IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: J1137/09

In the matter between:

JONKER VALASCE APPLICANT

AND

WIRELESS PAYMENT SYSTEMS CC RESPONDENT

JUDGMENT

MOLAHLEHI J

Introduction

[1] This is an urgent application in terms of which the Applicant seeks an order to have the Respondent to repay her R9, 140.00 (Nine Thousand One Hundred and Forty rand), which was allegedly unlawfully deducted from her final remuneration, paid on 30th May 2009. The order should according to the Applicant include an interdict restraining the Respondent from making any deductions from her remuneration payable at the end of her notice month, June 2009.

[2] The Applicant brought her application in terms of section 158(1) of the Labour Relations Act 66 of 1995 read with section 77(1) of the Basic Conditions Employment Act of 1997(the BCEA).

Background facts

[3] The Applicant who is serving notice of termination of her employment due to operational reasons was employed as a sales and marketing executive, in terms of a written contract of employment. The Applicant's gross monthly remuneration is about R14, 100.00, which amount was paid to her by means of electronic funds transfer to her bank. The Applicant's remuneration structure included a motor vehicle paid for by the Respondent.

[4] It is common cause that the Applicant was on 25th May 2009, called to a meeting by the Respondent where she was served with a notice that her employment would terminate at the end of May 2009 due to operational requirements. She was given a month's notice which means that she would receive her last salary at the end of June 2009.

[5] The Applicant complains that the Respondent unlawfully deducted an amount an amount of R9, 140.00 from her remuneration for the month of May 2009. She further complains that a further deduction was to be made at the end of June 2009.

[6] The Respondent on the other hand contended that the salary of the Applicant varied from month to month depending on the commission that the Applicant made for that particular month. The Respondent further contended that the Applicant was given a vehicle and was therefore not entitled to payment of a car allowance. Because of an administrative error the Applicant received a car

allowance in the amount of R2500,00 for eleven months from June 2008 to April 2009.

[7] The Applicant states in her founding affidavit that the matter was urgent because she is a divorced mother of three children. Her monthly expenses are; R5, 000.00 for rental, R500.001 for electricity, R500.00 salary of a domestic worker, R1.200,00 for the nursery school, R500,00 for school fees, R370.00, for bus fees, R 1, 900.00 for medical aid, R 3, 000.00, bursaries, R500.00 for DSTV, R600.00 for after school activities, R200.00 for gymnasium membership fee. Thus the total expenditure of the Applicant is R14, 270.00.

[8] The Applicant further indicated in her founding affidavit that she was renting the house in which she is living with her children and had been informed by the lessor that she would be evicted if she was to fail to pay her rental. The amount of R5, 000.00 per month which her former husband paid as maintenance for the children was insufficient to sustain the children's and her living standard.

[9] The Applicant based her case on the provisions of the Basic Conditions of Employment Act of 1997 in particular the provisions of section 34 of that Act. Section 34(1) of the BCEA provides that an employer may not make any deductions from an employee's remuneration unless:

(a) subject to subsection (2), the employee in writing agrees to the deduction in respect of a debt specified in the agreement; or

(b) the deduction is required or permitted in terms of a law, collective agreement, court order or arbitration award.

[10] Section 34(2) of the BCEA provides that a deduction in terms of subsection (1)(a) may be made to reimburse an employer for loss or damage only if-

(a) the loss or damage occurred in the course employment and
was due to the fault of the employee;

(b) the employer has followed a fair procedure and has given the employee a reasonable opportunity to show why the deductions should not be made;

(c) the total amount of the debt does not exceed the actual amount of the loss or damage; and

(d) the total deductions from the employee's remuneration in terms of this subsection do not exceed one-quarter of the employee's remuneration in money.

[11] Section 34(5) of the BCEA provides that an employer may not require or permit an employee to-

(a) repay any remuneration except for overpayment previously made by the employer resulting from an error in calculating the employee's remuneration; or

(b) acknowledge receipt of an amount greater than the remuneration actually received.

The legal requirements for urgent application

[12] It is trite that before an urgent application can be granted, the applicant must satisfy the following requirements; a clear right (or a *prima facie* right in the case of an interim relief); a well grounded apprehension of irreparable harm if the relief is not granted on urgent basis, that the balance of convenience favours the granting of the relief on an urgent basis; and that the applicant has no other alternative relief.

[13] In my view the Applicant has failed to show the existence of urgency in this matter. She has also failed to show that she has no alternative remedy that would avoid irreparable harm if the relief was not granted. Because the Applicant is seeking a final order she had to show that she had a clear right which has been interfered with, necessitating the Court's intervention.

Has the Applicant shown the existence of urgency

[14] The essence of the Applicant's case in as far urgency is concerned revolves around financial hardship that she is faced with as a result of the alleged unlawful deductions that the respondent has effected on her salary including the deduction to be effected at the end of June 2009. As indicated above she has listed her financial obligations that she would not be able meet as a result of the deductions from her salary.

[15] In the case of *Democratic Nursing Organisation of South Africa and Others v The MEC for Health: North Cape case number: J2386/08*, this Court was confronted with the same issue of having to determine whether financial

hardship constitutes a basis for seeking a relief on an urgent basis. In that case the Court in following the decision in *Hultzer v Standard Bank of South Africa (Pty) Ltd [1999] 8 BLLR 809 (LC), at para [13]*, held that financial hardship or loss of income is not regarded as a ground for urgency.

[16] The general rule that financial hardship and loss of income are not considered to be grounds for urgent relief was upheld in *Malatji v University of the North [2003] ZALC 32 (LC)* and *National Sorghjum Bierbrouery (Edms) Bpk (Rantoria Divisie) v John NO & Ander (1990) 11 ILJ 971 (T).*

[17] In *Democratic Nursing Organisation of South Africa*, this Court held that:

> *"In order to succeed when reliance is based on financial hardship, exceptional circumstances must be shown before an urgent interim relief can be granted."*

[18] In the unreported case of *Garry Harley v Bacarac Trading 39 (Pty) Limited case number J254/08,* the Court rejected the approach that financial hardship and loss of income can never be grounds for urgency. The Court per Van Niekerk J accepted the general approach that an employee would be entitled to an urgent relief if he or she was able to demonstrate detrimental consequences that may not be capable of being addressed in due course and if the employee was able to show that he or she will suffer hardship if the Court was not to intervene on an urgent basis. In my view the Court in that case did not depart from the approach that as a general rule financial hardship and loss of income do not necessarily constitute a basis for urgency but where special

circumstances of a particular case indicates otherwise the Court should not hesitate in intervening and granting an urgent relief.

[19] The case of *Hospersa & Another v MEC for Health, Gauteng Provincial Government (2008) 9 BLLR 861 (LC),* illustrates the circumstances where the Court was willing to intervene and grant an urgent relief. The Court in that case found that the employee was entitled to an urgent relief because the employer had unilaterally withheld her salary in breach of the Basic Conditions of Employment Act. It would seem to me that the Court in that case in granting the urgent relief was influenced more particularly by the unlawfulness of the conduct of the employer and failure to afford the employee a fair hearing before effecting the deduction.

[20] In the present instance, in my view, the Applicant has failed to demonstrate that the financial hardship she will face as a result of the deduction on her salary is incapable of being addressed in due course if she was to institute proceedings in this Court in terms of section 77 of the Basic Conditions of Employment Act or before any other tribunal that may have jurisdiction to entertain the matter. The Applicant has also not made out a case of unlawfulness in the deduction as will appear more in details below, where the right not to be faced with a deduction is discussed. The email of the Applicant suggests that she was aware of what was to happen before the deduction including the reason thereof.

Has the Applicant discharged her duty of showing the existence of a clear right?

[21] In support of her case that her right had been interfered with the Applicant relied on the provisions of section 34 (1) of the Basic Conditions of Employment Act. That section prohibits an employer from making any deductions from an employee's remuneration unless, the employee agrees in writing. It is indeed correct that as a general rule the Basic Condition Employment Act prohibits deductions from employees' salaries without their prior consent. However, deductions without consent are permitted where it is permitted by the law, collective bargaining agreement and a court order or arbitration award. In these instances all what the employer needs to do is to advice the employee of the error in payment and the deduction made or to be made. See *Papier and others v Minister of Safety and Security and others (2004) 25 ILJ 2229(LC).*

[22] In *Sibeko v CCMA (2001) JOL 8001 (LC)* the Ravelas J in dealing with the issue of the deductions said:

> *"It is indeed so, that in terms of the Basic Conditions of Employment Act, an employer may not deduct amounts from the salary or remuneration of an employee without the employee's consent. Where an employee was however overpaid in error, the employer is entitled to adjust the income so as to reflect what was agreed upon between the parties in the contract of employment, without the employee's consent."*

[23] The email which the Applicant addressed to the respondent on 1st June 2009, does not support the version of the Applicant that the Respondent was not

entitled to deduct the over payment which was made to her erroneously. The administrative error arose when the Applicant was granted a company vehicle. At that point the car allowance which was paid to the Applicant should have been discontinued. In paragraph 4 (four) of the email the Applicant writing about the amount to be deducted states:

> *"Ek vra dat jul groot asb met hierdie R8000,00 kan teregmoet kom, kan ons asb 'n releeling maak vir afbetaling. Ek wag vir antwoorde op drie positiwe onderhoude, ek sal werk kry, so dan sale k lul terug betaal asb."*

The above is repeated in the last paragraph of the same email.

[24] The Applicant's attorney argued during his submission that there was no provision for a car allowance in the two salary pay slips of the Applicant which were attached to the founding affidavit and therefore there was no basis to deduct from the salary of the Applicant an amount related to car allowance. However, he conceded at the end of his argument that the employee was not entitled to a vehicle allowance.

CONCLUSION

[25] In the light of the above and the circumstances of this case, I am satisfied that no special circumstance exists warranting an urgent relief for the Applicant. The Applicant has also failed to show that she has a real right in the amount deducted from her salary. As concerning costs, it would not be fair, in my view, to allow costs to follow the results.

[26] In the premises the application is dismissed with no order as to costs.

Molahlehi J

Date of Hearing : 9th June 2009

Date of Judgment : 23rd June 2009

Appearances

For the Applicant : Mr W P Scholtz of Jansen Incorporated

For the Respondent: N/A