

SOUTH AFRICA / JUDGMENT

**Mpanza and Others v Acting Chief Litigation Officer
For The Department Of Justice And Constitutional
Development And Correctional Services and
Others (J 1571/14) [2014] ZALCJHB 248 (9 July 2014)
[2014] ZALCJHB 248**

COURT

Labour Court Johannesburg

BEFORE

R Lagrange

CASE / FILE NUMBER

J 1571/14

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REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

JUDGMENT

CASE NO: J 1571/14

In the matter between:

DANIEL SIPHIWE MPANZA.....Applicant

JACQUELINE MATSHIDISO.....Applicant

LUBABALO CHARLES MQUSHULU.....Applicant

and

THE ACTING CHIEF LITIGATION

OFFICER FOR THE DEPARTMENT OF

JUSTICE AND CONSTITUTIONAL DEVELOPMENT

AND CORRECTIONAL SERVICES.....First Respondent

THE DEPARTMENT OF JUSTICE AND

CONSTITUTIONAL DEVELOPMENT AND

CORRECTIONAL SERVICES.....Second respondent

THE MINISTER OF JUSTICE AND

CONSTITUTIONAL DEVELOPMENT

AND CORRECTIONAL SERVICES.....Third respondent

Heard: 8 July 2014

Delivered: 9 July 2014

Summary: (Urgent – application to interdict alleged unlawful deductions).

LAGRANGE, J

- [1] This application is brought on an urgent basis to declare alleged deductions made from the applicants' remuneration unlawful and to prohibit any future deductions, as well as ancillary relief. The matter was postponed on the previous occasion on account of the non-joinder of the third respondent, which has now been remedied.
- [2] The respondents have reduced the applicants' remuneration by one third and in the case of the second applicant have levied a deduction for purported arrear unpaid leave taken by her in an amount far exceeding her monthly salary. The respondents claim they are entitled to reduce the applicants' remuneration and recover remuneration paid to them from 15 November 2013, on account of their alleged failure to report for duty which it has decided to treat as unauthorised, unpaid leave.
- [3] There is a major dispute of fact as to whether the applicants have reported for duty which cannot be resolved on the affidavits, which stems in part from a disagreement over whether they are obliged to relocate to other units within the second respondent following the disbandment of the civil litigation unit in which they were originally employed. Further, there is a dispute whether they reported for work at all since November 2013.
- [4] The test laid down in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235E
- F applies to disputes of fact where final relief is sought on application, viz:.

"It seems to me that where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents, together with the admitted facts in the applicant's affidavit, justify such an order."

- [5] The applicants cannot satisfy that test on the papers and, in my view, ought to have realized that a serious dispute of fact would arise.

Existence of a clear right

- [6] In essence, the applicants claim the reduction of their salaries by one third amounts to an unlawful deduction in terms of section 34(1) of the Basic Conditions of Employment Act, 75 of 1997 ('the BCEA'). The respondents concede that the reduction of the second applicant's salary by an amount of R 48, 946-50 in respect of her remuneration due on 15 July 2014 as per annexure "DM5" to the founding affidavit, is contrary to its own policy of not deducting an amount in excess of one-third of its employee's salary in any month, and would be unlawful.
- [7] However, the respondents contend that the remaining 'deductions' of up to one-third of the applicants' remuneration each month, is perfectly lawful, as the applicants are actually not entitled to any remuneration for so long as they are not tendering their services. On the respondents version the deduction of up to one-third of the applicants' salaries each month is simply giving partial effect to the fact that the third respondent is not obliged to pay them any remuneration all and the amount is in truth not a deduction from remuneration due to them, but is not due to them in the first place as they have no claim to payment of remuneration at all in the absence of tendering their services.
- [8] On this basis, the respondents argue that the judgment of Ngukaitobi, AJ in *The South African Medical Association obo Professor K D Boffard v Charlotte Maxeke Johannesburg Academic Hospital and others*
- [1] is distinguishable. In that matter the court was concerned with arrear deductions for alleged unpaid leave taken by the applicant which the court held was contrary to s 38 of the Public Service Act which permits the recovery of salary overpayments by way of instalments subject to the approval of the Treasury. In this instance, the deductions in question, except in respect of the amount mentioned above from the second respondent, do not involve deduction of prior alleged overpayment of salaries, but a partial reduction of current remuneration in the absence of the applicants' tendering their services.
- [9] As mentioned, whether or not the applicants are tendering their services by reporting for duty is a matter of dispute and on the papers, the applicants cannot establish on a balance of probabilities that they are reporting for work and are entitled to their full salaries.
- [10] In the circumstances, I am not satisfied that the applicants have established a clear right to prohibit the reduction of their salaries on account of a factual dispute over whether or not they are tendering their services. As the applicants have not established that the deduction is for the recovery of a debt, rather than simply a reduction in remuneration, for lack of reciprocal performance of their obligation to tender their services, it cannot be said that the provisions of s 34(1)(a) of the BCEA are applicable.
- [11] In the event the respondents purports to make a deduction in order to recover any alleged previous overpayment of salary on account of the applicants' alleged failure to tender their services during months prior to the month in respect of which remuneration is being paid, that might well be a deduction falling within the ambit of one or both of those statutory provisions, the lawfulness of which this court could scrutinise. However, the applicants have

failed to establish that this is what the current deductions made under code 80-00052 as reflected in Annexures DSM2, DSM3, DSM5, DSM7 and DSM8 to the founding affidavit constitute.

Absence of alternative remedies and prospect of suffering irreparable harm

[12] The applicants allege they are suffering financial hardship as a result of the loss of remuneration and will suffer irreparable harm if the court does not grant them urgent relief. I do not accept the harm they might suffer is irreparable. If the reduction in their remuneration is in fact unlawful because they have been tendering their services, they will be able to recover that money with interest in due course. In so far as there are other irreparable effects of the respondents' action, which cannot be

remedied by an action in due course, no factual basis for such relief has been made out in the founding affidavit.

[13] Similarly, if the deductions are contrary to the provisions of s 34 of the BCEA or s 38 of the Public Service Act, the applicants are not precluded from recovering the same in due course.

Conclusion

[14] In the circumstances, I am not satisfied the applicants have made out a case for urgent interdictory relief based on the existence of a clear right, the absence of suitable alternative remedies, and the prospect of suffering irreparable harm if such relief is not granted, save for the deduction to recover a purported undue payment of remuneration for the period 1 January to 31 January 2014 in the amount of R 48,946-50 from the second respondent, which the respondent concedes should not be deducted.

Order

[15] The third respondent is joined as a party in these proceedings.

[16] The application is dismissed save in respect of that part of the application pertaining to aforesaid deduction of R 48, 946-50 from the second applicant's remuneration in July 2014 in respect of her remuneration for the month of January 2014, which deduction the respondents are interdicted from implementing.

[17] No order is made as to costs.

R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: The first applicant appeared for the applicants as confirmed by the second and third applicants who both were present in court.

FIRST RESPONDENT: Adv. M Gwala instructed by the State Attorney

[1] J 2469/11 dated 20 March 2014 (unreported judgment)

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