



In the matter between:

THE COMPLAINANT

and

THE PENSION FUND

RESPONDENT

STATEMENT OF DETERMINATION OF COMPLAINT GIVEN IN TERMS OF SECTIONS 74 AND 75 OF THE FINANCIAL SERVICES REGULATORY AUTHORITY ACT, 2010 (the Act)

1 BACKGROUND

1.1 Statutory provision for the resolution of disputes or complaints arising within the financial services industry in a manner alternative to the conventional court system began during the era of the Retirement Funds Adjudicator (the Adjudicator), provision for which was made in terms of the now repealed Part VIII of the Retirement Funds Act, 2005.

1.2 The repeal of this legislative provision came through section 83 (4) of the Act. Together with this repeal was the ushering in of the era of the Ombudsman of Financial Services in terms of Part XII of the Act.

1.3 Of note between the two periods is that the Adjudicator's mandate was, in terms of the said repealed Part VIII of the Retirement Funds Act and the repealed Part XVI of the Insurance Act, 2005, to determine complaints arising only under these two pieces of legislation and such was the scope of the Adjudicator. On the other hand, the scope of the Ombudsman is wider and covers all non-bank financial services complaints including those arising under the Retirement Funds and Insurance Acts.

1.4 Of necessity, to prevent an instance of disservice to financial services consumers and to afford transition from the era of the Adjudicator to that of the Ombudsman all the complaints lodged and remaining pending before the Adjudicator now stand to be determined by the Ombudsman.

2 INTRODUCTION

2.1 Mr. X, (the deceased) was employed by the government of Swaziland. By virtue of such employment he was a member of the Respondent Pension Fund ("the Fund"). On his death, a death benefit became available for distribution in accordance with the Fund's governing rules.

2.2 The Complainant is challenging the Fund's decision to deny her spouse's pension. Her claim for spouse's pension is based on a customary law marriage that she alleges existed between herself and the deceased.

2.3 The Respondent acknowledges Complainant's dependency on the deceased during his lifetime and on that basis paid her 40% of the lump sum death benefit. The Fund however refused to pay her a spouse's pension citing lack of evidence that she was married to the deceased.

3 THE COMPLAINT

3.1 The complaint was lodged with the office of the Adjudicator on the 26th July 2013, by Complainant assisted by attorneys CD (Law Firm). The Complainant asserts that she got married to the deceased on the 14th September 2005 by Swazi law and custom whereupon she was smeared with red ochre, and that two head of cattle were paid. The Complainant states that she did not procure a marriage certificate.

3.2 The Complainant states that the deceased died on the 29th March 2008, whereupon his death benefits were forwarded to the Master of the High Court. It is not clear why and under what legal procedure the Respondent would forward the death benefit to the Master of the High Court, particularly in the face of provisions of the Retirement Funds Act which succinctly state that "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 ...not form part of the assets in the estate of such a member..." She further refers to her appointment as the executor of deceased's estate (presumably by the Master of the High Court).

3.3 Nonetheless, the Complainant is aggrieved that The Fund denied her spouse's pension which she says was based on deceased's paternal uncle's statement that she was not deceased's wife. She states that the Fund declined to recognize her as a wife despite all the others who supported her status, including the written support of the chief that was submitted to the Fund. She also states that the deceased's paternal uncle later retracted his objection.

3.4 On the 12 September 2013 the Complainant submitted to the Adjudicator an affidavit deposed to by one Mr. B, stating under oath that she smeared the Complainant with red ochre on the 14 September 2005.

3.5 The Complainant asks for a finding that she is deceased's wife and that she is entitled to all spousal benefits.

4 RESPONSE/ DEFENCE

4.1 The Respondent submitted a response to the Adjudicator dated 8 August 2013. The Respondent narrates that meetings were held with deceased's family, on the 10 February 2009 and 17th March 2009. Owing to inconsistencies in the evidence that was received on

these two days, another meeting was convened at deceased's parental home on the 18th June 2010. Present at the meeting were: deceased's uncle, deceased's two brothers, deceased's daughter; deceased's estranged wife, *Ms. X* and the Complainant.

4.2 The 18 June 2010 meeting elicited the following information: Complainant's relationship with the deceased dated back to 1998; the two cohabited since 2000 at deceased's then work station and have been together since then. In 2004 a certain custom was performed at the deceased's homestead. The Complainant's version was that at this occasion she was smeared with red ochre. The deceased's family elders disputed this, stating that what was carried out was "*kuphekisa*" not *kugcobisa lubovu*. According to them *kuphekisa* meant that she could cook and perform duties around the homestead, but did not make her a wife.

4.3 According to the Respondent the Complainant submitted that there were no family members in attendance at the red ochre anointing ceremony, and that the deceased subsequently informed Indvuna of the Inkhundla, about the marriage. The Respondent notes that the same Mr. B is a witness to the *teka* affidavit sworn to by the Complainant. From the 18 June meeting deliberations the Fund concluded that Complainant was not deceased's wife but a dependant.

4.4 The Respondent further states that it received letters dated 20 February 2012, one allegedly written by the Indvuna confirming that the Complainant was deceased's wife. Another letter purported to be by deceased's paternal uncle, revoking his earlier submissions disputing Complainant's status as a wife. In this letter he now confirmed that the Complainant was deceased's wife. The Respondent again convened two extra meetings wherein again stated that he was not present at the actual *kuteka* ceremony and that he was informed by the deceased's two brothers that the Complainant was deceased's wife.

4.5 'AB' did not attend the last meeting. The Complainant explained that AB's absence at the meeting was due to his ill health. An official of the Fund at the meeting made a call in an attempt to get 'AB' side of the story, but could only talk to his wife. 'ABs' wife confirmed that he was critically ill, unable to walk, talk or write since after the meeting. Information that 'AB' could neither talk nor write raised questions of authenticity of the letter that was attributed to him retracting his earlier denial of a marriage between the Complainant and the deceased. 'AB' wife explained that his children wrote the letter, using some sought of gestures to understand what he wanted to say to them.

4.6 The Respondent submits that its decision against payment of spouse's pension to Complainant was due to inconsistencies, including that in 2010 all the parties except Indvuna DDDD agreed that a marriage had not taken place; that it took the Complainant two years to get the letter from the *umphakatsi*; and the fact that the retraction letter purportedly by AB subsequently recognizing complainant's marriage is disputable given that the alleged author could not have written it at the alleged time due to his ill-health.

5 COMPLAINANT'S REPLY TO THE RESPONDENT

5.1 The Complainant replied to the response and stated that following the 8th June 2010 meeting the Fund informed her that the matter was referred to the Master of the High Court and that the Fund would be guided by the Master's pronouncement on Complainant's marital status. The Complainant denies that it took her two years to bring the chief's letter. She states that she received the letter from the Master's office on the 3rd August 2011. She states further that when she produced the letter the Fund advised her to open a bank account, and was later directed by the Fund to bring the *Indvuna*. The Complainant states that she was given a number of instructions to carry out, which she complied with, but still no award of spouse pension was made. The Fund's explanation is that the Complainant was made to open a bank account for the deposit of her portion of the death benefit which was subsequently paid to her.

6 REASONS FOR DETERMINATION

6.1 It is common cause that the Complainant received a portion of the death benefit from the The Fund based on her factual dependency on the deceased during his lifetime. It would appear that the payment was made in terms of Section 33 (2) read with Section 2 of the Retirement Funds Act of 2005 (RFA).

6.2 Section 33 (2) reads,

"If within 12 months of the death of the member the The Fund becomes aware of a dependant of the member, the benefit shall be paid to such dependant or dependants in a manner that is deemed equitable by the management board."

Interpretation of dependant per the relevant part of Section 2 reads thus,

"Dependant means in relation to a member: ... (b) a person in respect of whom the member is not legally liable for maintenance if such a person – (i) was in the opinion of the management board dependant on the member for maintenance:.."

6.3 However this is not the end of the matter, as the Complainant is not content with mere apportionment of the death benefit as a dependant. She claims payment of spouse's pension in terms of Regulation 17 (1) which provides that, *"If a member dies before his separation from the Fund and was married at the time of his death, his surviving spouse shall be entitled to a pension equal to one-half the pension referred to in regulation 8 (4)."* (Emphasis supplied). Regulation 8(4) prescribes the formula for computation of pension for a member who has reached compulsory retirement age. The spouse of a deceased member should, in terms of Regulation 17 (1) be awarded one half of the pension entitlement that would have been conferred on the deceased upon reaching retirement age. Proof of existence of a valid marriage between the Complainant and the deceased is a determinant for such entitlement by the Complainant. The issue for determination is accordingly whether or not a marriage existed between the Complainant and the deceased at the time of his death in 2008.

6.4 The onus lies on the Complainant as the claimant in this case to prove existence of such marriage. Unlike in the case of a civil marriage where parties simply produce a marriage certificate for this purpose, an unregistered Swazi customary law marriage is more onerous to prove. The latter is generally proven by furnishing credible legally admissible evidence of occurrence of smearing of the bride with red ochre by the groom's family members.

6.5 The High Court of Swaziland has made pronouncements on the essentials of a valid marriage contracted under Swazi law and custom. Court decisions are unanimous that there is one essential requirement for such a marriage, namely, the ritual of smearing the bride with red ochre which is performed by a family member of the groom. Any other ceremonies or peripheral rituals are not sufficient proof in the absence of the ochre anointing ritual. In other words it does not vitiate the validity of a marriage if any other related rituals have not been fulfilled; it suffices that the bride has been anointed with red ochre. Non consequential peripheral steps include: reporting of the marriage to the Regional Administrator's office which facilitates issuance of a certificate; payment of lobolo and others.¹ The position is succinctly enunciated by Nathan C.J. in *R v Fakudze and Another*² as follows:

"There are a number of ceremonies performed at the wedding, but the legally significant one is the anointing of the bride with red-ochre (libovu). Unless and until this has been done, she is not regarded as having been married."
[Emphasis added]

6.6 This legal position was echoed by Cohen J in *R v Timothy Mabuza*³ wherein he states that,

"...the smearing with the red-ochre was an essential part of a Swazi marriage ceremony... it is usually done outside the cattle byre but at the upper end of the cattle byre, that is immediately below the main hut... even if the smearing was not done at the proper place the person smeared in the circumstance of this case would be considered as a married woman, and this would be so even if no Lobola at all has been paid..."

6.7 The Complainant must submit proof that she was anointed with red ochre by a deceased's family member. She had submitted to the Respondent a self-attested affidavit in which she deposed that she was anointed with red ochre by one AAAA. The affidavit is signed by five witnesses including AAAA, GGGG, EEEE, SSSS, and induvuna DDDD. However, there is no indication that throughout its extensive investigation of this claim, through several meetings with several people, which entailed travels by its officials to the deceased's parental home, the Fund had occasion to hear from the key person who is said by the complainant to have administered the ochre or *libovu* smearing ritual. Neither were any of the witnesses, with the exception of DDDD, invited to the Fund's hearings. DDDD as a man does not, according to custom, partake in the

¹ See *Ndzinisa V Dlamini and 4 others* High court case No.1796/2004.

² 1970 – 1976 SLR 422 at 423 cited in *Magagula v Mabuza and 5 others* (case No. 4577/08) at paragraph 10.

³ 1979-1981 SLR 8 at 9 cited in *Magagula v Mabuza and 5 others* at paragraph 10.

ritual of smearing the bride with ochre. This highlights the problems facing ordinary people, most of whom are semi-literate and lack knowledge of how to consolidate necessary and relevant evidence, to prove their cases in the slippery customary law marriage terrain.

6.8 The Complainant, with the assistance of her attorney, subsequently filed with the Adjudicator an affidavit of AAAA who deposed to having smeared the Complainant with red ochre. This affidavit provides key evidence on the salient question whether or not a marriage existed between the Complainant and the deceased. The affidavit supports and lends weight to the self-sworn affidavit the Complainant submitted to the Fund. In the absence of counter evidence to that of the person who states that she administered the ritual, there seems to be no reasonable ground for disregarding it.

6.9 It is noted that the vexing inconsistent statements that led to Fund's rejection of the claim of marriage were made by people other than the person said by the Complainant to have anointed her with red ochre.

FINDING

The Complainant has shown through the affidavit of the person who anointed her with red ochre that she was a spouse of the deceased at the time of his death as contemplated by regulation 17 (1) of the Fund. By virtue thereof she is entitled to a pension equal to one-half the pension referred to in regulation 8 (4).

ORDER

The Fund is ordered to pay the Complainant a spouse's pension in terms of regulation 17 (1).

THUS DONE AT MBABANE ON THIS 15 DAY OF AUGUST 2016 AND CERTIFIED A TRUE AND CORRECT DETERMINATION OF THE OMBUDSMAN OF FINANCIAL SERVICES IN TERMS OF SECTION 75 (5) OF THE FINANCIAL SERVICES REGULATORY AUTHORITY ACT OF 2010.

OMBUDSMAN OF FINANCIAL SERVICES