

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, MTHATHA)**

Case No: 2213/2009

In the matter between:

ZOLISWA MGWEBI **1st Plaintiff**

LUSANDA MGWEBI **2nd Plaintiff**

And

ALFRED NZO DISTRICT MUNICIPALITY **1st Defendant**

O.R. TAMBO DISTRICT MUNICIPALITY **2nd Defendant**

JUDGMENT

BESHE J:

INTRODUCTION

[1] Plaintiffs in this matter allege that the first defendant, alternatively the second defendant is liable for the loss / damages suffered by the plaintiffs as a result of the negligence of first, alternatively second defendant's employee/s who failed to inform the Provident Fund of first plaintiff's husband's death.

PARTIES

[2] First plaintiff sues on her behalf as well of on behalf of her minor children who were born of her marriage with **Mr Osman Mkuseli Mgwebi** (the deceased) who passed away on the 20 September 1999. Second defendant is one of the children born of the abovementioned union who has since attained maturity.

[3] It is common cause that at the time of his passing deceased was an employee of Wild Coast Municipality Council. Wild Coast District Municipality or Council was

disestablished by Provincial Notice no. 83 dated 27 September 2000 that was issued by the MEC for Local Government, Province of the Eastern Cape.

[4] The defendants are cited on the basis that they assumed portion or all the responsibilities and / or obligations of its predecessor, the Wild Coast Council.

[5] Second defendant was joined and plaintiff particulars of claim were amended accordingly, as a consequence of first defendant's plea that:

"Defendant denies assuming all responsibilities and / or obligations of the Wild Coast District Municipality. Defendant further pleads that a much larger portion of the responsibilities and / or obligations of the Wild Coast District Municipality were in fact taken over by the O.R. Tambo District Municipality."

EVIDENCE

[6] First plaintiff and **Mr Xelubakuyi Amos Mbotoli** testified in support of plaintiff's case. Both defendants closed their cases without calling any witnesses or introducing any evidence.

ISSUES

[7] At the start of the proceedings / trial it was intimated to me that the only issues I was required to adjudicate upon were:

(i) Whether the deceased was employed by any of the defendants, if so, which of the defendants; and

(ii) Whether deceased's employer had a duty to report the former's death to the Provident Fund to which deceased was a member and, and if so, whether this duty was carried out.

Depending on the answers to the two questions determine where the liability for plaintiff's loss / damages lay.

PLEADINGS

[8] Regarding the issues outlined herein under, the defendants pleaded as follows:

First defendant: That plaintiffs do not have a valid claim against it. That it only came into being in December 2000 and could not have been deceased's employer since 1997 when it was not yet in existence. First defendant accordingly denied that it had an obligation to report deceased's death as alleged.

[9] Second defendant also pleaded that it only came into being during 2000 and that it did not assume a portion and all responsibilities of its predecessor. Second defendant denied that deceased was employed by it adding that he could not have been employed by two different municipalities. Second defendant denied liability for plaintiffs' claim.

PLAINTIFFS' CASE

[10] First plaintiff testified that she has been married to the deceased since 1986. They had three (3) children. Deceased passed away on the 20 September 1999. At the time of his demise he was employed by the Wild Coast District Council which was disestablished and replaced by Alfred Nzo District Municipality with offices in Mt. Ayliff where deceased was working as Director: Civil Engineering. Following the passing away of her husband on the 20 September 1999, on the 21 September 1999 she telephonically spoke to **Ms Nothemba Lebyane** also referred to as **Liphiyane** who was the Director for Human Resources at the Wild Coast District Council. She informed her of the passing of the deceased and enquired from her whether there were any monies that were due to her or that she could claim so as to foot the bill for her husband's burial. She was told there were none. Plaintiff testified that the deceased had once told her he was a member of the SAMWU also known as the South African Municipal Workers Union. She however did not know the details of what this membership entailed. On the 22 September 1999 she penned a letter to the Municipal Manager, **Mr Mpumza**. To this end plaintiff referred me to a copy of a letter addressed to **Mr Mpumza** dated 22 September 1999, the body of which recorded the following:

"Dear Mr Mpumza (The Municipal Manager)

From the Mgwebi family, wife and children it is sad to advise and report to your Council and office through you as the Municipal Manager that Mr Osman Mkuseli Mgwebi who was appointed by your Council as a Director Civil Engineering has passed away on the 20th of September 1999 in Kokstad Hospital.

According to the doctor's report the cause of death is the respiratory arrest, however the post-mortem may advise otherwise. You are also requested by the deceased's wife and family to advise if there is anything that your office can do to assist with funeral arrangement."

The letter is signed: Mrs Alicia Zoliswa Mgwebi.

She testified the **Mr Mpumza** who was in the company of some of his officials visited their home to offer their condolences before the day of the funeral.

[11] Years later she was approached by a person who claimed to be a SAMWU representative, **Mr Sanqela**, who relayed certain information to her relating to what should have been claimed and by whom following the death of the deceased who was a SAMWU member. As a consequence of this, she visited the offices of the Alfred Nzo Municipality in the company of **Mr Sanqela** where she submitted certain documents. She was then paid a sum of R8000.00 by SAMWU.

[12] It was after having been contacted by **Mr Sanqela** that she obtained further details pertaining to her late husband's membership of SAMWU. That SAMWU's National Provident Fund was under Lekana and what benefits became due at the occurrence of certain events. She embarked on an endeavour to claim what was due from the Provident Fund in question in her capacity as the deceased's surviving spouse and on behalf of their minor children.

[13] It is common cause that her claim was repudiated by the Provident Fund in question on the basis that, it was submitted out of time.

[14] The following clauses of the Fund Rules are germane to the issues at hand:

4.1.1 A MEMBER who is in SERVICE shall contribute to the FUND at the rate specified in the SCHEDULE. The contributions shall be deducted from his salary or wages at the end of each month by his EMPLOYER and paid to the FUND.

6.2.2 The EMPLOYER shall notify the FUND in writing about the death of a MEMBER within six months thereof subject to the provisions of Rule 6.2.3.

6.2.3 Should the EMPLOYER fail to discharge its obligations as imposed by Rule 6.2.2 or negligently cause a MEMBER or BENEFICIARY to forfeit any benefit to which he is entitled in terms of these rules, the EMPLOYER shall be fully liable therefor.

[15] The benefit statement from the SAMWU National Provident Fund, as at 30 June 2006 records the following:

Deceased's member number, 1 December 1997 as the date he joined the fund, his employer is listed as being Alfred Nzo (Wild Coast) Municipality.

[16] This information, coupled with plaintiff's evidence about the successor in title of the Wild Coast District Council as well as the Provincial Notice de-establishing certain municipalities and establishing others in their place as well as a document sourced from the South African Municipalities website (page 85 of plaintiff's bundle), it is clear that Alfred Nzo District Municipality is comprised of the following disestablished municipalities:

Wild Coast District Municipality, Mt Ayliff, Umzimkulu LC and TLC with its offices in Mt Ayliff, where according to the first plaintiff the Wild Coast offices have always been *albeit* in makeshift structures.

[17] The Provincial Notice that disestablished certain Municipalities including the Wild Coast District Council was issued as indicated by the MEC for Local Government who was acting in terms of *Sections 12 and 14 of the Local*

Government: Municipal Structures Act, 1998 (Act 117 of 1998). Section 14 of the said Act provides that:

“14 Regulation of effects of establishment of municipality on existing municipalities

(1) (a) A municipality established in terms of section 12 in a particular area, supersedes the existing municipality or municipalities to the extent that the existing municipality or municipalities fall within that area.

(b) The superseding municipality becomes the successor in law of the existing municipality subject to paragraph (c).

(c) Where a district municipality and one or more local municipalities within the area of the district municipality supersede the existing municipality or municipalities in that area, the district and local municipalities in that area become the successors in law of the existing municipality or municipalities depending on the specific assets, liabilities, rights and obligations allocated to the district and local municipalities respectively in terms of the relevant section 12 notice or notices.”

[18] Apparent from what has been stated above is that: the contention that because the defendants only came into being in 2000 they could not have employed the deceased in December 1997, is flawed and not supported by the evidence. This is specifically so in respect of first defendant as far as the deceased’s employment is concerned. It is clear that first defendant became the successor in title of the Wild Coast District Council and consequently assumed or inherited its assets, liabilities, rights and obligations. So the answer to the first leg of the enquiry or to the issue of who was the employer of the deceased at the time of his passing is that he was employed by the first defendant.

[19] The Provident Fund Rules clearly spells out what is expected from an employer *vis-à-vis* members and the fund. Of particular importance in this regard is *Clause 6.2.2 of the Fund Rules*. It appears to be common cause or not disputed that deceased’s employer did not notify the fund in writing of the death of the member

concerned (deceased in this case) within six months of his passing, thereby causing deceased's beneficiaries to forfeit the benefit to which they were entitled.

[20] In my view, there was a legal duty on the part of deceased's employer (first defendant) to report his death to the fund within six months of his passing and first defendant's omission in this regard resulted in the or harm or loss to his beneficiaries. First defendant is therefore liable for such loss. The plaintiff did her part by reporting deceased's death to his employer. Had they required any information or document from her in order for them to liaise with the fund, they should have told her. Her evidence that she asked both **Ms Lepeane** sometimes referred to as **Lebyane / Liphiane** as well as **Mr Mpumza** as evidenced by the copy of the letter that was exhibited in court in respect of **Mr Mpumza**, has not been assailed. I therefore do not have any difficulty finding in favour of the plaintiff.

COSTS

[21] The general rule is that costs follow the event. This entails that the successful party is entitled to a costs order. That unsuccessful party should bear the costs. This rule can however be departed from where there are good grounds to do so. There is no reason why I should depart from the rule in so far as first defendant is concerned. Namely, as far as first defendant's liability for plaintiffs' costs is concerned.

[22] I have already mentioned how second defendant ended being party to these proceedings. Namely, that it was as a result of first defendant pleading that it did not assume all the responsibilities and / or obligations of Wild Coast District Council, that a large part thereof was taken over by the second defendant. In my view, plaintiffs did what a prudent and cautious litigant would do by joining the second defendant in

light of first defendant's plea as aforementioned. The second defendant has obtained success in that he has been exonerated from liability for plaintiffs' loss. It will be appropriate in my view to exercise my discretion by ordering the unsuccessful party to shoulder the costs of both successful parties.

ORDER

[23] 1. First defendant is held liable for payment of plaintiffs' agreed or proven loss or damages suffered by the plaintiffs as a result of first defendant's failure to report deceased's death within six (6) months of his passing.

2. First defendant is ordered to pay costs of suite which costs shall include those of the second defendant.

NG BESHE
JUDGE OF THE HIGH COURT

APPEARANCES

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Date Heard : 11 & 12 May 2015 and 24 June 2019

Date Reserved : 24 June 2019

Date Delivered : 26 June 2019