REPUBLIC OF SOUTH AFRICA

Not Reportable

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT PORT ELIZABETH)

Case Nos: P578/11

P579/11

P580/11

In the matter between:

ZIYANDA PATIENCE CENGE **First Applicant**

LULAME SWEETNESS KINASE **Second Applicant**

BUSISWE WELEKAZI MZAMO **Third Applicant**

and

THE MEC, DEPARTMENT OF HEALTH,

EASTERN CAPE **First Respondent**

THE HEAD OF DEPARTMENT, DEPARTMENT
OF HEALTH, EASTERN CAPE **First Respondent**

JUDGMENT

LAGRANGE, J:

1. This matter consolidates three separate applications brought by each of the individual applicants respectively, relating to nearly identical claims for urgent relief

2. The applicants have approached the court on an urgent basis to prevent the respondents from making deductions from their salaries for a refund of a special skills allowance paid to them between 1 July 2010 and 31 March 2011.

3. They were notified on or about early August 2011, that they were being translated to the new Occupationally Specific Dispensation with effect from 01 July 2010. In the same letter they were advised that they would have to repay the Scarce Skills Allowance they received from 01 July 2010, which would be 'recovered from the first lump sum arrear salary' they would be paid.

4. On 7 November 2011, they received another letter adviseing them that the amount of the Scarce Skills Allowance they had previously received over nine months would be recovered in six months starting from November 2011.

5. They made representations to the respondents about the impact of such large deductions, and also queried why the deduction had apparently not been made from the first arrear salary payment made as advised in the letter of August. Lastly, they complained that it appeared that the amount the respondents proposed to deduct from their salary was the gross amount of the allowance and not the nett amount after tax, which is what they received at the time. They made representations through their attorney but the respondents did not address their queries and concerns.

6. They allege that the proposed deductions will be made contrary to the section 34 of the Basic Conditions of Employment Act, 75 of 1997 which states:

"34(1)

An employer may not make any deduction 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.

(2)

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 of 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.

(3)

A deduction in terms of subsection (1)(a) in respect of any goods purchased by the employee must specify the nature and quantity of the goods.

(4)

An employer who deducts an amount from an employee's remuneration in terms of subsection (1) for payment to another person must pay the amount to the person in accordance with the time period and other requirements specified in the agreement, law, court order or arbitration award.

(5)

An employer may not require or permit an employee to—

(a)

repay any remuneration except for overpayments 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.

7. In terms of section 34 it is clear that the only basis on which the

employer would be entitled to make the deductions would be under the provisions of subsections 34(1) (a) or (b) or 35(1)(a).

8. In the respondents letter to employees it implies that the amount can be deducted in terms of Resolution 2 of 2010 of the Public Health and Social Development Sectoral Bargaining Council. The only provision of that agreement which might be material to the matter is clause 4.1.9, viz:

   "*4.1.9Consolidation of Special Skills Allowance*

   4.1.9.1 The Special Skills Allowance payable to certain categories of health practitioners who occupy a post in a therapeutic, diagnostic or related allied health profession in terms of the Public Health and Welfare Sectoral Bargaining Council (PHWSBC), Resolution 1 of 2004 shall be terminated on implementation of this agreement.

   4.1.9.2 The Special Skills Allowance is incorporate into the OSD remuneration structure with effect from 1 July 2010."

9. Clearly these provisions envisage that the special skills allowance will be treated as part of the retrospectively implemented OSD remuneration structure. However, nothing in this provision suggests how or when the amount will be recovered, or whether previous special skills allowance payments would simply be offset against the backpay for the OSD remuneration adjustment. While I agree that the provision indicates that an employee would not be entitled to the backpay for arrear OSD remuneration and the special skills allowance, the agreement captured in the resolution does not deal

with the mechanics of how the offset would be implemented. The respondent has simply chosen to do it by way of deductions over six months.

10. It is clear the amounts paid to employees as special skills allowances cannot be deemed to have been overpayments made in error and therefore section 34(5)(a) does not apply.

11. In the circumstances there is no evidence that either section 34(1) or 34(5) of the BCEA can be relied on by the respondents to lawfully make the proposed deductions. The most that can be said is that the collective agreement contained in Resolution 2 of 2010 implicitly acknowledges that employees are only entitled to receive the OSD allowance retrospective to 1 July 2010, *less* the amount previously received as a special skills allowance for the period 1 July 2010 and 31 March 2011.

12. In his oral submissions, the applicants' representative indicated that the applicants were willing to repay the special skills allowance within a 12 month period, provided the amounts deducted are the nett, after tax, amounts of the allowances.

13. This proposal is the kind of agreement that the respondent might have reached if it had been willing to engage the employees, as they ought to have done.

Conclusion

14. I am satisfied that the deductions which the respondents propose to

make would be made in breach of the provisions of section 34 of the BCEA and the applicants are entitled to prevent the same taking place by way of an urgent interdict, given that the amounts are not inconsiderable.

15. The application was only made necessary by the respondents failure to engage with the applicants to agree on a reasonable repayment period and in the circumstances there is no reason they should not be entitled to their costs.

Order

16. In the circumstances,

16.1. The applications brought under the respective case numbers P578/11, P579/11 and P580/11 are consolidated in these proceedings.

16.2. The matter is dealt with as one of urgency and departure from the normal provisions of Rule 7 of the Labour Court Rules in so far as time limits are concerned is condoned.

16.3. The respondents are prohibited from deducting from their monthly remuneration the amounts owing by the applicants for Special Skills Allowances received by them for the period 1 July 2010 and 31 March 2011over a six month period commencing in November 2011;

16.4. The respondents may only deduct from their monthly

remuneration the amounts owing by the applicants for Special Skills Allowances received by them for the period 1 July 2010 and 31 March 2011over a twelve month period commencing in December 2011, each deduction being 1/12 (one twelfth) of the amount of the special skills allowance received by each applicant for the period 1 July 2010 and 31 March 2011 and still owing to the respondents at the date of this judgment, less any tax paid on that allowance.

16.5. The respondents must pay the applicants' costs of the consolidated application.

ROBERT LAGRANGE
JUDGE OF THE LABOUR COURT

Date of hearing : 5 December 2011
Date of judgment: 6 December 2011
(In chambers)

Appearances:

For the applicants : Mr K Nondabula

No appearance for the respondents