**REPUBLIC OF SOUTH AFRICA**

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

**Reportable**

Case no: J 945/13

In the matter between -

**DR SAMANTHA NAIDOO** **Applicant**

**And**

**THE CAREWAYS GROUP (PTY) LTD** **First Respondent**

**CAREWAYS (PTY) LTD** **Second Respondent**

**Date heard: 17 May 2013**

**Date delivered: 29 May 2013**

**Summary: Deducting full salary of applicant and setting off against unpaid tax. Contravention of section 32 and 34 of the Basic Conditions of Employment Act. Employer entitled to deduct tax irrespective of an agreement to the contrary between the parties.**

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**JUDGMENT**

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**MOLAHLEHI J**

Introduction

[1] This is an application in terms of which the applicant seeks an order compelling the respondents to pay her the salary for the month of April 2013. The applicant further seeks an order directing the respondents to pay her monthly salary of R 198-000, 00 pending the outcome of the arbitration proceedings soon to be instituted.

[2] At paragraph 7 of the founding affidavit the applicant states that she relies on the provisions of section 77 (1) and (3) read with section 5 of the Basic Conditions of Employment Act 75 of 1997. (the BCEA)

The parties

[3] The respondents in this matter are two companies registered in terms of the South African Companies Act. The first respondent is a company wholly owned by the Mexican and businessmen, Mr Larrea. The first respondent owns 74% of the shares in the second respondent.

[4] The applicant is employed by both the first and second respondents as Chief Executive Officer (CEO) on a fixed term contract which is to expire in September 2016.

The background facts

[5] The applicant states that towards the end of January 2013 she received a telephone call from Dr Larrea informing her that she was no longer wanted as the CEO of the respondents and that she should no longer report for duty. She was informed that the reason for the termination was because of her incompatibility with Dr Larrea.

[6] The applicant was subsequently barred from having access to the premises of the respondents and other employees were instructed not to communicate with her. However, despite these the respondents

continue to pay the applicant's salary for the months of February and March 2013. The payment of the salary was however stopped in April 2013 and despite numerous demands the respondents have refused and or failed to pay the applicant's salary.

[7] In opposing this application the respondents relies on three main grounds. The first ground is that the claim of the applicant as formulated, is not based on the provisions of section 34 of the Basic Conditions of Employment Act but rather it is a claim for contractual damages. Second ground is based on the allegation that the applicant has approached the court with "dirty hands." The third ground relates to the issue of urgency.

Evaluation

[8] In dealing first with the issue of urgency, I agree with Mr Cassim that the issue was not finally determined by Cele J when he postponed the matter and said that *prima facie* the matter was urgent. There are no reasons given for saying that the matter was *prima facie* urgent. Considering the matter in its totality I am of the view that the matter is indeed urgent and will accordingly be treated as such. This issue will receive further attention later in this judgment.

[9] The contention that the applicant came to court with dirty hands and therefore does not deserve assistance from the court is in my view ill-conceived. The complaint that the applicant has failed to pay tax on her monthly salary was reported to SARS and the South African Police Services during April 2013 by the Strategic Manager: Legal and Governance of the respondents. The report made to the South African

Police relates to the accusation that the applicant has contravened the provisions of the Income Tax Act.

[10] The SARS has subsequent to receiving the complaint about the non-payment of tax by the applicant, requested that further information regarding the consultancy agreement between the parties including the IRP 5 forms and invoices submitted by the applicant.

[11] The other issue related to the alleged "dirty hands" of the applicant has to do with the contention that the applicant sought to mislead the Court by claiming that she was unmarried and that the partner she was staying with was not supporting their minor child.

[12] In response to the above allegation regarding the issue of non-payment of tax the applicant addressed a letter to the respondents which read as follows:

> 'We as the accountant, have no issue with your(sic) referring this matter to SARS as a SARS had no issues regarding the information submitted to them. Dr Naidoo has abided to all SARS requirements.'

[13] In addition the applicant's accountant in the confirmatory affidavit states the following:

> "13.9.1 the Respondents are certainly not liable to SARS for the amount alleged;
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> 13.9.2 the simple solution for the Respondents is to seek SARS' guidance in this matter, given that the have prove of all income that I have declared;
>
> 13.9.3 if there's any liability by the Respondents to SARS, the Respondents should provide us with a copy of correspondence from SARS confirming that fact;

13.9.4 from the Respondents' allegations, it is apparent that the are being advised by a person who is not suspicion his in tax matters;

13.9.5 the tax assumptions calculation made by the Respondents in Annexure "AA9" are incorrect and not enough convincingly the SARS' regulation calculation."

[14] The law regarding legal deductions and in particular as concerning tax deductions by an employer is well established in our law. In this respect this court in *Barnard v Shellard Media (Pty) Ltd*,[1] was faced with a situation where an employee objected to the employer deducting tax from a settlement amount of R65,000.00. The employer had deducted the sum of R22 843.32. In objecting to the tax deductions the employee argued that the employer was not entitled to deduct tax from the settlement amount as there was no common intention between the parties to make the incidence of income tax to be applicable to the settlement agreement. In considering whether the law import into the settlement agreement as a matter of course an implied term that the employer is obliged to deduct tax from the settlement amount, the court held that:

> 'In terms of Schedule 4 Item 2 (1) of the ITA (Income Tax Act), an employer who pays 'any amount by way of remuneration to an employee . . . shall deduct or withhold from the amount by way of employee's tax an amount which shall be determined as provided for in paragraph 9, 10, 11 and 12 whichever is applicable, in respect of liability for normal tax of that employees . . .'

[15] The court further obsessed that:

[1](2000) ZALC 57.

> 'It is clear that the obligation (to deduct tax) arises when the employer pays or becomes liable to pay 'remuneration' to an employee.'

[16] In dealing with an express term in an agreement that seeks to exclude or prohibit an employer from deducting tax from the income of an employee the Court held that:

> 'In my view the unexpressed claim relating to deduction of tax is imported into this agreement by Schedule 4 of the ITA. In general in cases of this nature, the provisions of ITA nullify any attempt by parties to exclude in their agreements tax obligations. . . It suffices to mention that item 8 of schedule 4 of the ITA prohibits an employee from recovering any amount deducted as tax from the employer'.

[17] It would appear that the person responsible for the deduction of tax from the applicant's salary and making the contribution thereof to the SARS is Mr Schalkwijk. It is alleged that the reason for not effecting the deduction of tax from the applicant's salary is because the applicant had told Mr Schalkwijk not to do so and it was for this reason and fear of losing his employment that he complied with the instruction.

[18] In my view, even if the version of the respondent was to be accepted, it does not provide the basis for the non-payment of the salary of the applicant. The deduction that the applicant instructed Mr Schalkwijk not to deduct tax, at best indicates some form of misconduct which the respondents are entitled after following due processes, to act upon.

[19] The accusation that the applicant has instructed Mr Schalkwijk not to effect a tax deduction remains an allegation and can therefore not serve as a basis that she approached the court with dirty hands.

[20] The respondents contended that the applicant is not entitled to the relief sought as her case in the founding affidavit is based on a claim for contractual monies arising from a written agreement. In other words the respondents defence is that the applicant is not entitled to the relief sought because she has failed to make out a case in the founding papers. In this respect the respondent contended that, what is pleaded in the notice of motion is not in line with the contents of paragraph 8 of the founding affidavit. Paragraph 8 of the founding affidavit reads as follows:

> 'On or about 11 November 2011, the First Respondent and I entered into a consultancy agreement/employment contract . . . '

[21] The key issue in this matter is whether the applicant has made out a case that satisfies the requirements of an urgent application. I have already indicated that I was satisfied on the facts and the circumstances of this case, that the applicant has made out a case for urgency in particular when taking into account the approach adopted by the authorities referred to by the applicant, which are discussed later in the judgment.

[22] The respondents' attacks the case of the applicant on the basis that the applicant relies on the "Consultancy Agreement." The respondents do not dispute that the applicant is an employee neither do they dispute that her salary of R198, 000.00 has been stopped.

[23] It is trite that failure by an employer to pay the salary of an employee amounts to a breach of contract. In the event of breach of contract of employment an employee has an election to either accept the

repudiation and cancel the contract or to hold the employer to the contract.

[24] The payment of remuneration of employees is regulated by section 32 (3) of the BCEA which provides as follows:

> "(1) An employer must pay to an employee any remuneration that is paid in money -
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> (a) in South African currency;
>
> (b) daily, weekly, fortnightly or monthly; and
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> (c) in cash, by cheque or by direct deposit into an account designated by the employee.
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> (2) Any remuneration paid in cash or by cheque must be given to each employee -
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> (a) at the workplace or at a place agreed to by the employee;
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> (b) during the employee's working hours or within 15 minutes of the commencement or conclusion of those hours; and
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> (c) in a sealed envelope which becomes the property of the employee.
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> (3) An employer must pay remuneration not later than seven days after -
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> (a) the completion of the period for which the remuneration is payable; or
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> (b) the termination of the contract of employment.
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> (4) Subsection (3) (b) does not apply to any pension or provident fund payment to an employee that is made in terms of the rules of the fund."

[25] Mr Cassim, for the respondents conceded that suspension without pay is unlawful. The authorities relied upon by Mr Seleka, not only do they confirm that an employer has no right to suspend an employee without

pay and they have also treated issue of suspension without pay as a matter of urgency.[2]

[26] The Court in *Hospersa and Another v MEC for Health: Gauteng Provincial Government,*[3] held in relation to failure to pay the salary of the employee, that:

> 'An employee has the common law right to be paid her salary. If, through the default on the part of the employee, his or her services are not rendered, this must be diminished in proportion to the time during which the services when not rendered. This position is however, a different where the employee's is inability to perform her duties is her employer's doing. . .
>
> In terms of common law, the unilateral suspension of an employee also does not relieve the employer of the duty to pay the employee. It is also accepted in our Labour Law that an employer may not suspend an employee without pay and the only do so if they have contracted to the effect.'

[27] The respondent contends that the deduction is made as a set-off against payment of taxation which the applicant is owing to the SARS. As indicated above, the law in relation to the duty of an employer in relation to deducting tax from an employee's salary is clear. The employer has a duty to make deductions from the employee's salary in terms of the Income Tax Act. There are however limits to the amount which may be deducted from the employee's salary. A deduction from an employee's salary is governed by section 34(1) and (2) of the



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[2] *Singh v SA Rail Commuter Corporation Ltd* t/a Metrorail (2007) 28 ILJ 2067 (LC) *Hospersa and Another v MEC for Health Gauteng Provincial Government:* (2008) 9 BLLR 861 at para 17

[3] *Supra footnote 1 above.*

BCEA.[4] An employer is not permitted to deduct an amount exceeding one quarter of the total salary of the employee, in terms of section 34 (2)(d) of the BCEA.

[28] There are two principles to apply in this matter. The first and key principle relates to the right of the applicant as an employee to receive her salary from the respondents. The second principle relates to the duty of the respondents as an employer of the applicant to deduct from her salary an amount that does not exceed the quarter of her salary for the purposes of contributing it to SARS as payment of tax. This duty arises *ex lege* and therefore any provisions in an agreement between the parties relating to non-deduction of tax from the applicant salary is irrelevant and of no force and effect.

[29] I see no reason in fairness why the respondents should not be ordered to pay the costs.

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[4] Section 34 (1) and (2) of the BCEA 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 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.

[30] In light of the above reasons, the following order is made:

1. The first and second respondents are ordered to pay the applicant her monthly salary of R198-000, 00 less any legal deductions including Pay as You Earn Tax for the month of April.
2. The first and second respondents are ordered to continue paying the applicant her monthly salary of R198-000, 00 less any legal deductions including Pay as You Earn Tax, pending the outcome of the arbitration proceedings to be instituted in terms of the agreement between the parties.
3. The first and second respondents are ordered pay the costs of these proceedings the one paying the other to be absolved.

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Molahlehi J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Knowles Husain Lindsay Inc

For the Respondent: Goldman Judin Inc