

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 11/2017

In the matter between

BHEKISISA MAGAGULA

APPLICANT

And

MASSCASH SWD (PTY) LTD

RESPONDENT

Neutral citation : Bhekisisa Magagula v Masscash Swaziland (PTY) Ltd
(11/2017) [2017] SZIC 121 (2017)

CORAM

SIPHO L. MADZINANE : ACTING JUDGE

D.P. MMANGO : MEMBER

A.S. NTIWANE : MEMBER

MATTER HEARD : 19/10/2017

DELIVERED : 01/11/2017

J U D G M E N T

1. The Applicant is a former employee of the Respondent. He was employed by the Respondent on the 12th December 2008 and he remained in the continuous employee of the Respondent until he was dismissed on the 15th November 2012. The reasons, proprietor and/or otherwise of the dismissal are not in issue for determination in this matter.

2. After the dismissal of the Applicant by the Respondent, the Applicant reported a dispute of unfair dismissal to the Conciliation, Mediation and Arbitration Commission for conciliation. At CMAC, the parties entered into a Memorandum of Agreement in terms of which the matter was settled.

3. In terms of the Memorandum of Agreement, the Respondent agreed to pay the Applicant a sum of E13,731.65 (Thirteen Thousand Seven Hundred and Thirty One Emalangeni Sixty Five Cents) being in respect of seven (7) months salary, severance allowance and additional notice.
 - (i) Respondent was also to pay a further sum of E500.00 (Five Hundred Emalangen) as a contribution towards legal costs.

 - (ii) The Respondent was to make such payment by way of Electronic Funds Transfer (EFT) to the Applicant's attorney's bank account on or before the 15th July 2016.

- (iii) The Applicant's Attorneys was to provide CMAC with proof of payment on or before the 18th July 2016.
 - (iv) The Memorandum of Agreement was entered into at Manzini on the 12th July 2016 and both parties appear to have signed same together with the commissioner.
4. It is the alleged non-compliance in full with that Memorandum of Agreement by the Respondent that has occasioned these proceedings. It being argued that Respondent only paid a sum of E9,885.55 (Nine Thousand Eight Hundred and Eight Five Emalangi Fifty Five Cents) thereby occasioning a short fall of E4,346.10 (Four Thousand Three Hundred and Forty Six Emalangi Ten Cents) of the agreed amount.
 5. There is no dispute between the parties that indeed the Respondent only paid the Applicant the sum of E9.885.55 (Nine Thousand Eight Hundred and Eighty Five Emalangi Fifty Five Cents).
 6. The Respondent has argued that it deducted a sum of E4,346.10 (Four Thousand Three Hundred and Forty Six Emalangi Ten Cents) after it had sought a tax directive from the Swaziland Revenue Authority which directed it to deduct the sum of E4,346.10 from the agreed amount.

7. According to the Respondent, after receiving the tax directive, it deducted the amount of E4,346.10 from the agreed sum of E13,731.65 and paid it to the Swaziland Revenue Authority. As such, the money in issue in these proceedings is with the Swaziland Revenue Authority. Respondent further argued in its answering affidavit that the Applicant's attorney was informed of the remittance of the money and also furnished with a copy of the tax directive.

8. The Court notes that the Applicant in its founding affidavit did not at all say anything regarding that the deductions was in respect of tax or whether was aware or not. When confronted with such information by the Respondent in its answering affidavit, **(that applicant's attorneys was informed of the deduction towards tax and furnished with a copy of the tax directive)**, it was only then that Applicant said he was not furnished with a tax deductive and that despite constant reminders, respondent refused to furnish Applicant with the tax directive. Applicant further argues that Respondent, given the termination of services of the Applicant cannot be an agent of the Swaziland Revenue Authority against the Applicant.

9. Respondent therefore argues that Applicant should have joined the Swaziland Revenue Authority, as it (Respondent) had a legal duty to implement the tax directive and it did. As such, the matter at this stage can be dealt with between a tax payer and tax authorities.

10. This Court is ceased with an application to register the Memorandum of Agreement dated the 12th July 2016 as an order of court. The application is opposed by respondent on the basis that it complied with same fully.

11. **AD APPLICABLE LAW**

11.1. (a) The Applicant relied on the judgments of **Lucky Mahlalela V Swaziland Royal Insurance Corporation and four others – High Court of Swaziland Case No. 281/2001.**

“ The Court found that the 1st respondent was not obliged or entitled to deduct any amounts from the payment made to the Applicant”.

(b) In **Andrew Mkhonta and 6 Others and Sebenele Sibandze and 4 Others V Swaziland Post and Telecommunication (IC) Case No. 201/2005**, the Court held as follows:

“As the Respondent was no longer the employer of the Applicants, it had no obligation to seek a tax directive”.

(c) The same position was followed by the Court in the judgment of

Gugulethu Nsibande V Lewis Stores (PTY) Ltd – Industrial Court case no. 39/2004.

11.2. This Court fully aligns itself with these decisions of the court i.e that a

former employer cannot be an agent of the tax authority against its former employee.

11.3. In this matter however, as argued by the respondent, there are other factors that the court has to consider to arrive at its decision.

(i) In the judgments relied upon by the applicant's counsel, the tax directives were being sought in respect of awards made by the court not a Memorandum of Agreement. In the Lucky Mahlalela judgment (Supra) the, agreement had already been made an order of court when the employer sought to deduct tax from the amount forming part of the agreement.

(ii) In the judgment of Lucky Mahlalela, the Court said the following:

“There is no allegation that the tax on the exgratia payment has been assessed. Nor is there any allegation that the amount deducted from the payment has been remitted to the commissioner of taxes... I must assume therefore that the amount still remains with first respondent”

(iii) In this matter, Applicant has not stated whether or not the money is still with Respondent nor did it deny it. Applicant was content with only saying respondent was no longer entitled to seek a tax directive as it was no longer an employer. This was despite that respondent had oppositely stated that it had

informed the Applicant's counsel of the tax directive and deduction. Further Respondent stated in its answering affidavit that it has paid over to the Swaziland Revenue Authority the money it deducted.

11.4. This Court finds that the Courts have always considered the aspect of the ability to give effect to the order by the party against the proceedings have been commenced (whether the money is still in possession of the Respondent).

11.5. In **Phyllis Phumzile Ntshalintshali V Small Enterprise Development Company – Industrial Court Case No. 524/2008** his Lordship P.R. Dunseith stated as follows:

(15) *“The other issue in dispute concerns the recovery of income tax which the respondent deducted from the Applicant’s terminal benefits and paid to the commissioner of taxes. The respondent made such deductions in compliance with a tax directive it obtained from the commissioner. Pursuant to the reinstatement order of the court, the applicant has refunded to the respondent the terminal benefits upon which she was taxed. She is entitled to a refund of the tax on such benefits...*

(16) *The Applicant contends that the respondent should recover the tax on her behalf, since it was the respondent who deducted and remitted the tax in the first place, without the involvement of the Applicant.*

(17) The Court is of the view that the Respondent acted as an agent for the Commissioner of taxes in recovering the tax on the terminal benefits paid to the applicant. It is under no legal obligation to now act as agent for the applicant in recovering such tax. The Applicant should herself apply to the Commissioner for a refund of tax paid.”

11.6. It is this Court’s finding therefore that in view of the fact that the money was deducted towards tax and remitted to the Swaziland Revenue Authority as tax, Applicant can follow the money with the commissioner of taxes as it is no longer with the Respondent. It would be a miscarriage of justice if respondent is directed to recover the deducted money from Swaziland Revenue Authority and/or directing Respondent to pay the amount it paid Swaziland Revenue Authority to the employee..

11.7. This Court will not direct that the Applicant join the Swaziland Revenue Authority in these proceedings for two reasons:

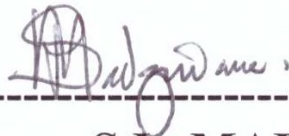
(a) The Applicant is permitted by law to follow certain internal processes with the Swaziland Revenue Authority if aggrieved with tax deductions that have been made.

(b) Secondly, the proceedings before court are for registration of a Memorandum of Agreement between the applicant and the Respondent. The Court will assume that the Applicant is

desirous to execute the order in respect of the amount in dispute in this matter. If the Swaziland Revenue Authority were to be joined, then the relief sought would have to be a different one altogether in as much as the latter is not a party to the Memorandum of Agreement.

12. The Court accordingly dismiss the application and there is no order as to costs. The Applicant is advised to follow internal processes with the Swaziland Revenue Authority if aggrieved.

The Members agree.



S.L. MADZINANE
ACTING JUDGE – INDUSTRIAL COURT

FOR APPLICANT : MR. V. NHLABATSI
(V. NHLABATSI ATTORNEYS)

FOR RESPONDENT : MR. S. MNISI
(S.S. MNISI ATTORNEYS)