

THE HIGH COURT OF SWAZILAND

MAVIS MHLANGA

Applicant

And

THE PUBLIC SERVICE PENSION FUND

Respondent

Civil Case No. 4198/2005

Coram:	S B. MAPHALALA - J
For the Applicant:	MR. M. SIBANDZE
For the Respondent:	MR. K. MOTSA

JUDGMENT

(14th July 2006)

[1] In this application, the Applicant seeks an order directing the Respondent to pay the amount of E6, 941-44 to the Applicant; interest thereon at the rate of 9% per annum calculated from the 18th August 2004, and costs of this application on the attorney and client scale.

[2] The applicant entered into agreement with the Swaziland Government ("The Government") as a teacher during or about 1977 ("the Applicant's employment"). The Applicant was dismissed from Government's employment during August 2003. She became a member of the Respondent fund during 1993 and made monthly contributions thereto ("the monthly contributions"). She applied for a refund of the monthly contributions together with interest after her dismissal from employment. Hereafter received a pension fund repayment from the Respondent in the sum of E1 7, 200-84 ("the actual refund"). Prior to the payment of the actual refund, the Respondent had received an instruction from Government to:

- (a) Deduct payment of the sum of E6, 941-44 from the refund amount to be made by the Respondent to the Applicant ("the disputed sum").
- (b) Pay the disputed sum directly to the Government.

[3] The basis for (b) *supra* was that the Government had made overpayments to the Applicant and the Applicant owed a debt to the Government in an amount equal to the disputed sum. The statutory deduction, the sum of the pension fund repayment, which would have been due to the Applicant, would have amounted to E24, 142-28 ("the gross refund").

[4] When the matter came for arguments I heard both the points of law *in limine* raised by the Respondent and the merits of the matter. The points *in limine* are raised in the Respondent's Answering affidavit and they read *in extenso* as follows at paragraph 4 and 5 thereof:

4. Non-joinder

4.1. The applicant has annexed a letter dated 16th July 2005 (annexure "MM4") directed to Respondent by the Accountant general, who is an officer of the Swaziland Government.

4.1.1. The Respondent is a Fund established to manage funds for the Swaziland Government and its employees.

4.1.2. In terms of regulation 23 (a) of the order the Respondent is enjoined to listen to directives of the Swaziland Government (when there is debt due to it).

4.2. As the Applicant was aware that it is Swaziland Government which directed Respondent to deduct the funds which the Applicant now seeks a refund of), she ought to have been joined the

Swaziland Government as a necessary party to the proceedings.

4.3. Therefore, this application is procedurally defective for failing to join the Swaziland Government and/or the Accountant General as a necessary party.

5. Dispute of fact

5.1. The application for the refund of money raises disputes of fact in the following sense;

5.1.1. Applicant's paragraph 12 says she is not aware of an overpayment.

5.1.2. On the other hand the Accountant General in a document filed by Applicant ("MM4") states that there was overpayment, and;

5.1.3. Furthermore, annexure "P3" annexed here to *prima facie* show that Applicant was aware of the overpayment.

5.2. In the circumstances, it is submitted and advised that Applicant ought not to have launched the proceedings by application as;

5.2.1. This is claim sounding in money, and

5.2.2. She was aware, or should have foreseen the disputes mentioned above.

Wherefore the Respondent prays that the application be dismissed with costs.

[5] In arguments before me both Counsel filed very comprehensive and articulate Heads of Argument for which I am grateful to both for their industry and a very high sense of professionalism.

[6] The essence of the Respondent's case in respect of the two points of law *in limine* is firstly that the Government ought to have been joined as a party, as it has a direct and substantial interest in respect of the issue whether the Applicant was indebted to it. In this regard the court was referred to certain portions of the record. Secondly, that a foreseeable dispute of fact existed in this matter from the very outset. To support the Respondent's case *in limine*, the court was referred to a number of decided cases in South Africa that of *Abrahamse and others vs Cape Town City Council 1953 (3) S.A. 855 (C)* at 859, *R Bakers (Pty) Ltd vs Ruto Bakeries (Pty) Ltd 1948 (2) S.A. 626 (T)* and the celebrated decision in *Room Hire Co. (Pty) Ltd vs Jeppe Street Mansions (Pty) Ltd 1949 (3) S.A. 1155 (T)*.

[7] On the other hand it was contended on behalf of the Applicant that the points of law raised is bad in law in that Rule 10 of the High Court Rules gives a discretion to the court to join Defendants as a matter of convenience. This

discretion is exercised at the behest of the party who is desirous of joinder, that is, either the Applicant or Respondent. Consequently, neither party is obliged to enjoin another. Thus the Respondent's averment that the Applicant "... **ought to have joined the Swaziland Government as a necessary party to the proceedings**" is misplaced since no such obligation exists in law.

[8] It would appear to me that in respect of the first point *in limine* that the Swaziland Government ought to have been joined in these proceedings. I say so because the Applicant is aware why the E6, 941-44 was deducted as she had possession of annexure "MM3 and "MM4". Annexure "MM4" is explicit in stipulating that Applicant was over-paid

E6, 941-44 and hence there was a clear instruction to Respondent to deduct the money. Therefore, it is apparent that the deduction for overpayment had already commenced prior to the Applicant's dismissal. The Government ought to have been joined as a party, as it has a direct and substantial interest in respect of the issue whether the Applicant was indebted to it.

[9] On the basis of the above-cited reasons this point of law *in limine* is sustained in that the Applicant ought to have joined a necessary party the "Swaziland Government" in these proceedings.

[10] Turning to the second point *in limine* that there is a foreseeable dispute of fact in this matter which existed from the very outset, it is the Respondent's argument that this application for the refund of money raises disputes of fact in the following sense. Applicant's paragraph 12 says she is not aware of an overpayment. On the other hand the Accountant General in a document filed by Applicant ("MM4") states there was overpayment and furthermore, annexure "P3" annexed to the Respondent's Answering papers show that Applicant was aware of the over-payment. In the circumstances, Applicant ought not to have launched the proceedings by application as this is claim sounding in money, and she was aware, or should have foreseen these disputes of fact.

[11] On the other hand the Applicant is of the view that there is no dispute of

fact *in casu*. According to the Applicant the issue in the present case is not whether there was an over-payment or not, but whether the Respondent was justified to act on mere correspondence to establish the existence of a debt as a consequence of such alleged overpayment. The Applicant's pension without a proper record of the existence of a debt.

[12] It appears to me that a disparity exists in each party's assertion of the facts and I am of the view that this disparity is material to the determination of the present case. I say so because of what is averred by the Respondent in paragraphs 5.1.1, 5.1.2 and 5.1.3 of the Respondent's Answering affidavit.

[13] In the result, for the afore-going reason^the Respondent's points of law *in limine* are upheld with costs and in the circumstances the application is accordingly dismissed.

S.B. MAPHALALA
JUDGE