IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C141/20

In the matter between:

HEALTH AND WELFARE SECTOR

EDUCATION & TRAINING AUTHORITY Applicant

and

NOSISA MAYOSI 1st Respondent

THE SHERIFF FOR DISTRICT OF GERMISTON 2nd Respondent

Date heard: 11 November 2020 on the papers

Delivered: 25 March 2021 by means of scanned email

JUDGMENT

RABKIN-NAICKER J

[1] On the 20 March 2020, Moshoana J handed down an order as follows:

> "1. That the writ of execution issued by the Registrar of this Court under case number WECT 2926-2019 and the notice of attachment issued by the Second Respondent dated 20 February 2020, be stayed pending the final determination of the matter.

2. That the Respondents serve and file answering affidavits on or before 27 March 2020.

3. That the Applicant serve and file its replication (if any) on or before 3 April 2020."

[2] Costs were to stand over for later determination and the Registrar set the matter down on the 11 November 2020. An answering affidavit was filed on the 27 March 2020, and a reply on the 3rd of April 2020. The second respondent has filed a Notice to Abide.

[3] The applicant and the first respondent entered into a settlement agreement under the auspices of the CCMA under Case number WECT2926-19. The material terms of the agreement were that the employer (the applicant) herein was to pay the first respondent an amount of R82 639, 97 by no later than 14 July 2019. The amount was to be paid into a Nedbank account identified by its number and branch in the settlement agreement.

[4] On the 17 July 2019, the applicant proceeded to pay an amount of R49 584,07 into the wrong bank account, an ABSA bank account in the first respondent's name which it had used to pay her salary during her employment. The balance of the agreed settlement amount was paid to SARS. The applicant avers as follows:

"The balance of the agreed settlement amount, being the sum of R33 055,99, was paid over to the South African Revenue Service. A tax directive was not requested from SARS due to the fact that the Applicant wouldn't have been able to obtain such a directive within the timelines set for payment in the settlement agreement In order to calculate the tax deduction applicable to the settlement amount, the First Respondent's tax was calculated using a hypothetical tax bracket commensurate with the salary the Respondent would have received over the course of a completed tax year. There could therefore be no prejudice to the First Respondent since she would be able to claim back any excess income tax from SARS."

[5] On 18th July 2019, the applicant asked the applicant to reverse the payment made into the ABSA account and pay the "two months settled" into the correct account. On the 30 July 2019 the applicant, having made attempts to obtain the reversal was informed that it could not be processed by the ABSA Bank because the account had insufficient funds.

[6] On hearing this, and in an email to the Executive Manager of Corporate Services, which is annexed to the founding papers, the first respondent states inter alia the following:

"I find it shocking that after you have "Paid" the money into the ABSA bank account now when it should be recalled it becomes "Unsuccessful due to Insufficient Funds".

I must indicate that, I was even shocked to read through your emails that I was paid **R49 584.07** instead of the 2 months salary as per the settlement agreement, without any proof of payment with all the deductions."

[7] The first respondent then obtained the certification of the Award containing the settlement agreement and the writ at issue in this application. The first question before the Court is whether the applicant was entitled to deduct monies and pay these into SARS from the settlement amount reached in the CCMA. The law on this issue has been set out in a number of cases.[1]

[8] In **Motor Industry Staff Association & another v Club Motors, A Division of Barlow Motor Investments (Pty) Ltd (2003) 24 ILJ 421 (LC)**, the Court was concerned with the a Settlement agreement in an amount agreed to in full and final settlement of dispute. The employer deducted income tax before paying the balance to the employee in accordance with tax directive. The employee alleged it was not entitled to do so. The Court per Rogers AJ stated:

"[7] The statutory context in which this case must be decided is as follows. Section 89bis (1) of the Income Tax Act 58 of 1962 (the ITA) requires payments

[1] Motor Industry Staff Association & another v Club Motors, A Division of Barlow Motor Investments (Pty) Ltd (2003) 24 ILJ 421 (LC) Motor Industry Staff Association & another v Club Motors, A Division of Barlow Motor Investments (Pty) Ltd (2003) 24 ILJ 421 (LC); National Union of Mineworkers v Maseko & another (2002) 23 ILJ 2099 (LC) et al

by way of employees' tax to be made in accordance with the provisions of the fourth schedule to the ITA. Paragraph 2(1) of the fourth schedule stipulates that a South African employer who pays or becomes liable to pay any amount by way of 'remuneration' to an employee shall, unless the commissioner has granted authority to the contrary, deduct or withhold from that amount by way of employees' tax an amount determined in accordance with paras 9-12 of the schedule. Paragraph 1 of the fourth schedule defines 'remuneration' as including any amount referred to in (inter alia) para (d) of the definition of 'gross income' in s 1 E of the ITA. *The said para (d) refers to 'any amount, including any voluntary award, received or accrued in respect of the relinquishment, termination, loss, repudiation, cancellation or variation of any office or employment'.* (emphasis mine)……

[9] ……Paragraph 7 of the fourth schedule states that any agreement between an employer and an employee whereby the employer undertakes not to deduct or withhold employees' tax shall be void.

[10] Where an employer has deducted employees' tax in accordance with the fourth schedule and paid same over to the commissioner, the amount is credited to the employee in accordance with para 28 of the fourth schedule. In the context of employees' tax, the word 'taxpayer' in para 28 is a reference to the employee. Paragraph J 28(1) reads as follows:

'There shall be set off against the liability of the taxpayer in respect of any taxes (as defined in subparagraph (8)) due by the taxpayer, the amounts of employees tax deducted or withheld by the taxpayer's employer during any year of assessment for which the taxpayer's liability for normal tax has been assessed by the Commissioner and the amounts of provisional tax paid by the taxpayer in respect of any such year, and if -

(a) the sum of the said amounts of employees tax and provisional tax exceeds the amount of the taxpayer's total liability for the said taxes, the excess amount shall be refunded to the taxpayer; or

(b) the taxpayer's total liability for the aforesaid taxes exceeds the sum of B the said amounts of the employees tax and provisional tax, the amount of the excess shall be payable by the taxpayer to the Commissioner.'…….

[11] …….

[12] On the other hand, if an employer undertakes to pay the employee a specified figure which is not stated to be net of tax and which represents the gross amount which the employer is obliged to pay, tax on the said amount must be withheld and paid to the commissioner in terms of the ITA. Even if the agreement were expressly to state that the full gross amount should be paid to the employee without deduction, effect could not lawfully be given to the term. Paragraph 7 of the fourth schedule provides that such a term is void."

[9] In view of the authority, in relation the issue of tax deducted from the settlement amount, I find that the applicant acted lawfully when it deducted the estimated taxable amount on the payment equal to two month's remuneration.

[10] In as far as the failure of the applicant to act in accord with the terms of the settlement agreement by paying the settlement amount in the incorrect bank account, the answering papers evidence that the first respondent acknowledges that the ABSA account was in her name. However, she avers that she personally did not receive the funds. She does not attach any bank statements to support her claim. She does however mention that she did not intend the funds to go to third parties. It is therefore unclear how the funds moved out of her ABSA account and the first respondent does not take the Court into her confidence.

[11] In an annexure to the founding papers, an offer is made by the applicant to the first respondent on 7 January 2020, to make payment to the first respondent into her Nedbank account, on condition that the funds deposited into the ABSA account be transferred back to the applicant. The first respondent did not accept this offer, one presumes because she was not in a financial position to do so.

[12] It is submitted on behalf of the first respondent that through the unilateral actions of the applicant, and contrary to the terms of the agreement, the judgment debt was paid to the bank or a third party, not the First Respondent. Payment in any

form it is submitted, other than that explicitly agreed to by the parties does not constitute a payment to the First Respondent. However the first respondent has not brought a contractual or delictual counter-claim herein. Her defense to the setting aside of the writ must be confined to an argument that the underlying causa of the writ subsists.

[13] As set out above the first respondent is not entitled to the gross amount of the settlement monies as reflected in the Writ. In addition, and in relation to the underlying causa of the writ, I take into consideration that payment of the settlement amount was received for first respondent's benefit (albeit in an account not specified in the agreement). Although it appears that first respondent did not have control over distribution of the payment, on the facts, the underlying causa of the writ has been removed.

[14] The application to set aside the writ must therefore succeed. However, I am of the view that the first respondent should not be mulcted in costs for opposing this application. My order also reflects that an unnecessary administrative error on the part of the applicant was at the root of the litigation between the parties. I therefore make the following order:

Order

1. The writ under case number WECT 2926-2019 and the notice of attachment dated 20 February 2020 is hereby set aside.

2. The applicant is to pay any legal costs incurred by the first respondent up and until the 8 June 2020.

H. Rabkin-Naicker

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Representation

For the Applicant: G. Viljoen instructed by Nongogo Guzana Inc

For the First Respondent: In person (her instructing attorney having withdrawn on 8 June 2020)