have lacked loci standi in the absence of Letters of Administration. However, it appears to me that this argument cannot be sustained regard being had to the provisions of the Administration of Estate Act as stipulated in Section 19 thereof.

[14] The said Section provides that when one of two spouses who have been married in community of property dies; the joint estate shall remain under the charge of the survivor, until the executor of the deceased, or the tutor

testamentary or dative of the minor children of the marriage, or the Master or curator bonis, lawfully appointed to such minor children, takes proceedings for the administration, distribution and final settlement of the said joint estate. It is clear therefore on the facts that the Applicant's cause of action arose as far back as February 2005, but she has come to court on an extremely urgent basis giving the other side no time to file and settle its opposing affidavits. It appears to me that this was a classical "illogical knee-jerk reaction" on the part of the Applicant on the facts of this case.

[15] In Gallagher vs Norman's (supra) the learned Judge stated the following which is apposite on the facts of the present case, and I quote:

"Even if I attach no weight to the irregularity that Form 2 9a) was ignored, there are aggravating features which I do bear in mind. The dismissal took place on 13 December and the Applicant for inadequate reasons only proceeded with the application on 10 January. That call to mind Schweizer Reneke Vleis (Mkpy) (Edms) Bkp v Die Minister van Landbou en Andere 1971 (1) PHF 11(T). Some facts which do not involve Applicant personally should weigh against him. In particular, that attention to Applicant's predicament was suspended when the offices of his attorneys closed on 20 December. It is not testified that it was impractical for the relevant member of the firm to continue work on the matter. When the stage arose where it suited the (understandable) preferences of the attorney to take a break, the urgency also took a break. As the attorney's vacation ended, urgency resumed. It resumed with such vehemence that it was apparently of limited concern that the attorneys on the other side and Counsel (and the Judge) would have to move in highest gear to adjust to what the Applicant required in terms of being heard. For four weeks the urgency adjusted to the decisions of Applicant and his attorney. Then the opposite party had to adjust to the decisions in an unreasonably short time".

[16] For the above mentioned reasons the Applicant has failed to satisfy the peremptory requirements of Rule 6 (25) (a) and (b) as enunciated in a long line of cases in this court including the case Humphrey H. Henwood vs Maloma Colliery and another - Civil Case No. 1623/93. Therefore, the point of law in limine in this regard ought to be upheld.

[17] The above therefore disposes of the whole application, and if I may make a comment although obiter

dictum, it would appear to me that the Applicant would have had great difficulties on the other points as is seems to be settled that a pension cannot be brought within the ambit of the Administration of Estate Act. It would appear to me in this regard that the legal authority cited by Mr. Sibandze that of Jourbert, The Law of South Africa (Vol. 20) at paragraph 102, though not in point, is relevant in so far as it states that pension benefits are not reducible, transferable or executable according to the South African Pensions Fund Act, save to the extent permitted by the said Act. Following from this therefore it seems that prior to the promulgation of the Act, the common law position was that pension benefits are not reducible, transferable or executable. It appears to me that Swaziland which shares the same common law heritage viz Roman Dutch Law with South Africa would follow the principles applied above i.e. that pension benefits are not reducible, transferable or executable. This may explain the exclusion of pension benefits from the operations of the Administration of Estate Act. Lastly, if I may state en passant that a time has come for the legislature to give consideration in regulating pensions in the country to dispel such confusion as in the present dispute. It would appear that her remedies would lie within the confines of the Pension Fund Rules.

[18] In the result, for the afore-going reasons the application is dismissed and costs

to follow the event.

S.B. MAPHALALA

JUDGE