**IN THE LABOUR COURT OF SOUTH AFRICA**

**HELD IN JOHANNESBURG**

**Reportable**

**CASE NO.: JS 708/14**

In the matter between:

**DANIEL SIPHIWE MPANZA** First Applicant

**JACQUELINE MATSHIDISO** Second Applicant

And

**THE MINISTER OF JUSTICE AND**

**CONSTITUTIONAL DEVELOPMENT AND**

**CORRECTIONAL SERVICES** First Respondent

**THE DIRECTOR-GENERAL FOR THE**

**DEPARTMENT OF JUSTICE AND**

**CONSTITUTIONAL DEVELOPMENT AND**

**CORRECTIONAL SERVICES** Second Respondent

**THE ACTING CHIEF LITIGATION OFFICER**

**FOR THE DEPARTMENT OF JUSTICE &**

**CONSTITUTIONAL DEVELOPMENT &**

**CORRECTIONAL SERVICES** Third Respondent

Heard: 9 September 2016

Delivered: 31 January 2017

Summary: Breach of contract – applicants' alleged failure to tender their services - alleged unlawful salary deduction - evidence led by the parties mutually destructive – factual finding entails the balancing of probabilities and selecting one conclusion which seems to be the more natural or plausible – applicants failed to tender services – deductions lawful.

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**JUDGMENT**

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**CELE J.**

**Introduction**

[1] The Applicants seek an order declaring the deductions made by the Respondents' Department, the Department, against the Applicants' remunerations to be not in compliance with the provisions of Section 34 of the Basic Conditions of Employment Act[1] read with Section 34 of the Public Service Act[2] and consequently unlawful. The Applicants also seek an order for the repayment of the monies deducted, with interest and costs of the application. This matter essentially turns on whether the applicants reported for duty at the period for which deductions were made.

[1] Act Number 75 of 1997 hereafter referred to as the BCEA.
[2] Act Number 103 of 1994 hereafter referred to as the PSA.

[2] The respondents opposed the claim and contended that the applicants were not entitled to remuneration because the applicants were not reporting for duty at the material times and that therefore the corresponding duty to pay remuneration did not apply. The respondents contended that in view therefore the Department became entitled to apply the no-work - no-pay - no benefit principle against the applicants.

Factual Background

[3] The Applicants were appointed in the Department in 2009 as Senior State Advocate and State Advocate respectively, in accordance with the provisions of Section 9 of the PSA. Their terms and conditions of employment with the Department were in terms of the PSA, the Public Service Regulations, 2001 and other related legislations. They were appointed in terms of written contract of employment in the Directorate: Civil Litigation Unit ("the CLU") within the Branch of the Office of the Chief Litigation Officer, headed by the third respondent, Ms Mohubi Onicca Phahlane. Their immediate supervisor was Mr Vincent Selemela Mahwai who reported directly to Ms Phahlane. The Applicants' responsibilities and/or duties involved primarily practising in accordance with the laws and rules governing practising advocates in the Republic. In simple terms they were in-house counsel representing the Department in court litigation upon briefings of the State Attorneys. They used the same office building in Pretoria as their supervisor, Mr Mahwai but he was on the fourth floor and they were on the first floor.

[4] At times relevant to this matter there were 11 to 14 advocates, including the two applicants in the in-house representation. Clause 1.2.4 of the contract of employment of the first applicant provided that the employee might be required to perform other duties or to work at other places that might reasonably be required by the employer. Under 1.4.2 of the contract of employment of the second

applicant, the Department reserved the right to recover any amount with which she might be overpaid as a result of erroneous calculations, breach of a contract and leave without pay from her salary or from any other monies to which she might be entitled.

[5] On 11 October 2010 the third respondent's predecessor stopped the in-house representation thus disbanding the unit. That left all advocates with no properly defined work to do. They were instructed to render assistance in the unit and this continued for quite some time. On August 2013 Ms Mohubi and Mr Mahwai held a meeting to discuss the future role of the in-house advocates. Mr Mahwai was instructed to discuss with various heads of other units within the Department to find places where the 14 advocates could be accommodated. There were about five units, including the Labour Relations, the Contracts Management, Law Enforcement and the Prosecution (NPA). The move to these units could include a transfer of the budget from Mr Mahwai to that unit which accepted an advocate. On 2 September 2013 he then met the advocates, as a group and also individually discussing possible permanent transfers, interim arrangements and employee/employer relations. He offered them positions as were given to him by the heads of the other units. Many concerns were raised by the advocates, including the procedure adopted for their proposed move to other units. One head of a unit insisted that the advocates to be considered for his unit had to undergo a competency test to determine their suitability to the available posts. That was one of the concerns of the advocates. He gave them time to discuss the concerns among themselves. The advocated suggested other units to which they could be moved, including the Anti-corruption unit within the Public Service Administration, Legal Aid and being appointed as Acting Magistrates.

[6] Various places were found for these advocates and they accepted the move. Tentative places were found for the two applicants and Mr Mahwai held meetings with them. The first applicant was told of a move to the Office of the Chief

Litigation Officer as a Director. An appointment was arranged for the first applicant to go and meet with Ms Phahlane. He went to meet her. She was not present in her office as she had gone to attend to a matter involving the South African Police (SAP). On 17 September 2013 Mr Mahwai issued an electronic mail (email) letter to the first applicant in which the applicant was being placed with immediate effect to the office of the CLO under supervision of Ms Phahlane. He was to assist in that office temporarily pending a permanent transfer. He did not report back at Ms Phahlane's office.

[7] The second applicant was told of a move to another unit. Initially she agreed to the move but later retracted her consent. Mr Mahwai looked for another unit for her and found possible accommodation in the Law Enforcement Unit. He discussed the proposal with the second applicant and according to Mr Mahwai she agreed to this move. She however never reported for duty at the Law Enforcement Unit.

[8] Ms Phahlane then addressed temporary placement letters dated 05 November 2013 to the applicants. They were materially similar. In those letters she described the move as a temporary placement for a period of six months to a year, renewable subject to mutual agreement between the employee and the Head of the unit being Ms Phahlane for the first applicant and Mr Venkatsamy for the second applicant. They were to enter into a performance agreement with their Unit Heads. A grievance letter was then submitted to the Department by the applicants concerning their placements. Further correspondence was entered into about whether the applicants were tendering their services to their employer. The applicants were asked in writing to show why deductions could not be made on their salaries for not properly reporting on duty and they responded to such a probe. The Department made deductions against the Applicants' remunerations on the allegations that the applicants did not report for duty as expected. A further grievance was lodged by the applicants and when it could not be resolved

to their satisfaction, they initiated the present application.

The issue for consideration

[9] It is to be determined whether the secondment or temporary placement made by the Respondents, through Mr Mahwai and Ms Phahlane were in compliance with the provisions of Section 15 of the PSA, and consequently lawful and whether the deductions made by the Department against the Applicants' remunerations were in compliance with the provisions of Section 34 of the BCEA read with the provisions of Section 34 of the PSA.

Evidence

[10] The applicants had to prove the allegations made in their statement of case as well as in the disputed facts listed in the pre-trial minute. The first applicant was the only witness they decided to call. The second applicant remained in attendance during trial. The respondents called two witnesses being, Mr Mahwai and Ms Phahlane. Much of the evidence became common cause and that which remained disputed shall be summarized hereunder.

Applicants' version

[11] The applicants' case is that they never consented to the proposed move as they had not been properly consulted and given description of the posts they were to occupy. The first applicant said that after he had been to Ms Phahlane's office only to find her absent, no follow up meeting was arranged by anyone. He questioned Ms Phahlane's powers to authorize the move of the applicants to other units, saying that it was contrary to the provisions of section 15 of the PSA. He maintained that both applicants tendered their services in terms of their

employment contract.

[12] He said that when he came to work he either used his motor vehicle or public transport. He knew about a register which was kept by the Department at the entrance of the parking area at the Pretmed Building in which all those entering the building with cars would sign and record their entry. As to why his name barely appeared in it, he said that he would use his car at least 5 times a month. On other occasions he would use public transport. For the period February 2014 to July 2014 no record of him appears in that register. He denied that the applicants often absented themselves and could not be found in the building when Mr Mahwai looked for them.

Respondents' version

[13] Mr Mahwai said that he was tasked by the third respondent to facilitate and to assist in the placement of the advocates and to make sure that none of the advocates would lose their job and to ensure that they were placed correctly taking into account their suitability. The placement would be temporal pending their final placement. There were different positions that he secured both internally, within the Department, and outside the Department.

[14] Mr Mahwai at first attempted to convene a meeting but could not find most of the advocate including the applicants. When he regularly and at least twice a day, visited the first floor of Pretmed Building wherein the advocates where stationed for purposes of execution of their duties, he could not find them in their office except for two advocates who are not part of this action. Whenever he wanted to have a meeting with them he would not find them telephonically on the land line and in their offices and thus forcing him to call them on their mobile telephones. A register was kept at the entrance of the parking area at the Pretmed Building in which all those entering the building with cars would sign and record their entry.

In terms of this register the first applicant's names barely appeared. In particular, for the period February 2014 to July 2014 no record of him appeared in that register.

[15] When Mr Mahwai finally managed to secure a meeting with the advocates various options were placed before them and they indicated that they needed time to consider those options. On the same day an agreement was reached that the advocates would be placed in various positions pending their final placements. The process of placement would then begin.

[16] After the meeting Mr Mahwai had a one on one discussion with the first applicant. He explained to him that there was a position available within the office of the CLO branch and the position was Director Litigation at the level 13, he explained to him what his functions would be in that office. Whilst discussing with the first applicant another advocate, Mr Dlwathi, joined in. He showed interest in the same position in the office of the CLO. However, he did not qualified for that position since it was at level 13 and Mr Dlwathi's position was below that level. Only the first applicant was qualifying. Mr Mahwai testified that the first applicant agreed to be temporally placed at the CLO office to the extent that he went to report to that office. Mr Mahwai provided the first applicant with the mobile phone number of Ms Phahlane in order that the first applicant could call her and make an arrangement when the two could meet after he had not found her in her office.

[17] As with regard to the second applicant Mr Mahwai testified that, after a one on one meeting with her he took her to several units within the department where the second applicant could be temporarily placed. She opted for the position in the office of the Director: Operation Management. This was confirmed with an email dated 17 September 2013. At first she reported there for a few days after which she asked to be moved to the Directorate Law Enforcement. Her request was considered and it was granted and was communicated to her with an email.

However, she did not report at that Unit.

[18] Mr Mahwai said that although the word secondment was use in his correspondence, the placement was actually a re-assignment of duties in terms of Section 32 (1) of the PSA, that is, Proclamation 103 of 1994. He also said that he made regular progress reports to his supervisor, Ms Phahlane. In his second progress report dated 6 December 2013 he dealt with attendance management and said:

> "Attendance records for members of the In-House Counsel are very poor. They do not come to work regularly. They prefer to come to work when it suits them. Those that manage to come to work usually leaves (sic) early. Mr Mahwai had individual discussions with each advocate (not coming to work regularly) to discuss the importance of regular attendance and submission of leave forms. Most of them view this as intimidation. Consequent to these discussions three advocates submitted leave forms, but others refused."

[19] The third respondent, Ms Phahlane testified that she was an Acting Chief Litigation Officer holding the rank of the DDG. Her office managed litigation, legal Services in general, Human Resources and Financial Resources. She said that the Civil Litigation Unit of the applicants fell under her branch. She testified that she did have delegation of powers for Human Resource Management and that she therefore could re-assign applicants their duties. The delegation of her authority was in terms of Section 32 (1) of the PSA for the assignment of duties. When she joined the branch, the unit of the applicants had already been disbanded and a number of advocates had already left to other units. A bulk of them went to State Law Advisors. She encouraged the remainder to look for placements for themselves in other directorates promising to support them in that move. Mr Mahwai was then tasked with the placement of those who remained and he constantly gave her updates, either verbally or in written reports.

[20] She said that the first applicant called her and told her that he had come to her office to report for duty but could not find her. They both agreed that he would come to her office to report for duty even if she was not available. She testified that the office as work station was available for first applicant to occupy. She wrote the letters for the placement of the first applicant in the Office of the CLO and the second applicant in the Law Enforcement Unit. That was after the applicants had insisted that they required formal communication regarding their placements.

[21] Before the unit of the applicants was disbanded they would draft legal document, give legal opinion, present and argue matters in courts. After the disbandment the only change was that they would no longer present and argue matters in court but would attend courts and keep a watching brief.

[22] When it became apparent that the applicants were not reporting for work she wrote the letters to them about "Unauthorised Leave of Absence: Possible Leave Without Pay". In those letters she called upon the applicants to make representations as to why leave without pay should not be granted for their unauthorised absence from work. She never received any representations and leave without pay was implemented as the applicants were not reporting for work.

<u>Evaluation</u>

[23] The issues identified by the applicants to be resolved through evidence led were earlier identified as whether:

a) the secondment or temporary placement made by the Respondents, through Mr Mahwai and Ms Phahlane were in

compliance with the provisions of Section 15 of the PSA, and consequently lawful and

b) the deductions made by the Department against the Applicants' remunerations were in compliance with the provisions of Section 34 of the BCEA read with the provisions of Section 34 of the PSA.

[24] The first issue suggests that the deductions were made solely on the basis that the applicants failed to honour their secondment or temporary placement to the new units and were thus absent from duty. The applicants have contended that they have always honoured their contracts of employment which were unilaterally changed by the Department through its secondment or temporary placement. The respondents on the other hand have insistently maintained that the applicants were not reporting for duty. In their closing submissions the respondents put the issue in the following manner:

> "Since the dispute arose, the department has always contended that the applicants were not reporting to work. The applicants were aware of this contention of the department. Despite this knowledge, the applicants did not attempt to produce any evidence in that regard save a mere say so. If the applicant were reporting for duty, they would produce objective evidence of that instead of making unsupported allegation."

[25] Thus, the respondents' basis for making the deductions was never made to be only dependent on the failure of the applicants to report at the stations to which they were seconded or temporarily placed. Therein lay the difference in the approaches adopted in this matter by the parties throughout the trial. A lot of time and effort was placed by the applicants on issues pertaining to secondment or temporary placement but little or not much effort was placed on whether the applicants reported for duty at least from the period September 2013.

[26] As correctly submitted by Mr Gwala for the respondents, evidence led by the parties during the trial as to whether the applicants were reporting for duty is mutually destructive. The first applicant contended that they were reporting at work. On the other hand the Department led evidence that the applicants were often not reporting at work. On that basis their version cannot co-exist. The standard of proof in civil cases is that of a balance of probabilities or a preponderance of probabilities. The process entails the balancing of probabilities and selecting one conclusion which seems to be the more natural or plausible conclusion from amongst several conceivable ones even though that conclusion may not be the only reasonable one.

[27] Apart from the mere say so of Mr Mahwai that the applicants were not regular work attendees, there is the evidence of the attendance register which support the version of the respondents. The first applicant was at pains to explain the absence of the applicants' name in the prescribed register. His explanation took care of only a few occasions, as when he took his car for service. There is also the delayed receipt by them of email correspondence from Ms Phahlane, suggesting rather, that they were not in their offices to access their emails. Further still, there is the second progress report by Mr Mahwai to Ms Phahlane, issued in the normal execution of his duties. It was not suggested that this was a manipulative exercise in anticipation for this application. Also, Clause 1.2.4 of the contract of employment of the first applicant provided that the employee might be required to perform other duties or to work at other places that might reasonably be required by the employer. Finally, the version of Mr Mahwai on work attendance of applicants was never shown by the applicants to have any inherent improbabilities.

[28] As against the second applicant, in particular, while she was in court she chose not to testify. She could not be said to have always been with the first applicant when it came to work attendance, as they were not said to be living together and

always doing things together. Her version of work attendance was therefore not specifically testified to, thus leaving that of Mr Mahwai unchallenged.

[29] In the process of balancing the probabilities and selecting one conclusion which seems to be the more natural and plausible, I find that the version of the respondents has overwhelming probabilities. Accordingly, I accept that the applicants did not tender their services as regularly as they had to in terms of their contract of employment. A determination whether the applicants' services were lawfully or properly seconded or temporarily placed to the new units would, in my view, only serve an academic purpose. Had it been necessary to indulge in that exercise, I would have found that in the 'new units' both applicants would do the same duties with the exception of presenting matters in court. They would be working under the same Head of a unit, Ms Phahlane, with the first applicant reporting directly to her and the second applicant falling within her line management duty. Ms Phahlane therefore acted within her delegated powers in terms of section 32 (1) of the PSA to re-allocate their duties.

[30] In the event I am wrong in my assessment of the powers of the Head of the Office of the Chief Litigation Officer, Ms Phahlane in this matter, I would still find that the applicants were not entitled to refuse to work on the facts of this matter. In *Coin Security (Cape) v Vukani Guards & Allied Workers' Union*,[3] court held that:

> "A contract of employment is a contract with reciprocal rights and obligations. The employee is under an obligation to work and the employer is under an obligation to pay for his services. Just as the employer is entitled to refuse to pay the employee if the latter refuses to work, so the employee is entitled to refuse to work if the employer refuses to pay him wages which are due to him."

[3] 1989 (4) SA 234 (C) at 230I

[31] Indeed the employee is entitled to refuse to work if the employer refuses to pay him wages which are due to him. In the instant case, the applicants refused to regularly tender their services even long before their services were seconded or temporarily placed to the new units. That absconding habits continued unabated. Their failure to attend work was thus not proved to have been a reaction to the secondment or temporary placement.

[32] As a contract of employment is a contract with reciprocal rights and obligations, the applicants were under an obligation to work in which case the Department was under an obligation to pay for their services. Therefore the Department was entitled to refuse to pay the applicants as they refuses to work. In other words, the applicants were legally not entitled to refuse to carry out their side of the employment contract. In fact, it was them who were in breach of their employment contract by unlawfully failing to perform their obligations. As the applicants failed to render their services to the Department, the Department became entitled, in law, to implement the no-work, no-pay and no-benefit rule.

[33] The last probe turns on whether a proper procedure was followed by the Department in giving effect to the deductions on the salaries of the applicants. The issue turns on whether the deductions made by the Department against the Applicants' remunerations were in compliance with the provisions of Section 34 of the BCEA read with the provisions of Section 34 of the PSA.

[34] Section 34 of the BCEA provides, inter alia that:

> ***"*34. Deductions and other acts concerning remuneration**
>
> (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 the 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.

[35] It is common cause that the applicant did not agree to the deductions being made. In fact they resisted the deductions being made, hence this application. Mr Mpanza for the applicants argued that they were not give a hearing prior to the application of the no work no pay principle. In terms of section 34 (2) (b) of the BCEA the respondents had to follow a fair procedure and had to give the applicants a reasonable opportunity to show why the deductions should not be made. The applicants were given letters by Ms Phahlane who asked them to give reasons why the deductions were not to be made. They received the letters. Their testimony was that they responded to the letters. They were asked to produce proof of their submission of their responses but none was forthcoming. The probability is that the applicants failed to tender their responses. There is no issue that they were not given reasonable time. In fact by saying they sent a response that was in their bundle of documents, they excluded any suggestion that no reasonable time was afforded to them.

[36] I accordingly find that the respondents followed a fair procedure in making the deductions against the salaries of the applicants. All things considered therefore, including the law and fairness pertaining to costs, I issue an order in the following terms:

1. The application for a declaratory order and an order for repayment of monies deducted are both dismissed.

2. The applicants are to pay the costs of this application. They are held to be jointly and severally liable for these costs.

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Cele J.

Judge of the Labour Court of South Africa.

APPEARANCES:

FOR THE APPLICANTS: Mr D Mpanza (First Applicant)

Instructed By: the Applicants.

FOR THE RESPONDENTS: Mr M Gwala

Instructed By: The State Attorney, Pretoria.