THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no.: J 1777/12

In the matter between

POPCRU obo AN TSHAKA	Applicant
And	
MINISTER OF CORRECTIONAL SERVICES	First Respondent
NATIONAL COMMISSIONNER OF THE CORRECTINOAL SERVICES	Second Respondent

Heard: 19 November 2015

Delivered: 25 January 2016

[1] The applicant seeks an order declaring a deduction of R 9181.03 from his salary effected in June 2012 to be unlawful. He also seeks to have financial circular issued by the respondent (financial circular 5 of 2010/2011), in terms of which the deduction was effected, declared unlawful.

[2] The material facts are not in dispute. The applicant is employed by the second respondent. The terms of his employment (along with many others) were the subject of a report of a commission of enquiry (the White Commission) into promotions within the department during 1994. The applicant's appointment was found to be irregular and set aside, a conclusion that he does not challenge.

[3] The second respondent has sought, over many years, to recover the remuneration paid to the applicant on account of his irregular promotion. During 2004, the second respondent advised the applicant that an amount of R 19 399.50 remained outstanding in respect of overpaid salary, and that arrangements should be made to settle the debt. It would appear that the applicant agreed to a deduction from his remuneration of R200 per month. In May 2011, the second respondent addressed a letter to the applicant and advised him that he should make written submissions in 'reviewal' of his monthly instalment toward the liquidation of his debt, and that a failure to do so would result in a 'unilateral decision' being taken based on available information. The letter states further that 'It also needs to be mentioned that the 70% principle will also be implemented towards recovery of debts with effect from June 2011.05.11'. Attached to the letter was the financial circular that is in part the subject of the present application.

[4] The circular is entitled 'Reviewal of monthly instalments towards recovery of departmental debts'. It provides, amongst other things, that regional commissioners should ensure that monthly instalments towards the recovery of outstanding departmental debts are reviewed and increased on an annual basis. Specifically, the circular provides that 70% of service bonuses paid must be used to reduce the outstanding debts of relevant

officials there is no specific indication of the papers before me as to what a service bonus might comprise, but it would appear to be something akin to a 13th cheque.

[5] It is not disputed that the applicant failed to respond to the invitation to make submissions regarding a review of the monthly deduction from his remuneration, and that he did not respond to the terms of the circular.

[6] The applicant's payslip dated 4 June 2012 indicates that an amount of R 9181.03 was deducted from his remuneration. He had been warned of this eventuality in a letter addressed to him on 29 May 2012 when the area commissioner advised him that the amount concerned would be deducted from his service bonus in June 2012 to reduce the level of the applicant's indebtedness to the second respondent.

[7] The applicant's case is that the deduction was unlawful because it infringed the provisions of s 34 of the Basic Conditions of Employment Act, 1997 (BCEA).

[8] Section 34 reads as follows:

(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 date specified in the agreement; or

(b) the deduction is required or permitted in terms of a law, collective agreement, court order arbitration award.

(2) A deduction made 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.

[9] In particular, the applicant submits that he did not agree in writing to the deduction, that his liability for the debt had not been determined by a court or other tribunal, or in terms of any court order or arbitration award and that the amount deducted exceeded 25% of the remuneration paid to him.

[10] The second respondent contends that the deduction was lawful and relies on the provisions of s 34(1) (b) of the BCEA, and more particularly on the provisions of s 38 of the Public Service Act, 1994 (PSA). That provision deals with the wrongly granted remuneration and provides as follows:

(1)(a) If an incorrect salary, salary level, salary scale or reward is awarded to an employee, the relevant executive authority shall correct it with effect from the date on which it commenced.

(b) Paragraph (a) shall apply notwithstanding the fact that the employee concerned was unaware that an error had been made in the case with the correction amounts to a reduction of his or her salary.

(2) If an employee contemplated in subsection (1) has in respect of his or her salary, including any portion of any allowance or any other remuneration or any other benefit calculated on his or her basic salary or salary scale or awarded to him or her by reason of his or her basic salary –

(a) been underpaid, an amount equal to the amount of the underpayment shall be paid to him or her, and that other benefit which he or she did not receive, shall be awarded to him or her as from a current date; or

(b) been overpaid or received any such other benefit not due to him or her –

(i) An amount equal to the amount of the overpayment shall be recovered from him or her by way of the deduction from his or her salary of such instalments as the relevant accounting officer may determine if he or she is in the service of the state, or, if he or she is not so in service, by way of deduction from any monies owing to him or her by the state, or by way of legal proceedings, or partly in the former manner and partly in the latter manner.

[11] The respondents' uncontested version is that the applicant's promotion to the rank of sergeant (also referred to as "correctional officer grade 2") was found to be irregular and set aside, and that he reverted to the lower rank and salary of a warder, also known as a "correctional officer grade 3". It is also not disputed that the deduction of the contested sum from the applicant's salary during June 2012 was in part settlement of an overpayment that was occasioned by the applicant's irregular promotion. As I have indicated, the overpayment in salary has never been in dispute between the parties, nor the extent of the applicant's indebtedness to the second respondent.

[12] That being so, in my view, the provisions of s 34 (2) of the BCEA do not apply, since that subsection relates only to losses or damages suffered by an employer and an attempt by the employer to recover those losses or damages that it has suffered consequent on any act by the employee. This is what distinguishes the present matter from the factual circumstances that prevailed in *Police and Prisons Civil Rights Union obo Moyo v Minister of Correctional Services & another* (2013) 34 ILJ 992 (LC). In that matter, the court held that the applicant had established a clear right not to have deductions made in respect of a loss consequent on damage allegedly caused by the applicant to a vehicle owned by the respondent. The present application does not concern any loss or damage occasioned by the

applicant; it concerns no more than an overpayment of salary consequent on an irregular appointment. The lawfulness of the deduction thus falls to be determined by reference to s 34 (1) (a).

[13] The respondents concede that the applicant did not agree in writing to the deduction. As I have indicated, they rely on the contention that the deduction was made pursuant to an overpayment of salary as contemplated by s 38 of the PSA that permits the deduction and was thus permitted by law. I agree. Section 38 (2) (b) clearly permits the recovery of any overpayment to an employee in the service of the state to be recovered by way of deduction in instalments, as determined by the relevant accounting officer. In the present instance, the financial circular issued by the chief financial officer provides in effect for a deduction of up to 70% of any service bonus to reduce outstanding debt. The deduction effected from the applicant's remuneration was effected in accordance with this provision. Further, the applicant was afforded an opportunity to make submissions before the deduction was made. He failed to do so. In short, the deduction was permitted by law for the purposes of s 34(1) of the BCEA.

[14] To the extent that the applicant relies on s 34 (2) of the BCEA to submit that the deduction was unlawful because it exceeded 25% of his remuneration for the month of June 2012, for the reasons stated above, s 34 (2) has no application.

[15] To the extent that the applicant seeks an order declaring the financial circular to be unlawful, the applicant relies only on s 34(2) (d), i.e. the limit of 25% of the employee's remuneration payable in money on the total amount of any deduction, in support of this contention. The applicant has not made out a case to the effect that the circular in its entirety offends s 34 (2) of the BCEA. As the present case illustrates, not all deductions fall to be regulated by s 34(2). Even where the subsection does apply (as it did in *Moyo's* case) it does not necessarily follow that in every instance, the 25% ceiling will be exceeded. There is accordingly no basis for the broad

declaratory order that the applicant seeks. The legitimacy of each deduction must necessarily be determined on its own merits.

[16] Finally, in relation to costs, there is no reason why costs ought not to follow the result.

I make the following order:

1. The application is dismissed, with costs.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

APPEARANCES

For the applicant: Mr. J. Nysschens of Grosskopt Attorneys

For the third respondent Adv. R. Ramaloele, instructed by The State Attorney Pretoria