IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO 1652/98

In the matter between

SAULINE SIKHONDZE	APPLICANT
And	
THE TEACHING SERVICE COMMISSION	1st RESPONDENT
THE ATTORNEY GENERAL	2nd RESPONDENT
Coram	S.B. MAPHALALA – J
For Applicant	MR. Z. MAGAGULA
For Respondent	MR P. SIMELANE

JUDGEMENT

(07/01/99)

Maphalala J:

The applicant has made an application to the court for an order restraining the 1st respondent from making deductions from the applicant's salary forthwith. That the first respondent be ordered to refund the applicant the sum E9,690-44. She also seeks costs of the suit and further and/or alternative relief.

In her founding affidavit the applicant sets forth that she is an adult woman resident in the Shiselweni District. The 1st respondent is the Teaching Service Commission a department in the Ministry of Education represented in these proceeding by the Attorney General who is cited in his capacity as such. In these proceedings she states that she is assisted by her husband Simon Thandokuhle Sikhondze to whom she is married in community of property, by civil rites.

The applicant is a teacher by profession in the employment of the 1st respondent. She has been so employed since 1974. Presently she is teaching at Ngwane Practising Primary School in Nhlangano. In or about 1986 her husband and she was teaching at Ngudzeni Primary School where her husband was the head teacher and she was the Deputy Head Teacher at the end of 1986 her husband was transferred to Ebenezer Primary School, he had applied for this transfer. She was also transferred to Mzila Primary School, then called Mbhebha Primary School. She had not applied for this transfer nor had she applied to be promoted to the position of Deputy Headmaster.

In January 1987, she resumed duty as Deputy Headteacher at Mzila Primary School. However, the distance between Mzila and Ebenezer where her husband and she lived about 30 km. This meant that she had to leave home very early each morning and return very late in the evening. She then wrote a letter to the Teaching Service Commission and requested to be transferred to a school closer to the Hlatikulu area so that she may work closer to her husband and children.

On the 12th February 1987, she sent a letter to the 1st respondent requesting to be demoted from the position of Deputy Headmistress if only to be transferred to a school closer to her family. She also phoned the Executive Secretary of the 1st respondent about the matter and he immediately arranged for her transfer to Ebenezer Primary School where she assumed the position of an Assistant Teacher. Before her promotions to the position of Deputy headteacher she was earning the sum of E455-00 on the old government scale of Grade 12. When she was promoted to the position of Deputy headteacher she was placed on the then Grade 14 at a salary of E493-92. Although her appointment was communicated to her in 1986 the letter of appointment was dated the 18th April 1985, and the

appointment was with the effect from 21st May 1985, she did not receive any back pay. When she was at Ebenezer at the end of February 1987, she relinquished the position of Deputy head teacher and became an ordinary Assistant teacher. After her demotion according to her papers it was the duty of the 1st respondent to do the necessary adjustments to her salary. She does not know when her salary was finally adjusted because the salary advice slip did not indicate the sum of money that one was being paid for specific responsibility. This was more so because over the years teachers salaries have been affected by various adjustments such as increments and back pays.

In October 1996, the 1st respondent deducted the sum of E822-61 from her salary. The salary advice slip attached to her affidavit marked annexure "B" indicated that she owed government the sum of E28,791-21. She enquired from the 1st respondent's officer about the deductions and the alleged debt and was informed that the deductions was a refund for overpayment. The deductions have continued to date. Before the deductions commenced she was never informed that she had been overpaid nor were she informed that her salary would be deducted she was shocked when she saw her salary advise reflecting that she would receive only the sum of E215-00 net pay. She enquired from 1st respondent about how had the sum of E28, 791-21 been arrived at and she did not get a clear answer, but in February 1997, her salary advise slip reflected that she owed the government E18, 521-66. This surprised her because it did not tally when considering that up to that only the sum of E3, 290-40 had been deducted from her salary. In or about February 1997 1st respondent unilaterally adjusted the deduction to E400-00 per month. To date the sum of E9, 690-44 has been deducted from her salary. This deduction in her salary has worked untold hardships into her life and family. In at least five months she had not been able to earn anything as her salary advise slip would effect the figures E0-00 in the space that should show her net salary. She annexed her salary advise slip for the months of December 1996, January, February, October and November collectively marked as "C" to show this state of affairs.

Her gross monthly salary is the sum of El,647-83 and after all the deductions including tax and membership dues into teacher's professional bodies have been made she earn a net salary of E510-20. She has five children all of whom at school. She

also pays school fees for three of her brother-in-law's children. Her brother-in-law is deceased. The deduction is clearly prejudicial to her and she is informed and verily believes that they are unlawful in as much as they are not sanctioned by a court of law. Her husband retired from the teaching profession in March 1997, due to ill health and she is the sole breadwinner in the family. Lastly, she wished to point out that she wrote the letter requesting the demotion in February 1987, and actually assumed her status as an Assistant teacher in the same month. It is definitely not her fault that she was overpaid if at all.

These are the factual allegations that from the basis of the applicant's case.

The application is opposed by the government which filed an answering affidavit of one Pat Muir who is the Executive Secretary to the Teaching Service, who deposed that all facts stated in this affidavit are within his personal knowledge and belief, true and correct and/or are derived from official documents in the custody and possession of the teaching service commission. He admits paragraphs 1, 2,3, 4, 6, 7, 8.1 9, 11, 12, 14, 16 of the founding affidavit. Paragraphs 5, 8.2, 10, 15, 16.1, 17, 18, 19, 20, 21, 22, 23, 24, 25 ad 26 are denied by the respondent. The respondent's defence is that at all material times applicant knew that the necessary adjustment had not been made. However, she unlawfully continued to receive the money that was not due to her and she did absolutely nothing to notify the 1st respondent until the commission realized on its own. The applicant was aware that she had been overpaid and thus unjustly enriched. These proceedings are a deliberate ploy by the applicant in the execution of what is just and fair. In fact, although applicant was not formally informed about the overpayment applicant came to the commissioner's offices to enquire about the issue whereupon the deponent verbally explained the circumstances leading to the deduction. The adjustments was done after applicant's constant and persistent telephone calls and personal visits to respondents office requesting that the deduction be reduced to E400-00 as she could not make ends meet. For a period of more than (9) nine years applicant continued to receive, use and enjoy money that was not due to her. Applicant was aware that the adjustment had not been done and she did absolutely nothing to abate the situation. She did not notify the teaching service commission about the

anomaly until the commission realized. This on its own accord. The applicant is not candid before the court.

These are the facts that form the respondent's defence to the suit.

The applicant filed a replying affidavit to the respondents answering affidavit. She maintains that her salary is controlled by the first respondent and at all times material hereto it was incumbent upon the first respondent to effect the necessary changes. Applicant further stated that the deductions are illegal in, as much as she did not consent to further the respondents did not obtain an order of court to effect the deductions. They merely resorted to self-help. The applicant further more put in issue the manner in which the deductions were effected in that respondents are themselves not sure how much the overpayment was.

These are the facts before the court.

The matter came before court on the contested motion of the 23rd October 1998, where the court heard arguments and reserved judgment. Mr. Magagula argued that

the applicant queries the manner in which the money is being deducted. He conceded that applicant owes the respondent some money. The respondent did not even have a court order empowering them to make these deductions. Mr. Magagula argued that the said deductions are in dergit contravention to Section 56 of the Employment Act, 1980 (as amended by Act No. 5 of 1997).

On the other hand Mr. Simelane for the respondent took the view that the deductions were effected after applicant's instant and persistent telephone calls and personal visits to respondents office requesting that the deduction be reduced to E400-00 as she could not make ends meet (paragraph 18 of the respondent's affidavits). In any event, there is no authority that the respondent has to obtain a court order.

On points of law Mr. Magagula contended that for a right to be enforced one needs a court order. In the present case the respondents cannot be allowed to take the law in its own hands.

These are the issues before court for determination. It is common cause that the applicant was paid more than she was entitled to and this much is conceded by Mr. Magagula for the applicant. It appears to me that the applicant has been unjustly enriched in so far as she was paid in excess of what she was entitled to for a period of nine (9) years until the respondent detected the anomaly. The only crisp question of law to be determined by the court is whether or not the manner deductions effected by the respondents to recover what has been unjustifiably enriched the applicant was done in terms of the law. According to Sharrock on Business Transactions Law (4thED) at page 236 he states that at common law, the employer may not make any deductions from the employer's wages without his consent, except where the rules of set off apply. However, for our present purposes to answer this question the court was referred to Section 56 of Act No. 5 of 1980 (The Employment Act) as amended by Act No. 5 of 1997 which authorized deductions from wages. Section 56 © reads as follows:
"Authorized deductions from wages

(1) An employer may deduct from the wages due to an employee

(a) .....
(b) .....
(c) .....
(d) .....

(e) Any amount paid to the employee in error as wages in excess of the amount due to him".
It appears therefore from the afore going that the respondents have a right in law to recover from the applicant monies paid to her in excess of her usual pay. However, the same Section prescribed the manner in which such deductions are to be effected. The Section does not allow the employer to whilly willy deducts what is due to him. SubSection (4) of Section 56 reads as

follows:

"(4) The total amount which may be –

(a) deducted from wages of an employer under paragraphs
(c) and (e) of SubSection (1) or under SubSection 2: (b) .....

(c) .....
shall not in any period, exceed one third (my emphasis) of the wages due to the employee in respect of that period.

It is clear therefore that the proviso to Section 56 (4) (a) was not followed by the respondent in the case in casu. The intention of the legislature to put in place such a proviso was to protect an employee so that he cannot find himself in financial dire straits in as much as he has been unjustly enriched. In the present case as reflected in the papers for some months the applicant went home with no salary at all. In my view this was a grave injustice.

In my considered conclusion, I rule as follows:

1. That the 1st respondent be and is hereby restrained from making deductions from the applicants salary save those that conform to Section 56 (4) (a) of the Employment Act of 1980.
2. That the 1st respondent be and is hereby ordered to refund the applicant two thirds of the sum of E(,690-44 and thereafter deduct lawful deductions from the applicant's salary in conformity with the proviso to Section 56 (4) (a) of the Employment Act No. 5 of 1980 until the amount owed to the respondents is finally liquidated.
3. Cost of suit.

S. B. maphalala

JUDGE