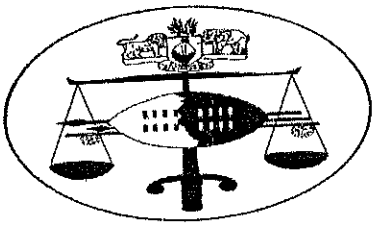

IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE Case No. 338/2022

In the matter between:

NOMVUYO SIPHEPHO Applicant

And

MONTIGNY INVESTMENTS LIMITED Respondent

In re:

NOMVUYO SIPHEPHO Applicant

And

MONTIGNY INVESTMENTS LIMITED Respondent

Neutral Citation: Nomvuyo Siphepho vs. Montigny Investments Limited *in re:* Nomvuyo Siphepho vs. Montigny Investments Limited (338/2022) [2023] SZIC 24 (06 April 2023)

Coram: **V.Z. DLAMINI – JUDGE**
(Sitting with Mr. D. Mncina and Mr. D.P.M. Mmango – Nominated Members of the Court)

LAST HEARD: 15 March 2023

DELIVERED: 06 April 2023

Summary: *The Applicant filed an urgent application seeking an order that Respondent refund her monies deducted from her salary without prior consultation. Respondent opposed the application firstly on the basis that the matter was not urgent as financial prejudice is not a ground for urgency. Another ground for opposing the application on the merits is that the deduction was to recover monies overpaid to the Applicant which she received the previous month and the Employment Act 1980 permitted such deduction without the Respondent first approaching the Court.*

Held: *It is an established principle that, generally financial prejudice is not a ground for urgency, but where the employer/employee relationship still subsists, an employee may approach the Court by way of urgency to challenge an unlawful deduction from her salary.*

Held: *Further, that in terms of the Employment Act the Respondent has the right to deduct the overpayment from Applicant's salary provided it proves that the employee was not entitled thereto and the overpayment was made in error. Respondent proves all the requirements of a claim under the condictio indebiti and Applicant fails to prove legal right to*

the monies deducted. Punitive deduction from wages of employees without a hearing distinguished from facts of present.

JUDGMENT

INTRODUCTION

[1] The Applicant is employed by the Respondent as Legal Officer. On the 20th October 2022, the Respondent suspended the Applicant without pay pending a disciplinary hearing, but the suspension was later varied to one with pay after the latter challenged her interdiction from work without pay in Court. Nevertheless, in January 2023, a certain portion of the Applicant's salary was withheld by the Respondent culminating in her filing an urgent application on the 21 February 2023 seeking payment of the sum of E9, 650. 73 withheld by the Respondent from her salary in January 2023. Respondent opposed the application by raising one point of law on urgency as well as answering the merits.

POINT OF LAW

[2] The Respondent contends that the matter is not urgent because the Applicant relies on financial prejudice as her ground for urgency and yet it is an established rule that economic prejudice occasioned to an employee due to an employer's refusal to pay her salary is not a ground for urgency. Moreover, the Respondent alleged that prior to filing the urgent application the parties exchanged correspondence on the issue, but this information was intentionally withheld from the Court for the sole purpose of clouding the issues. It was

further stated by the Respondent that the Applicant is still an employee and was aware of the internal avenues to approach to have her concerns addressed.

[3] In response to the point of law, the Applicant argued that it was trite that the unlawful withholding of a salary while the employment relationship still subsists is a ground for urgency. Moreover, it was Applicant's contention that the communication that Respondent alludes to occurred after the deduction of her salary and in any event, the explanation proffered by the Respondent for withholding her salary was legally inexcusable.

MERITS

[4] The Applicant alleged that her salary was unilaterally withheld by the Respondent without consulting her and as such she was entitled to the order sought; any explanation by the Respondent for the deduction was inconsequential because it came after the unlawful deduction.

[5] On the other hand, the Respondent alleged that firstly, the deduction was an amount of **E15, 774.91** as opposed to **E 9, 650. 73** claimed by the Applicant. Secondly, the deduction came about because in December 2022, the Applicant was overpaid by the sum **E15, 774.91** and this was realized when the salaries for January 2023 were being processed; consequently, the Respondent, as was entitled by law, deducted that amount from the Applicant's salary, hence the shortfall of **E15, 774.91** and not **E 9, 650. 73.** Thirdly, Respondent alleged that the reason for the deduction was explained to the Applicant prior to her filing the application.

ARGUMENTS

URGENCY

[6] The Respondent's counsel argued that the Applicant had failed to allege facts that render the matter urgent and reasons why she could not be granted redress in due course, but relied on financial prejudice, which is not a ground for urgency. Moreover, the Applicant neglected to place sufficient information before the Court in order for it to make an informed decision. In support of her arguments, counsel relied on the case of **Graham Rudolph v Mananga College (IC Case No. 92/2007).**

[7] In contrast, the Applicant's counsel submitted that it was trite that in a case where the employer/employee relationship still subsists, failure to pay the wages of the employee is a ground of urgency. He referred to the case of **Nelsiwe Fakudze v Swaziland Business Coalition on Health & AIDS (339/2016) SZIC 58 (DECEMBER 01, 2016)** as authority for the aforesaid principle.

MERITS

[8] The Applicant's counsel contended that an employer is obliged to remunerate an employee who has tendered services and deductions from an employee's remuneration is prohibited unless the employee has agreed to it in writing for a specified debt, or such deduction is permitted or required by law, collective agreement, Court order or Arbitration Award, or to reimburse the employer for losses caused by the fault of the employee, but only after the latter has been given a fair hearing. In the present case, the deduction was unilateral and as such unlawful.

[9] As authority for the aforegoing principles, the Applicant's counsel referred to *GROGAN J: WORKPLACE LAW 9th Edition* and the case of **Aaron Fakazi Kunene v The Principal Secretary – Ministry of Agriculture and Co-operatives & Others (IC Case No: 296/2004).**

[10] The Respondent's counsel argued that the Applicant had failed to prove that an amount of **E 9, 650. 73** was deducted from her salary; she could not produce any payslip showing the alleged deduction. Counsel further submitted that in actual fact, a sum of **E15, 774.91** was deducted from the Applicant's salary and the said deduction was authorized by **Section 56 (e)** of the **Employment Act, 1980** because it was a set off of an overpayment that was made on her salary the previous month. The Respondent need not come to Court prior to the deduction; however, the employee could challenge the deduction.

[11] It was counsel for the Respondent's contention that the employer had proved the three requirements for a valid claim of recovering the amount paid in error to the Applicant, which are, that money was paid to the Applicant, there was no legal obligation to pay her and that it was paid by mistake. Counsel referred to the case of **Frame v Palmer 1950 (3) SA 340 (C) at 346 D-H** as authority for the aforegoing principles.

[12] The Respondent's counsel further submitted that the Applicant has not suffered any prejudice as a result of the deduction because she had received

her salary for four months prior to the deduction; should the Court order that the amount be refunded to the Applicant, such would amount to an unjust enrichment on her part.

[13] It was further argued by the Respondent's attorney that the Applicant was consulted regarding the authorized deductions. In any event, the Applicant was furnished with payslips, which have notes that adequately explain the variation in her salary, she therefore cannot claim that she was not aware of the variations.

ANALYSIS

URGENCY

[14] The Respondent's point of law on urgency is based on the fact that the Applicant premised her application on financial prejudice. According to the Respondent, it is an established principle in this jurisdiction that economic prejudice is not a ground for urgency. Generally, financial prejudice is not a ground for urgency, but it is also trite that where the employer/employee relationship still subsists, failure to pay an employee's wages is a ground for urgency. The aforegoing principle was stated in the following cases: **Graham Rudolph v Mananga College (IC Case No: 94/2007)**; **Bonkhe Lukhele v SDFC (IC Case No: 39/2008)**; and **Nelsiwe Fakudze v Swaziland Business Coalition on Health & AIDS (above)**.

[15] Moreover, it was argued by the Respondent that the Applicant did not approach the Court immediately after becoming aware of the deduction, but engaged the employer; hence, the urgency became stale. Again, it is an

established principle that urgency is not lost by an expeditious extra-curial attempt to settle a dispute; See: **Vusi Gamedze v Mananga College (IC Case No: 267/2006)** and **Lwazi Mdziniso v CMAC (IC Case No: 150/2006).**

[16] The deduction from the Applicant's salary was effected on the 25th January 2023 and on the 30th of the same month, her attorneys wrote a letter of demand to the Respondent; the latter responded to the letter of demand on the 1st February 2023 and explained the circumstances leading to the deduction. On the 2nd February 2023, the Applicant and the Respondent's Group Human Resources Manager exchanged emails on the same subject; the present application was then lodged in Court on the 21st February 2023. In the circumstances of the case, we do not think the lapse of two weeks from the time the duo exchanged emails constitutes undue delay. In the premise, the point of law on urgency falls to be dismissed.

MERITS

[17] On the subject of authorized deductions from the salary of an employee, **Section 56 (1)** of the **Employment Act** reads as follows:

"Authorised deductions from wages.

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

(a) any amount due by the employee in respect of any tax or rate which the employer is required to deduct from the wages of an employee under any law;

(b) any amount due by the employer in respect of a contribution to the Eswatini National Provident Fund;

(c) the actual or estimated cost to the employer of any materials, clothing (other than protective clothing required to be supplied by the employer under any law or under the provisions of a collective agreement), tools and implements supplied by him to the employee at the latter's written request and which are to be used by the employee in his occupation;

(d) any money advanced to the employee by the employer, whether paid directly to the employee or to another person at the employee's written request, in anticipation of the regular period of payment of his wages;

(e) any amount paid to the employee in error as wages in excess of the amount due to him." [Emphasis added].

[18] The provisions of **Section 56 (1) (e)** above were interpreted by the Court in the case of **Aaron Fakazi Kunene v The Principal Secretary – Ministry of Agriculture and Co-operatives & Others** (above) at paragraphs **17** to **18** as follows:

> *"The Act thus authorises the employer to set off money which it claims was overpaid in error as wages, by deduction from the wages due to an employee. The employer does not have to first come to court and establish its claim of condictio indebiti. This does not preclude an employee from challenging the right of the employer to make the deduction(s) from his wages by way of set off, and if he does so the employer must prove the requirements of the condictio indebiti action."*

[19] At paragraphs **20** to **21** of the **Aaron Fakazi Kunene** case (above), the Court proceeds to observe that:

"The requisites for a valid claim under the condictio indebiti were set out by Van Zyl J in Frame v Palmer 1950 (3) SA 340 (C) at 346D-H in these terms: "(a) The plaintiff must prove that the property or amount he is reclaiming was transferred or paid by him or his agent to the defendant. (b) He must prove that such transfer or payment was made indebite in the widest sense (i.e. that there was no legal or natural obligation or any reasonable cause for the payment or transfer). (c) He must prove that it was transferred or paid by mistake." With regard to the third requirement set out in (c) above, namely proof that the payment was made by mistake, it is now established law that the mistake:

May be a mistake of fact or of law; and must be excusable. In the case of WILLIS FABER ENTHOVEN (PTY) LTD v RECEIVER OF REVENUE AND ANOTHER 1992 (4) SA 202 (A) at 224, the SA Court of Appeal ruled that: "Our law is to be adapted in such a manner as to allow no distinction to be drawn in the application of the condictio indebiti between mistake in law (error juris) and mistake of fact (error facti). It follows that an indebitum paid as a result of a mistake of law may be recovered provided that the mistake is found to be excusable in the circumstances of the particular case." What is meant by an "excusable" error or mistake? In Rahim v Minister of Justice 1964 (4) SA 630 (A) the Court held that an amount of money paid indebite in mistake of fact could not be recovered by means of the condictio indebiti where the conduct of the payer was found to have been 'inexcusably slack' (at 635E-F). As appears from 634A-C of the report, the Court adopted the view of Glück and Leyser that, to quote Leyser, crassus et inexcusabilis error condictionem indebiti impedit; and Voet's

statement that "the ignorance of fact should appear to be neither slack nor studied (nec supina nec affectata)."

[20] Through copies of the Applicant's payslips for the months of October and November 2022, the Respondent was able to show that the Applicant was refunded on the latter month a sum of **E15, 774.91** that was deducted from her salary on the previous month. The Applicant's denial of knowledge of the aforesaid occurrences in her Replying Affidavit is quite strange because in her Founding Affidavit she alleges that she was suspended without pay on the 20th October 2022, but her salary was reinstated after she approached the Court in an earlier application.

[21] The Applicant's allegations in the Founding Affidavit are consistent with the Respondent's account in its Answering Affidavit. The Applicant's version cannot gainsay the latter's account, in light of her failure to even annex payslips supporting her version.

[22] The Respondent also attached copies of Applicant's payslips for December 2022 and January 2023 showing the overpayment and deduction of **E15, 774.91.** It bears mentioning at this point that, the Applicant's assertions that she earns **E24, 391.97** per month and that an amount of **E9, 650.73** are not supported by any payslip. She just makes bare assertions; these cannot overshadow the payslips that were produced by the Respondent.

[23] As it was entitled by law, the Respondent acted swiftly to set off the December 2022 overpayment with the deduction of January 2023; it was not slack after realizing the error. Other than the contention that the money should be returned to the Applicant because the Respondent never consulted her prior to the deduction, the Applicant had no other legal right to the money deducted; her counsel even conceded that fact.

[24] In a plethora of decisions, the Court has ordered the employers to refund employees their wages that were unlawfully withheld without a hearing, cases that come to mind are that of **Churchill Dlamini v Swaziland Government (IC Case No: 299/04)** and **Sabelo Mncina v Ellerines Furnishers (IC Case No: 41/2007)**. These cases are distinguishable because not only did the employers fail to hold a prior hearing, the basis of the deductions was alleged negligence and poor performance respectively; the Court had no hesitation in ordering the refunds under those circumstances.

[25] In the present case, the rationale for the deduction is not punitive, but is the recovery of money overpaid to an employee in error; she did not earn the money she now demanded to be refunded. We accept that it is a good practice to notify the employee of the deduction based on the erroneous overpayment; however, this should be done out of courtesy and not premised on a requirement that the employee is entitled to make prior representations whether the deduction should be made or not. Importing such a requirement under such circumstances would be contrary to the provisions of **Section 56 (1) (e) of the Employment Act.**

[26] Even if the Court were to import the requirement of a hearing in the present case and order that the Applicant be refunded, it would serve no purpose, but instead would result in circuitous litigation because the Respondent would again deduct the overpayment after hearing the Applicant leading to the latter approaching the Court again. Such a scenario should be discouraged by the Court as it leads to unnecessary and protracted litigation.

CONCLUSION

[27] In the aforegoing, Court would dismiss the application.

[28] In the result, the Court orders as follows:

[a] The application is hereby dismissed.

[b] No order as to costs.

One member agrees, the other member disagrees.

V.Z. DLAMINI

JUDGE OF THE INDUSTRIAL COURT

For Applicant : Mr. G. Hlatshwayo
(MLK Ndlangamandla Attorneys)

For Respondent : Ms. M. Hillary
(M. J. Hillary Attorneys)