IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 79/2016**

In the matter between:

MBONI DLAMINI **1ST APPLICANT**

LOMALUNGELO DLAMINI **2ND APPLICANT**

CELUMUSA DLAMINI **3RD APPLICANT**

And

MINISTRY OF ECONOMIC PLANNING

& DEVELOPMENT **1ST RESPONDENT**

NATIONAL AUTHORISING OFFICER **2ND RESPONDENT**

ATTORNEYGENERAL **3RD RESPONDENT**

Neutral Citation : Mboni Dlamini 8 2 Others vs Ministry of Economic Planning & Development & 2 Others [2017] SZIC 42 (09 June 2017)

CORAM: : **M. SIBANDZE ACTING JUDGE**
(Sitting with Ms. D. Nhlengethwa & Mr. P.S. Mamba Nominated & Alternate Members of the Court)

DATE HEARD **:** **05th June 2017**

DATE HANDED DOWN : 09th June 2017

Summary

Civil Litigation - Employer's rights to deduct monies paid to employees as wages, in error.

Findings - The employees were paid monies due to The Swaziland national Provident Fund and monies in respect of a medical aid allowance incorrectly when these were benefits to be paid to the Provident Fund and a medical aid fund respectively.

The monies were later reclaimed from government by the project funder, the European Union. Employer was entitled after consultation to deduct these monies from wages due to the employees, in terms of Section 56 (1) (e) of the Employment Act.

JUDGMENT

1. The Applicants have brought an Application seeking the following relief;

   Directing the 1st and 2nd Respondents to pay the Applicants their gratuities in respect of the Support to Education and Training Programme, Estimate B.

2. The Applicants were employed by the Government of Swaziland in various capacities under the Support to Education Programme, a programme funded by the European Union on, fixed term contracts from the 01st November 2012 to 31st December 2013 and again from 02nd April 2014 to the 31st January 2015.

3. In terms of each of the contracts, the Applicants were entitled in terms of Paragraph 7 thereof, upon completion of the fixed term contracts to a gratuity of 25% of the basic annual salary over the duration of the contracts.

4. After the first contract term the Applicants duly received their gratuities but during the second contract term they were informed in writing by the National Authorizing Officer for the programme that monies inappropriately paid to them in respect of medical aid, and SNPF payments and in respect of the 2nd Applicant, excessive use of her mobile, would be deducted from them from the gratuity due to them and they were given a period of 10 days to lodge any objections.

5. It is common cause that all the Applicants received these letters from the National Authorizing Officer and it is further common cause that none of them raised any objection.

6. It emerges from the pleadings that the 1st and 2nd Respondents deny having made the deductions as indicated in the letters to the Applicants from the National Authorizing Officer and state instead that they merely withheld the payments pending the outcome of Disciplinary Action against the 3 Applicants.

7. It further emerges that in respect of each of the Applicants, the gratuity amount is higher (albeit slightly) than the amounts to be deducted, as reflected by the letter from the National Authorizing Officer, but in each case the entire gratuity was withheld, apparently on the basis that the 3 Applicants were responsible not just for overpayments to themselves but to other employees which resulted in the Swaziland Government having to repay The European Union the amount of E 369 000.00 because of the alleged misconduct of the Applicants.

8. From the outset may we state with no hesitation that we find the denial, by the National Authorizing Officer that there were deductions made against the gratuities of the Applicants' to be disingenuous.

9. It is clear from a reading of the letters written to each of the Applicants that at least part of the gratuities were deducted from in respect of the individual misdirected payments to each of the 3 Applicants, and it would appear that the balance was withheld for the reasons as alleged by the Deponent to the Respondents' Affidavit.

10. Although this was not the defence raised by the Respondents in their Answering Affidavit, which actually was devoid of any defence for the withholding of the gratuities it was apparent from the facts that the actual conduct of the Respondent of deducting monies erroneously paid to employees from wages due to employees is justifiable in terms of Section 56(1) (e) of the Employment Act of 1980.

11. The court *meru motu* raised the question of Section 56 (1) (e) to Applicants' Counsel Mr. Jele and whilst he conceded that the monies deducted were indeed paid to the Applicants in error he argued that

this notwithstanding, the gratuity was not a wage and therefore is not covered by the ambit of Section 56 (1) (e). We disagree.

12. "Wages", are defined in the Employment Act as ***"remuneration or earnings including allowances however designated or calculated, capable of being expressed in terms of money and fixed by mutual agreement or by law which are payable by an employer to an employee for work done or to be done under a contract of employment or for services rendered or to be rendered under such contract".***

13. Clearly the gratuities in this context form part of the wages and stand to be subject to Section 56 (1) (e).

14. Mr. Jele for the Applicants then argued that even if the gratuity is part of the wage as contemplated by Section 56 (1) (e), the gratuity cannot be subject to deduction without consultation with the Applicants.

15. We are in agreement with Mr. Jele that some form of consultation may be necessary or at the very least notification to the employee, however we need not decide that in this matter because the employer wrote to each of the Applicants and informed them of its intention to recover the misdirected payments from each of them, giving them 10 days to object in terms of the internal grievance procedures, which they did not do.

16. We find that the Respondent was entitled to deduct the amounts reflected in Annexures C1 and C2 in respect of the 3rd Applicant and 2nd Applicant respectively and Annexure BS2 in respect of the 1st Applicant, however the balance of the gratuities should have been paid to the Applicants immediately thereafter and there was no legal justification for the balance to be withheld without approaching the court.

17. Mr. Jele further argued the cellular phone excess cannot be deducted in terms of Section 56 (1) (e). It is clear that in this instance, whilst the employer cannot claim a refund from the employees' salary in terms of Section 56 (1) (e) in respect of excess mobile usage in

violation of the employer's cellular phone policy, it was open to the Applicants to challenge the employer in terms of the internal grievance procedures and deny the over – usage. In fact they were invited to do so. The applicants have not made any separate case regarding the deduction in respect of cellphone usage, leaving the court in the dark on whether the employer acted in accordance with its own polices. Accordingly, the court will not interfere with this aspect of the deductions either.

18. The court must mention the unconscionable conduct of the 1st Applicant Mboni Dlamini who, on the face of it, attempted to mislead the court on Affidavit, by saying in his Founding Affidavit that he had not been notified of or invited to a disciplinary hearing in respect of the alleged misconduct surrounding the misdirected payments.

19. It emerged from the Respondents Opposing Affidavit that in fact this was not true.

20. Attempts to serve Mr. Dlamini were made on at least two occasions by one Ms. Dudu Zwane and Sikhumbuzo Dlamini and the 1st Applicant refused to accept such service.

21. The Respondents allege that 1st Respondent was also telephoned by the Chairman of the disciplinary panel to attend the hearing, which he refused to do. The 1st Respondent half-heartedly denies these allegations in general terms.

22. He admits that Sikhumbuzo Dlamini attempted to serve him and states that he asked him to request the Chairman of the disciplinary hearing to serve his superiors at the Ministry of Education and Training so that they would know where he is during his absence to attend the hearing. This smacks of further dishonesty. Not only is it illogical, but why would the 1st Respondents superiors need to know about his absence for a hearing he would not attend and clearly had no intention to? Furthermore, why would he simply not accept service and inform his superiors?

23. The 1st Applicant correctly points out that the allegation that Mr.

Tshabalala telephoned him is hearsay, but he does not apply for it to be struck out, nor does he deal with it, leaving the court to accept that it is indeed true.

24. The court hereby censures the conduct of Mr. Mboni Dlamini in the strongest possible terms however we fall short of finding that Mr. Dlamini has committed perjury. He would be entitled to a hearing before such a finding can be made, however due to his conduct he will not be granted the costs of his partially successful application.

25. We make the following order;

1 The 1st Respondent was entitled to make the deductions it did in terms of Annexures C1 and C2 to the Founding Affidavit and Annexure BS 2 to the Opposing Affidavit.

2 Any residue to the gratuities are to be paid to the Applicants forthwith.

3 The 2nd and 3rd Applicants are awarded their portion of the costs of this Application.

4 No order is made as to costs in respect of 1st Applicant.

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The Members agree.

MUSA M. SIBANDZE
ACTING JUDGE - INDUSTRIAL COURT

For the Applicant: Mr. N.D. Jele (Robinson Bertram Attorneys)

For the Respondent: Mr. K. Nxumalo (Attorney General's Chambers