

**IN THE SUPREME COURT OF SWAZILAND**

**APPEAL CASE NO.42/06**

**In the matter between:**

**MAVIS MHLANGA**

**APPELLANT**

**VS**

**PUBLIC SERVICE PENSION FUND**

**RESPONDENT**

**CORAM: STEYN JA**

**TEBBUTT JA**

**BANDA JA**

**FOR APPELLANT: MR. S. NSIBANDE**

**FOR RESPONDENT: MR. MOTSA**

**JUDGMENT**

Tebbutt JA

[1] The non-joinder of an essential party in a case is what has given rise to this appeal.

[2] The appellant entered into employment with the Swaziland Government (the Government) as a teacher in or about 1977, rising to become the Head Mistress of a primary school. In 1993 the Public Service Pension Fund, (the Fund) the respondent in this appeal, came into being. The appellant became a member of it and made monthly contributions to it.

[3] In August 2003 the appellant was dismissed from her employment with the Government. The reason for this is not known but it is, in any event, not material to this case.

[4] In terms of the Fund's regulations the appellant, upon her dismissal, was entitled to a refund of her contributions, together with accrued interest. She was informed in writing that her total refund, inclusive of interest, was the sum of E24142.28. She was, however, also told that E6 941.44 had been deducted from this sum, resulting in her receiving an actual amount of E 17,200.84. The sum of E6 941.44 was said to constitute an over-payment of salary to her over previous years. In deducting the latter amount the respondent (Fund) acted on an instruction from the Government to deduct the said sum from the refund amount payable by the Fund to the appellant and to pay it directly to the Government. The actual wording of the instruction reads:

**"She has an over payment of salary for E6,941.44. Please process a cheque for E6,941.44 payable to the Swaziland Government with the remainder ... due to her."**

It is common cause that this occurred.

[5] The appellant denied that she had ever been overpaid her salary by the Swaziland Government or been advised thereof by the Government.

[6] On 10<sup>th</sup> November 2005 the appellant, by way of notice of motion, applied

in the High Court for an order directing the respondent Fund to pay her the aforesaid sum of E6,941.44 together with interest thereon and costs.

[7] The Fund opposed the application and raised two points *in limine* in its opposition viz

(i) that the Swaziland Government ought to have been joined as a necessary party to the proceedings, which as this had not been done, in consequence rendered them procedurally defective; and

(ii) that there was a dispute of fact that the appellant should have foreseen viz whether there had been an overpayment to her which the Government alleged but she denied, and whether she owed a debt to the Government, which she also denied. She should accordingly not have proceeded by way of application.

[8] When the matter came before him, Maphalala J upheld both points *in limine* and dismissed the application, with costs. It is against that decision that the appellant now comes on appeal to this Court.

(9) It is well established that a defendant or respondent has the right to demand the joinder of another party where the latter has a direct and substantial interest in the issues involved and in the order which the Court might make (see **AMALGAMATED ENGINEERING UNION V MINISTER OF LABOUR 1949(3) SA 637 (A)**; **HENRI VILJOEN (PTY) LTD V AWERBUCK BROTHERS 1953(2) SA 151(0)**; **SMITH V CONELECT 1987(3) SA 689 (WLD)**; **RECKSON MAWELELA V ASSOCIATION OF MONEY LENDERS AND ANTOJSEJR CIVIL APPEAL 43/99 (COURT OF APPEAL)**).

It should also occur where the legal right of a party could be

prejudicially affected by the judgment of the Court (see **Henri Viljoen** case supra at 167) or where such order cannot be sustained or carried out without prejudicing that party (see the **RECKSON MAWELELA** case, supra)

(10) In the present case it is clear that the Government has a direct and substantial interest in the issues involved and in the order which the Court might make. Should the Court order payment of the E6,941.46 to the appellant, it is obvious that it is the Government which will have to pay it to her. A pension (or no doubt part thereof) can in terms of regulation 23 of the Fund be attached, ceded or transfer to satisfy "a debt to the Government of Swaziland." Should the amount the Government claimed as an overpayment, and thus be a debt to it, be held to have been wrongly deducted, the Government would obviously be prejudiced by that judgment. The learned Judge a quo was therefore clearly correct in upholding the point ***in limine*** on non-joinder.

(11) It is also clear that there is a dispute between the parties as to whether the appellant owes the sum of E6,941.44 to the Government. It says she does; she says she does not. The Court cannot resolve this dispute on the papers. It may well be that only part of it is owed. The Court simply cannot know without the benefit of oral evidence.

The learned Judge a quo was therefore clearly correct in also upholding the second point ***in limine***.

(12) The appeal therefore fails. The Court would however, urge the parties to attempt to resolve their dispute without recourse to further litigation. So far time and money has been wasted on two technical legal points. The Government will now have to be joined in fresh proceedings and a

trial will have to be held. This will all result in huge costs - costs which will far exceed the E6,941.44 that is involved in this case. If the parties were to debate the account of the appellant with the Government a solution to the problem raised herein should surely be able to be found.

(13) The Court would finally wish to remark that in the light of this judgment potential litigants against the Fund should be aware that it is the Government which should be cited together with the Fund in any claims against the latter.

[14] On the question of costs, Mr. Motsa for the respondent, informed the Court that it was not insisting on any of its costs being paid by the appellant, either in this Court or in the Court a quo. The Court expresses its appreciation of this magnanimous gesture.

In the result, the Court makes the following order.

The appeal is dismissed. There is to be no order as to costs either of the appeal or in the application in the court a quo.

P.H. TEBBUTT

Judge of Appeal

I AGREE

J.H. STEYN

Judge of Appeal

I AGREE

R.A. BANDA

Judge of Appeal

Delivered in open court on this 16th.. day of November 2006