

## **SALARY DEDUCTIONS: CAN EMPLOYERS RESORT TO “SELF-HELP”?**

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### **SUMMARY**

In the context of an employment relationship, an employee may cause the employer to incur loss or damages. In such an event, an employer would be entitled, with the employee's consent, to recover the loss or damage caused by the employee by deducting the corresponding amount from the employee's remuneration. It is also common for employers to enter into loan agreements with employees, in terms of which employees are required to repay a loan in instalments by way of deductions from their remuneration. These situations do not, in practice, tend to be controversial.

The controversy, however, tends to lie in respect of instances where an employer pays an employee additional money to which the employee is not contractually entitled. This may occur as a result of an administrative payroll error. In other instances, the employee may receive additional remuneration in respect of hours or days not worked. The latter instance may also be attributed to an administrative error resulting in erroneous overpayment, depending on the circumstances. The employer, upon realising such an administrative error, may want to recover the additional remuneration paid to the employee.

However, an employer may be faced with an employee who contends that they are not to blame for the administrative error, or that they are entitled to the remuneration, and that, as a result, the employer may not proceed to deduct amounts from future remuneration without their consent. This impasse raises questions regarding the employer's ability to resort to "self-help" by proceeding to effect deductions from the employee's remuneration without the employee's consent. It further raises questions regarding whether the employer may rely on the common-law doctrine of set-off in effecting deductions. This article considers whether the employer is empowered to effect deductions from the employee's remuneration without the employee's consent and, if so, whether the employer is required to follow a process in making the deductions.

## 1 INTRODUCTION

The employment relationship is centred on reciprocal obligations. The main contractual obligation of an employee is to place their personal service at the disposal of the employer and render efficient service.<sup>1</sup> The employee is expected to perform specified work and is entitled, in return, to be paid remuneration by the employer. Specified work and remuneration are also regarded as essential elements of the contract of employment.<sup>2</sup>

There are, however, several situations that may result in an employer paying an employee more than the amount to which the employee is contractually entitled. An employee could, for example, be paid an additional amount through an erroneous payroll error, or the employer could remunerate an employee for hours or days not worked. The latter typically arises in situations relating to an employee allegedly being on authorised leave or participating in strike action (whether protected or unprotected) and subsequently being remunerated, despite their absence from the workplace.

In practice, employers often encounter situations where there has been an overpayment made to an employee. The employee often refuses to grant the employer authorisation to deduct the overpaid amount from their remuneration. The question that arises in the event of such a refusal is whether an employer may resort to “self-help” and proceed to deduct the overpaid amount from an employee’s remuneration without the employee’s consent.

## 2 THE AMBIT OF SECTION 34 OF THE BCEA

### 2.1 The enabling provisions for deductions

#### 2.1.1 *Deductions from remuneration*

Section 34(1) of the Basic Conditions of Employment Act<sup>3</sup> (BCEA) regulates deductions from an employee’s remuneration. The section provides:

- “(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.”

Section 1 of the BCEA defines the term “remuneration” as “any payment in money or in kind, or both in money and in kind, made or owing to any person in return for that person working for any other person, including the State”. Section 35(5) provides that the Minister of Employment and Labour may

<sup>1</sup> *Smit v Workman’s Compensation Commissioner* 1979 (1) SA 51 (A). See also *Mpanza v Minister of Justice and Constitutional Development and Correctional Services* (2017) 38 ILJ 1675 (LC) par 30.

<sup>2</sup> *Jack v Director-General Department of Environmental Affairs* [2003] 1 BLLR 28 (LC).

<sup>3</sup> 75 of 1997.

determine whether a particular category of payment, whether in money or in kind, forms part of an employee's remuneration for the purposes of any calculation made in terms of the BCEA.

In *SATU (obo Van As) v Kohler Flexible Packaging (Cape) (a division of Kohler Packaging Ltd)*,<sup>4</sup> the Labour Appeal Court (LAC) held that section 35(5) does not expand on the definition of "remuneration", as contained in section 1 of the BCEA. If anything, it curtails the definition.

In *Rank Sharp v Kleinman*,<sup>5</sup> the Labour Court held that an amount to be paid as severance pay by the employer to the employee in terms of a settlement agreement was not "remuneration" as defined in section 1 and envisaged in section 34 because it was "over and above the remuneration owing to the employee 'in return for that person working for' the [employer]".<sup>6</sup>

Accordingly, the definition of "remuneration" means that any deduction from an employee's remuneration may only be made in respect of a payment made to an employee for purposes of the employee rendering their services.

Section 34(1) expressly provides that any deduction may be made from an employee's remuneration where (i) the employee agrees to the deduction in writing, or (ii) the deduction is required or permitted in terms of a law, collective agreement, court order or arbitration award.

Accordingly, where an employee agrees to the deduction, the provision requires the employee's consent to be in writing and in accordance with a debt specified in the agreement. This postulates a position where the employee acknowledges their indebtedness, and requires the agreement to stipulate the debt in respect of which the employee's liability towards the employer has arisen. This section does not provide for a situation where there is no agreement between the parties. This is intended to curb employers from resorting to "self-help" and deducting amounts from an employee's remuneration where there is no debt due and payable by the employee to the employer.

Where the amount to be deducted is required or permitted in terms of a law, collective agreement, court order or arbitration award, the employer evidently does not require the employee's consent in order to deduct such amount from the employee's remuneration. This typically applies to the deduction of payments such as statutory deductions permitted in terms of legislation – for example, tax deductions or the employee's unemployment insurance contributions. It also applies to garnishee orders.

## 2 1 2 Deductions from bonus payments

In the context of an employment relationship, an employee may be entitled to receive various types of payment, including a bonus payment. The bonus payment may either be a contractual entitlement or a discretionary payment, depending on the contractual provisions. The question that arises is whether an employer is entitled to deduct any amount from an employee's bonus

<sup>4</sup> [2002] 7 BLLR 605 (LAC) par 18.

<sup>5</sup> (2012) 33 ILJ 2932 (LC).

<sup>6</sup> *Rank Sharp v Kleinman supra* par 28.

payment, relying on section 34 of the BCEA. The key aspect in determining this issue is, therefore, whether the particular bonus payment constitutes remuneration for purposes of the BCEA.

In *Quantum Foods (Pty) Ltd v Commissioner H Jacobs NO*,<sup>7</sup> the LAC held, albeit in the context of the interpretation of what constitutes “wages” in terms of the National Minimum Wage Act,<sup>8</sup> that a bonus payment that is paid to an employee as a result of a binding contract does not constitute a gratuitous payment and thus forms part of an employee’s wages.<sup>9</sup>

It is arguable that an employer is not entitled to effect deductions in terms of section 34 of the BCEA in respect of bonus payments that are, in the strict sense, gratuitous payments and not remuneration. This is because section 34 only caters for deductions from remuneration. In *Schoeman v Samsung Electronics (Pty) Ltd*,<sup>10</sup> the Labour Court sought to draw a distinction between a “benefit” and remuneration. In that matter, the Labour Court discussed the meaning of the word “benefit” and concluded: “[A] benefit is something extra, apart from remuneration.”<sup>11</sup> Accordingly, where a bonus payment constitutes a benefit and not remuneration, the employer cannot effect deductions from the employee’s bonus payment under section 34.

In *Solidarity v Gijima Holdings*,<sup>12</sup> the LAC confirmed that section 34 does not apply to a dispute about the deduction of a retention bonus from an employee’s termination payments.

Based on the above authorities and the wording of the BCEA, it is evident that the BCEA only makes provision for deductions from an employee’s remuneration, and not from other amounts that are payable to the employee. Accordingly, any deduction from any other amount due to the employee that does not constitute remuneration, as defined, is not subject to the requirements of section 34 of the BCEA.

### 2 1 3 Deductions from pension benefits

The deduction of any amounts from an employee’s pension fund does not fall within the purview of section 34 of the BCEA. The deduction of pension fund contributions from an employee’s remuneration is, however, regulated in terms of section 34A of the BCEA. Section 34A of the BCEA provides expressly that an employer that deducts from an employee’s remuneration any amount for payment to a benefit fund<sup>13</sup> must pay the amount to the benefit fund within seven days of the deduction being made. This section,

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<sup>7</sup> [2023] JOL 61409 (LAC).

<sup>8</sup> 9 of 2018.

<sup>9</sup> *Quantum Foods (Pty) Ltd v Commissioner H Jacobs NO supra* par 25.

<sup>10</sup> [1997] 10 BLLR 1364 (LC).

<sup>11</sup> *Schoeman v Samsung Electronics (Pty) Ltd supra*.

<sup>12</sup> (2019) 40 ILJ 1216 (LAC) par 20.

<sup>13</sup> S 34A(1) of the BCEA provides that for purposes of the section, a benefit fund is a pension, provident, retirement, medical aid or similar fund.

however, does not affect any obligation on an employer, in terms of the rules of the benefit fund, to make any payment within a shorter period.<sup>14</sup>

The deduction of any amount from an employee's pension fund is specifically regulated in terms of the Pension Funds Act (PFA),<sup>15</sup> and not the BCEA. In this regard, section 37A(1) of the PFA provides that no pension benefit provided for by a registered pension fund may, among other things, be reduced, transferred or otherwise ceded, or be liable to be attached or subjected to any form of execution under a court order or judgment.

The wording of section 37A(1) of the PFA has the effect that an employer cannot unilaterally deduct any amount from an employee's pension fund. In any event, it would be practically impossible for an employer to do so given that the employer does not hold the employee's pension benefit.

The proviso to section 37A(1) of the PFA is encapsulated in section 37D(1). In particular, section 37D(1)(b)(ii) provides that the relevant pension fund may deduct any amount due to an employer from its member's fund as compensation in respect of any "damage caused to the employer by reason of any theft, dishonesty, fraud or misconduct". This, however, requires: (i) the employee to have admitted liability to the employer in writing; or (ii) a judgment to have been obtained against the employee in any court. The latter situation may arise in the context of the employer instituting a civil claim for damages and obtaining relief in the form of a court order against an employee.

The object of 37D(1)(b)(ii) is to protect the employer's right to pursue the recovery of money misappropriated by its employees.<sup>16</sup> The power to withhold and deduct an amount from an employee's pension benefit, pursuant to determination of the employee's liability, therefore, lies with the registered pension or provident fund and not the employer.

## 2.2 The limitations expressly provided

Turning to permissible deductions, section 34(2) of the BCEA provides express limitations in respect of the instances when an employer is empowered to make deductions in terms of section 34(1) of the BCEA. In this regard, section 34(2) provides:

- "(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

<sup>14</sup> S 34A(4) of the BCEA.

<sup>15</sup> 24 of 1956.

<sup>16</sup> *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen* (2009) 30 ILJ 1533 (SCA) par 16. See also *Twigg v Orion Money Purchase Pension Fund* (1) [2001] 12 BPLR 2870 (PFA) par 21; *Charlton v TONGAAT-HULETT Pension Fund* [2006] 2 BPLR 94 (D) 971–98B.

- (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."

In order for an employer to be entitled to make a deduction from an employee's remuneration, the deduction needs to (i) comply with the requirements of section 34(1), and (ii) be effected in a manner that complies with all of the substantive requirements falling under section 34(2).

In addition, regulation 4.6.2 of the General Administrative Regulations, promulgated in terms of the BCEA provides:

"A deduction in respect of damage or loss caused by the employee may only be made with agreement and after the employer has followed a fair procedure."<sup>17</sup>

The General Administrative Regulations merely amplify the requirements stipulated in the BCEA; requirements to have a written agreement and to follow a fair procedure are already stipulated in section 34(2)(b) of the BCEA. Significantly, an employer cannot comply only with section 34(1) and not comply with section 34(2). Both sections need to be complied with to achieve compliance with the BCEA. Therefore, section 34(2) serves the function of a proviso for deductions effected in terms of section 34(1).

Section 34(3) provides that a deduction in terms of section 34(1)(a) in respect of any goods purchased by the employee must specify the nature and quantity of the goods. This is in relation to instances where an employee has purchased goods from an employer and the parties have expressly agreed in writing that the employer may deduct the amount in respect of such goods from the employee's remuneration.

Section 34(4) further provides that where an employer deducts an amount from an employee's remuneration in terms of section 34(1) for payment to another person, the employer 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. This provision merely regulates the enforcement of the time period and other stipulated requirements when an employer is required to pay any amount that an employee is liable to pay to another person.

The above provisions are not particularly contentious in circumstances where (i) an employee has provided their express agreement in writing to the deduction, or (ii) the deduction is required or permitted in terms of a law, collective agreement, court order or arbitration award. However, there has been some controversy as to whether the common-law doctrine of set-off comes into effect by operation of law in respect of deductions in circumstances where the common law constitutes "a law" as contemplated by section 34(1)(b) of the BCEA. This aspect is considered in detail below.

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<sup>17</sup> GN R1438 in GG 19453 of 1998-11-13 as amended by GN R174 in GG 43026 of 2020-02-17. See also *Padayachee v Interpak Books (Pty) Ltd* (2014) 35 ILJ 1991 (LC) par 13.

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### **3 DEDUCTIONS WITHOUT AN EMPLOYEE'S CONSENT**

In practice, where the employer has made an overpayment, employees often refuse to provide their consent to deductions from their remuneration. Such instances include where the employer has made overpayments resulting from an administrative error in calculating the employee's remuneration, or where an employer has paid an employee for service not rendered. The employee is likely to contend that they are not to blame for the overpayment and that the employer is not entitled to deduct any amount from their remuneration, without their consent, in an effort to recover the amount paid.

The relevant provision in such instances is section 34(5) of the BCEA, which provides:

- “(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.”

The provision encapsulated in section 34(5)(a) applies where an employer has made overpayments to an employee. The courts have, on occasion, had to consider the application of section 34, and specifically section 34(5)(a) within different contexts. The relevant decisions are considered below.

#### **3 1 Recovering remuneration from erroneous overpayments**

The recovery of remuneration for overpayments made by an employer as a result of an administrative error in calculating an employee's remuneration is specifically regulated in terms of section 34(5)(a). The contentious issue is whether this provision entitles an employer to deduct overpaid amounts without an employee's consent.

Section 34(5) does not appear to be intrinsically linked to the requirements stipulated in section 34(1). In particular, it cannot be argued that, based on the express wording, section 34(5)(a) specifically requires the employer to obtain the employee's agreement in writing prior to the deduction being made from the employee's remuneration.

It is submitted that the intention of the drafters of the BCEA was deliberately to distinguish between different types of deduction permissible under the BCEA. It would be an absurd interpretation to hold that section 34(5)(a) requires an employee's consent where section 34(1)(a) is the section that makes specific provision for the requirement to obtain an employee's consent prior to effecting deductions. To the extent that the legislature intended to require the employer to obtain the employee's consent, such an intention would be apparent from the wording of the provision. It is further trite that legislation should be interpreted in a manner

that does not result in incongruity or absurdity.<sup>18</sup> An interpretation that leads to the conclusion that section 34(5)(a) requires an employer to obtain the employee's consent would not accord with the intention of the legislature.

Whitcher AJ (as she then was) also observed this point and, in *Padayachee v Interpak Books (Pty) Ltd*,<sup>19</sup> held:

"It is noteworthy that the drafters of section 34 chose to identify and deal separately with a number of different types of deductions. This must mean that the purpose of the provision is to regulate these deductions.

It thus follows that any inquiry into section 34 should commence by identifying the nature and purpose of the deduction in dispute and then ascertain whether the section requires employers to regulate such deductions in a particular manner."<sup>20</sup>

It is evident that the intention of the legislature was to differentiate between deductions to be made in terms of section 34(5) and those in terms of section 34(1), read with section 34(2). Based on the wording of section 34 in its entirety, the wording of section 34(5) appears to be a stand-alone subsection. It specifically caters for the recovery of overpayments made to an employee, whereas section 34(1), read with section 34(2), caters for the recovery of loss of damages and the repayment of debts.

In *Cenge v MEC, Department of Health, Eastern Cape*,<sup>21</sup> the Labour Court appears to have accepted the notion that there are different provisions in terms of which an employer is entitled to make deductions. In this regard, the Labour Court held:

"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 [34(5)(a)]."<sup>22</sup>

Although the Labour Court appears to have appreciated the distinct provisions permitting deductions, the decision did not determine the issue regarding whether section 34(5)(a) specifically requires consent. This was in circumstances where, based on the facts, the skills allowance that had been paid to the employees did not constitute an overpayment and therefore section 34(5)(a) did not apply.<sup>23</sup>

In *Sibeko v CCMA*,<sup>24</sup> the Labour Court had to determine whether the employer was entitled to deduct erroneous payments made to the employee. In this matter, the employee had been paid an amount in excess of that provided in terms of his contract of employment. The employer notified the employee in writing that he had been paid the excess amount in error and that the amount paid in error would be deducted from his salary. The employee was also requested to furnish reasons, at a later stage, as to why he felt that he was entitled to the higher amount. The employee declined

<sup>18</sup> *Liesching v S* 2017 (4) BCLR 454 (CC).

<sup>19</sup> *Supra*.

<sup>20</sup> *Padayachee v Interpak Books (Pty) Ltd supra* par 27–28.

<sup>21</sup> (2012) 33 ILJ 1443 (LC).

<sup>22</sup> *Cenge v MEC, Department of Health, Eastern Cape supra* par 7.

<sup>23</sup> *Cenge v MEC, Department of Health, Eastern Cape supra* par 10.

<sup>24</sup> [2001] JOL 8001 (LC).



and, instead, demanded an explanation from the employer to advance reasons why he should not be paid the higher amount.

The Labour Court held:

“It is indeed so, that in terms of the Basic Conditions of Employment Act, an employer may not deduct amounts from the salary or remuneration of an employee without the employee’s consent. Where an employee was however overpaid in error, the employer is entitled to adjust the income so as to reflect what was agreed upon between the parties in the contract of employment, without the employee’s consent.”<sup>25</sup>

The Labour Court further noted that the employee sought relief to the effect that the employer be interdicted from “interfering” with his salary. The Labour Court found this to have been a very wide form of relief, which would also mean that the employer would never be entitled to adjust the employee’s salary.<sup>26</sup> The Labour Court dismissed the employee’s application on the basis that the employee failed to make out a case that entitled him to urgent relief.<sup>27</sup>

The extract quoted from the *Sibeko* decision requires careful consideration. Revelas J appears only to have confirmed that an employer is entitled, without the employee’s consent, to “adjust” the employee’s future remuneration to reflect the remuneration agreed upon between the parties.<sup>28</sup> Although the *Sibeko* decision has been quoted with approval in subsequent decisions, it is important to highlight that this decision does not expressly postulate the position that an employer is entitled to deduct an amount from the employee’s remuneration to which an employee is contractually entitled. The interpretation is that the employer is merely entitled to adjust the employee’s remuneration so as to prevent the employee from receiving additional remuneration to which they are not contractually entitled.

In *Sekhute v Ekhuruleni Housing Company SOC*,<sup>29</sup> the Labour Court confirmed the distinction between deductions made in terms of section 34(1) and section 34(5) respectively. In this regard, the Labour Court held:

“The first thing to note is that, all the subsections except for [section] 34(5) are concerned with deductions made in terms of section 34(1). Section 34(1) identifies two classes of deductions which may be made. The first (s 34(1)(a)) is a deduction which may be made for an acknowledged debt and which specifically requires the employee to authorise the deduction in writing. The second (s 34(1)(b)) is a deduction which does not require the employee to authorise the deduction personally in writing before it can be made. This second type of deduction may be mandated by other legal instruments such as a law, Court order or collective agreement. It is noteworthy, that this second type of deduction does not presume the existence of an acknowledged debt.”<sup>30</sup>

The *Sekhute* decision confirms that deductions made in terms of section 34(5) are not akin to deductions made in terms of section 34(1).

<sup>25</sup> *Sibeko v CCMA supra* par 6.

<sup>26</sup> *Sibeko v CCMA supra* par 7.

<sup>27</sup> *Sibeko v CCMA supra* par 8.

<sup>28</sup> *Sibeko v CCMA supra* par 6.

<sup>29</sup> [2017] ZALCJHB 318.

<sup>30</sup> *Sekhute v Ekhuruleni Housing Company SOC supra* par 12.

Deductions in terms of section 34(1) either require the employee's consent in writing or that the deductions are permissible in terms of a law, collective agreement, court order or arbitration award. There is, however, no express requirement to obtain an employee's consent in respect of deductions that fall within the ambit of section 34(5).

To further illustrate this point, Lagrange J held as follows in *Sekhute*:

"At the very least, I believe s 34(5) was clearly intended to authorise a particular type of deduction for amounts due to an employer not arising from debts of the kind contemplated by s 34(1) and even if s 34(5) must be read as subject to s 34(1), the s 34(5) is a provision of 'a law' contemplated in s 34(1)(b) which permits recovery without consent. At common law, the obligation of an employee to refund an employer for an overpayment made in error in essence would appear to be an obligation that could found an action based on the *condictio indebiti*. It would serve little purpose if section s 34(5) was included to simply reaffirm the existence of a common law right to recover the payments made in error. The more plausible interpretation of the provision is that the legislature intended it to specifically authorise deductions for overpayments of remuneration."<sup>31</sup>

It is submitted that the Labour Court's purposive interpretation of section 34(5) is correct. It is well in accordance with the established canons of interpretation, and, in particular, the imperative of contextual reading of words and phrases as enunciated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*.<sup>32</sup>

An important rule of interpretation is to establish the purpose of the relevant provision and to give effect to it. The purpose is either explicitly stated or can be determined logically and from the full text and context of the provision.<sup>33</sup> Adopting this approach, it should be accepted that section 34(5) was not enacted for purposes of reaffirming an employer's existing rights to recover erroneous payments under the common law. If that were the case, the legislature would have included wording in the provision to the effect that an employer is entitled to recover overpayments through judicial process, as would be required in the case where an employer seeks to recover overpayments under the common law.

It is submitted that the purpose of section 34(1) is to limit the specific instances where an employer may effect deductions. This prevents an employer from potentially resorting to "self-help" in respect of an employee's remuneration without first obtaining the employee's consent. The purpose of section 34(5), based on its wording alone, does not expressly require consent. To the extent that it is argued that consent is required to effect deductions under section 34(5), the *Sekhute* decision confirms that section 34(5) constitutes "a law" as contemplated in section 34(1)(b). The latter does not require an employer to obtain an employee's consent prior to effecting deductions.

It is noteworthy to mention that, in *Sekhute*, some of the employees in the main application had launched an application for leave to appeal against the

<sup>31</sup> *Sekhute v Ekurhuleni Housing Company SOC supra* par 15.

<sup>32</sup> (2012) (4) SA 593 (SCA) par 18.

<sup>33</sup> *Padayachee v Interpak Books (Pty) Ltd supra* par 19.

decision on the basis that, among other things, the Labour Court had erred in interpreting section 34(1)(b) and (5)(a) of the BCEA.<sup>34</sup> In deciding the application for leave to appeal, Lagrange J appreciated that although the employees had not advanced any contrary authority for the interpretation of these provisions, there had been no LAC decision dealing with the proper interpretation of the provisions at the time. Therefore, the correct interpretation was of some importance to both employers and employees.<sup>35</sup> The application for leave to appeal was, therefore, granted on this narrow legal issue alone. However, the employees did not persist with the appeal.

In *Valasce v Wireless Payment Systems CC*,<sup>36</sup> the employee launched an urgent application seeking an order to direct the employer to repay her an amount that had allegedly been unlawfully deducted from her final remuneration. The employee further sought an order interdicting and restraining her employer from making any deductions from her remuneration payable at the end of her notice period.

The employer contended that the employee's salary varied from month to month, depending on the commission earned for a particular month. The employer further contended that the employee had been provided with a vehicle and was, therefore, not entitled to payment of a car allowance. However, because of an administrative error, the employee had received a car allowance.

The basis of the employee's urgent application was founded upon section 34 of the BCEA.<sup>37</sup> However, the Labour Court dismissed the application on the basis that the employee failed to show the existence of urgency.

Despite dismissing the application based on a lack of urgency, the Labour Court entertained the question of whether the deductions were unlawful. In determining the lawfulness of the deductions, the Labour Court held as follows:

"In support of her case that her right had been interfered with the Applicant relied on the provisions of section 34(1) of the Basic Conditions of Employment Act. That section prohibits an employer from making any deductions from an employee's remuneration unless, the employee agrees in writing. It is indeed correct that as a general rule the Basic Condition[s] of Employment Act prohibits deductions from employees' salaries without their prior consent. However, deductions without consent are permitted where it is permitted by the law, collective bargaining agreement and a court order or arbitration award. In these instances all [t]hat the employer needs to do is to advi[s]e the employee of the error in payment and the deduction made or to be made." See *Papier and others v Minister of Safety and Security* (2004) 25 ILJ 2229 (LC)

In *Sibeko v CCMA* (2001) JOL 8001 (LC) [ ] R[e]velas J in dealing with the issue of the deductions said:

<sup>34</sup> *Sekhute v Ekurhuleni Housing Company SOC; In re: Sebola v Ekurhuleni Housing Company SOC* [2018] ZALCJHB 8.

<sup>35</sup> *Sekhute v Ekurhuleni Housing Company SOC; In re: Sebola v Ekurhuleni Housing Company SOC* [2018] ZALCJHB 8 par 8.

<sup>36</sup> (2010) 31 ILJ 381 (LC) par 21; quoted with approval in *Sekhute v Ekurhuleni Housing Company SOC* [2017] ZALCJHB 318.

<sup>37</sup> *Valasce v Wireless Payment Systems CC supra* par 9.

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“It is indeed so, that in terms of the Basic Conditions of Employment Act, an employer may not deduct amounts from the salary or remuneration of an employee without the employee's consent. Where an employee was however overpaid in error, the employer is entitled to adjust the income so as to reflect what was agreed upon between the parties in the contract of employment, without the employee's consent.”

The e-mail which the applicant addressed to the respondent on 1<sup>st</sup> June 2009 does not support the version of the Applicant that the Respondent was not entitled to deduct the over payment which was made to her erroneously. The administrative error arose when the Applicant was granted a company vehicle. At that point the car allowance which was paid to the Applicant should have been discontinued.”<sup>38</sup>

The Labour Court dismissed the employee's urgent application after having found that no special circumstances existed to grant the urgent relief sought.<sup>39</sup> In the *Valasce* decision, the Labour Court effectively concluded that the car allowance payments were made erroneously to the employee.

The Labour Court further appears to have placed reliance on the *Sibeko* decision, although the latter decision does not expressly stand as authority that deductions may be effected without the employee's consent. As illustrated above, the *Sibeko* decision merely confirms that the employer may “adjust” the employee's remuneration to reflect what has been agreed upon between the parties. The facts in *Valasce* did not concern “adjusting” the employee's remuneration. Instead, it concerned the employer seeking to recover payments already erroneously made in respect of a car allowance. The process of recovering such payments would not have involved “adjusting” the employee's final remuneration (since the employer was serving notice) but would have necessitated a deduction from her final remuneration.

Despite this, for the reasons reflected in *Sekuthe* above, it is accepted that an employer is entitled, in terms of section 34(5)(a), to effect deductions for erroneous overpayments from an employee's remuneration, without the employee's consent.

### **3 2 Recovering remuneration for services not rendered**

The circumstances that lead to overpayment of remuneration are not limited to administrative glitches resulting from an employer's payroll system. An employer may, for example, remunerate an employee in respect of hours not worked. In this regard, an employer may assume that the employee tendered their services on a particular day, only for the employer to establish later that the employee ought not to have been remunerated for those particular hours or days not worked. There is some debate as to whether circumstances of this nature constitute an error in calculating the employee's remuneration as contemplated in section 34(5)(a) of the BCEA.

Specifically, the question is whether an employer is entitled to deduct

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<sup>38</sup> *Valasce v Wireless Payment Systems CC supra* par 21–23.

<sup>39</sup> *Valasce v Wireless Payment Systems CC supra* par 25.

remuneration already paid where the employee has not rendered the services, and whether the employer requires the employee's consent to effect the deduction from their remuneration. This is dealt with below.

### *3 2 1 Recovering remuneration paid in respect of unauthorised leave of absence: Public Service Act and BCEA considerations*

In *SA Medical Association on behalf of Boffard v Charlotte Maxeke Johannesburg Academic Hospital*,<sup>40</sup> the employee had taken various types of leave. During the period of his absence, he was paid his remuneration. Without any notice to the employee, deductions were made from the employee's remuneration in various different months. It was argued that the deductions were made because the leave taken by the employee was not in compliance with the leave procedure.

The employee was employed in the public service and the question for determination was whether an employer in the public service is entitled to deduct monies from an employee's remuneration where it alleges that the employee has been on unauthorised leave. If so, what procedures should be followed to effect such deductions. It was, however, common cause that the deductions were not preceded by any opportunity for the employee to make representations and also that the deductions were not consensual between the parties.

In distilling the applicable legal principles, the Labour Court had to determine whether the Department of Health had the authority to effect the deductions, regardless of the issue of consent.<sup>41</sup> Having considered the principles pertaining to the supremacy of the Constitution and the rule of law, the Labour Court held that it is clear that any decisions taken by the Department of Health, as a repository of public power, must comply with the principle of legality.<sup>42</sup>

In addition, the Labour Court held that, in this case, the power of the Department of Health to deduct monies from state employees or civil servants to reverse situations of wrongly paid remuneration, is specifically governed by legislation in the form of section 38 of the Public Service Act, 1994.<sup>43</sup> In this regard, section 38(2) of the Public Service Act provides:

"If an officer or employee contemplated in sub-section (1) has in respect of his or her salary, including any portion of any allowance or other remuneration or any other benefit calculated on his or her basic salary or scale of salary or awarded to him or her by reason of his or her basic salary— ...

- (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 head of department, with the

<sup>40</sup> (2014) 35 ILJ 1998 (LC).

<sup>41</sup> *SAMA obo Boffard v Charlotte Maxeke Johannesburg Academic Hospital supra* par 28.

<sup>42</sup> *SAMA obo Boffard v Charlotte Maxeke Johannesburg Academic Hospital supra* par 32.

<sup>43</sup> *Ibid.*

approval of the Treasury, may determine if he or she is in the service of the State, or, if he or she is not in so 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.<sup>44</sup>

The difference between the wording of the BCEA and the Public Service Act is noteworthy. The BCEA caters for deductions where there has been an error in calculating the employee's remuneration, whereas the Public Service Act makes provision for deductions where remuneration has been "wrongly granted". The difference in wording is significant in that the Public Service Act provides a wider ambit within which to effect deductions. Ngcukaitobi AJ similarly recognised the latter point and described section 38(2) as permitting a deduction where an employee has been wrongly paid.<sup>45</sup> Thus, the wrongful conduct in this matter arose pursuant to the payment of the employee in circumstances where payment ought not to have been made (owing to the employee allegedly being on authorised leave) as opposed to an error in calculating an employee's remuneration, as envisaged in the BCEA.

In determining whether the Department of Health had complied with section 38(2) of the Public Service Act, the Labour Court found that the Department of Health had effected the deductions without the approval of National Treasury and, therefore, in the absence of authority, the deductions were declared unlawful.<sup>46</sup>

Interestingly, the enquiry did not end with determining whether there had been compliance with section 38 of the Public Service Act. In this regard, Ngcukaitobi AJ held that the fact that the State has authority to make deductions from an employee's remuneration to reverse wrongly paid remuneration does not necessarily render such deductions lawful.<sup>47</sup> Any authority to make deductions provided by section 38 of the Public Service Act is subject to the procedural constraints provided in section 34 of the BCEA.<sup>48</sup> This finding is not controversial in circumstances where State employees, although falling within the purview of the Public Service Act, nevertheless remain employees for purposes of the BCEA. With the exception of members of the State Security Agency, the BCEA does not specifically exclude public service employees from its application,<sup>49</sup>

Ngcukaitobi AJ considered the Labour Court's previous decisions in *Sibeko* and *Valasce*. In this regard, he held:

"It is apparent from these decisions that the view taken by the Labour Court is that an overpayment as a result of an administrative error does not constitute remuneration as defined in terms of the BCEA. Since it is outside the parameters of the BCEA, an employer is not required to obtain the consent of

<sup>44</sup> In a later decision, the Constitutional Court declared this provision unconstitutional. This decision is discussed below (see *Public Servants Association obo Ubogu v Head of the Department of Health* (2018) 39 ILJ 337 (CC)).

<sup>45</sup> *SAMA obo Boffard v Charlotte Maxeke Johannesburg Academic Hospital supra* par 33.

<sup>46</sup> *SAMA obo Boffard v Charlotte Maxeke Johannesburg Academic Hospital supra* par 34.

<sup>47</sup> *SAMA obo Boffard v Charlotte Maxeke Johannesburg Academic Hospital supra* par 35.

<sup>48</sup> *Ibid.*

<sup>49</sup> S 3 of the BCEA.

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an employee before effecting the deductions as required by s 34(1) of the BCEA.<sup>50</sup>

The above extract from the *Boffard* decision confirms that the employer does not require the employee's consent to deduct an overpayment, as contemplated in the BCEA, if an overpayment is not remuneration (because it is not in exchange for services rendered). However, this fails to recognise that the issue is not whether the amount sought to be deducted constitutes remuneration. Rather, the central issue concerns the fact that the amount is sought to be deducted from the employee's remuneration. The nature of the amount sought to be deducted (ie whether it constitutes remuneration) is not relevant to the enquiry.

In the *Boffard* decision, the deductions were effected from remuneration, which the employer contended was not due since the employee was on unauthorised leave. The deductions, therefore, fell within the ambit of "remuneration" as defined in section 1 of the BCEA. It is for this reason that the Labour Court found that the deductions were unlawful based on a lack of compliance with section 38 of the Public Service Act, read with section 34 of the BCEA.<sup>51</sup> This was compounded by the fact that the employer had not pleaded that the monies were overpayments made as a result of erroneous remuneration.

As an aside, Ngcukaitobi AJ pointed out that the Labour Court's previous decisions in *Sibeko* and *Valasce* did not decide the issue regarding whether an employee is entitled to a fair hearing before an employer recovers an overpayment.<sup>52</sup> In this regard, Ngcukaitobi AJ held that, in his view, it may well be implicit from the structure of the BCEA as a whole that all instances involving demands for repayment of money already paid to an employee should at least be preceded by a fair hearing.<sup>53</sup> Although this remark was made obiter, the reasoning is supported.

The Labour Court's decision in *Boffard*, however, needs to be reconsidered in relation to a later decision that the Constitutional Court handed down regarding the unconstitutionality of section 38(2)(b)(i) of the Public Service Act.

### 3 2 2 *Recovering wrongly paid remuneration by the State: the unconstitutionality of section 38(2)(b)(i) of the Public Service Act*

In *Public Servants Association obo Ubogu v Head of the Department of Health*,<sup>54</sup> the Constitutional Court had to determine the constitutionality of section 38(2)(b)(i) of the Public Service Act insofar as it permitted the State, in its capacity as the employer, to recover monies wrongly paid to its employees from the employees' remuneration in the absence of any due

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<sup>50</sup> *SAMA obo Boffard v Charlotte Maxeke Johannesburg Academic Hospital supra* par 39.

<sup>51</sup> *SAMA obo Boffard v Charlotte Maxeke Johannesburg Academic Hospital supra* par 44.

<sup>52</sup> *SAMA obo Boffard v Charlotte Maxeke Johannesburg Academic Hospital supra* par 40.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Supra.*

process or agreement between the parties. This determination brought into sharp focus the issues regarding “self-help” and the common-law principle of set-off.<sup>55</sup>

In this matter, the employee was employed by the Department of Health. Therefore, she was subject to the provisions of the Public Service Act. The employee was previously employed as the CEO of a hospital and was subsequently transferred to a different position, being that of Clinical Manager: Allied. This position was classified as Grade 11, while the higher graded position of Clinical Manager: Medical was a Grade 12 position. The employee received remuneration at the rate applicable to the post of Clinical Manager: Medical (Grade 12).

The Department of Health informed the employee that, in the process of her redeployment, she had erroneously been “translated” into the Grade 12 position, as opposed to the Grade 11 position. She was thus advised that she owed the Department of Health an amount of R794 014.33. The Department of Health proceeded unilaterally to deduct a sum from the employee’s remuneration to compensate for a part of the overpayment. The employee was opposed to this and maintained that the Department of Health had no right to help itself to part of her salary. The Public Service Association (PSA), on the employee’s behalf, launched urgent proceedings in the Labour Court for relief.

In the Labour Court, the PSA challenged the lawfulness of the deductions on the basis that, among other reasons, (i) there was no overpayment and (ii) section 38(2)(b)(i) of the Public Service Act, in terms of which the deductions had been made, was unconstitutional.

The PSA specifically contended that section 38(2)(b)(i) of the Public Service Act entitled the State to remain passive for extensive periods and, thereafter, recover amounts in respect of which the claims would otherwise have prescribed and that the Department should, instead, be directed to institute legal proceedings against the employee to allow her to challenge the basis of the deductions. This is in circumstances where sections 3(3) and 38(1)(c)(i) of the Public Finance Management Act,<sup>56</sup> read together with the National Treasury Regulations, required the Department of Health to institute legal proceedings where any unauthorised, irregular, fruitless and wasteful expenditure was found.

The Labour Court considered whether the deductions made in terms of section 38(2)(b)(i) of the Public Service Act amounted to untrammelled “self-help”, as prohibited by section 1(c) of the Constitution.<sup>57</sup> In this regard, the Labour Court held that it was unclear why section 38(2)(b)(i) of the Public Service Act did not, in the same manner as section 31(1) (relating to “unauthorised remuneration”) make provision for the recovery of overpaid remuneration through consent or legal proceedings.<sup>58</sup> The Labour Court analysed the principle of the rule of law and its components, including the

<sup>55</sup> *Public Servants Association obo Ubogu v Head of the Department of Health supra* par 1.

<sup>56</sup> 1 of 1999.

<sup>57</sup> S 1(c) of the Constitution provides that the Republic is one sovereign, democratic state founded on values that include “[s]upremacy of the constitution and the rule of law”.

<sup>58</sup> *Public Servants Association obo Ubogu v Head of the Department of Health supra* par 15.



principle of legality as encapsulated in *Lesapo v North West Agricultural Bank*.<sup>59</sup> This involved a consideration of whether deductions made in terms of section 38(2)(b)(i) amounted to “self-help”, as prohibited by the principle of legality in terms of section 1(c) of the Constitution.<sup>60</sup>

The Labour Court concluded that the deductions in terms of section 38(2)(b)(i) violated the spirit, purport and objects of the Bill of Rights and amounted to untrammelled “self-help”.<sup>61</sup> The Labour Court, therefore, declared section 38(2)(b)(i) of the Public Service Act unconstitutional.<sup>62</sup>

The PSA lodged a confirmation application to the Constitutional Court in terms of section 172(2)(d) of the Constitution. The purpose of the application was to confirm the order of constitutional invalidity.

In the Constitutional Court, the PSA contended that section 38(2)(b)(i) sanctions “self-help” in that it permits deductions where the State is the sole arbiter concerning any dispute on allegedly wrongly granted remuneration, as well as on the appropriate means to recover the indebtedness. In addition, the State is the self-appointed executioner. The Department of Health contended that, insofar as the allegation that section 38(2)(b)(i) offends the principle of legality is concerned, actions taken in the context of the employment relationship between the State, as employer, and its employees falls within the sphere of private law and cannot be qualified as administrative action.<sup>63</sup> It was contended that the principle of legality only applies to the sphere of public law and not private law.

The Department of Health, therefore, contended that section 38(2)(b)(i) is consistent with the Constitution and that the confirmation application, therefore, fell to be dismissed.

The Constitutional Court considered the effect of section 38(2)(b)(i) on limiting the right to judicial redress in terms of section 34 of the Constitution, which provides everyone with the right “to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court”.

The Constitutional Court held that the effect of section 38(2)(b)(i) is to impose strict liability on an employee, in that deductions may be made without the employee concerned making representations about her liability and even her ability to pay the deductions (in terms of instalments).<sup>64</sup> The impugned provision provided the State with unrestrained power to determine, unilaterally, the instalments without an agreement with the employee.<sup>65</sup>

The Constitutional Court noted that, although section 38(2)(b)(i) is a statutory mechanism to ensure recovery of monies wrongly paid to an

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<sup>59</sup> 1999 (12) BCLR 1420.

<sup>60</sup> *PSA obo Ubogu v Head of the Department of Health supra* par 53.

<sup>61</sup> *PSA obo Ubogu v Head of the Department of Health supra* par 16 and 53.

<sup>62</sup> *PSA obo Ubogu v Head of the Department of Health supra* par 54.

<sup>63</sup> See also *Chirwa v Transnet Ltd* 2008 (3) BCLR 251 (CC) and *Gcaba v Minister for Safety and Security* 2010 (1) BCLR 35 (CC).

<sup>64</sup> *PSA obo Ubogu v Head of the Department of Health supra* par 65.

<sup>65</sup> *Ibid.*

employee out of the State's coffers, the provision gives the State free rein to deduct whatever amounts have been allegedly wrongly paid.<sup>66</sup> As a result, the Constitutional Court held that section 38(2)(b)(i) allows the State to undermine judicial process, which requires that disputes be resolved by law as envisaged in section 34 of the Constitution.<sup>67</sup>

The Constitutional Court similarly found that deductions in terms of section 38(2)(b)(i) constituted unfettered "self-help" – the taking of the law by the State into its own hands and enabling it to become the judge in its own cause – in violation of section 1(c) of the Constitution.<sup>68</sup> As a result, the Constitutional Court held that section 38(2)(b)(i) does not pass constitutional muster.<sup>69</sup>

As at the date of publication of this article, section 38(2)(b)(i) of the Public Service Act had not been amended. The effect is that any deductions from the remuneration of employees employed in the public service are to be effected in accordance with the prescripts of the BCEA.

### *3.2.3 Recovering erroneous remuneration paid in respect of unauthorised leave of absence in terms of section 34(5) of the BCEA*

In *Stein v Minister of Education and Training*,<sup>70</sup> the Labour Court had to determine whether the employer's conduct in effecting deductions from the employee's remuneration was unlawful in circumstances where the employee was regarded as absent from work.

In this matter, the employer had requested the employee to submit completed leave application forms in respect of the days he was allegedly not at work. The employee failed to submit the leave forms, arguing instead that he was not on leave but working outside the office on matters assigned to him. When the leave forms were not forthcoming, the human resources manager applied for approval to declare the days in respect of which the employee was absent as unpaid leave.

It is not clear from the decision in respect of which legislative provision that approval was sought, since, at the date of the *Stein* decision, the requirement for an employer in the public service to obtain approval from National Treasury was encapsulated under section 38(2) of the Public Service Act, which was declared unconstitutional in *Ubogu*. However, this is not material.

The approval was nevertheless granted and in due course, the Department of Higher Education and Training (as employer) deducted certain amounts for the days that the employee did not work.

The employee approached the Labour Court for an order declaring that the deductions were unlawful because he did not consent to them being

<sup>66</sup> *PSA obo Ubogu v Head of the Department of Health supra* par 64.

<sup>67</sup> *PSA obo Ubogu v Head of the Department of Health supra* par 67.

<sup>68</sup> *PSA obo Ubogu v Head of the Department of Health supra* par 65.

<sup>69</sup> *PSA obo Ubogu v Head of the Department of Health supra* par 68.

<sup>70</sup> [2021] ZALCJHB 420.

made against his remuneration as required by section 34 of the BCEA, and nor were they permitted by a law, court order or collective bargaining agreement. He further sought a consequential order that the deductions already made be reversed.

In reaching its decision, the Labour Court noted that the employer had notified the employee that the days on which the employee was absent would be treated as unpaid leave.<sup>71</sup> The Labour Court found that the deductions for the days in respect of which the employee was not at work constituted recoupment of a payment made in circumstances where the payment ought not to have been made. Thus, the employer was recovering an amount in respect of an overpayment previously made.<sup>72</sup> In reaching its finding, the Labour Court relied on the *Sibeko* decision, in terms of which it was held that where an employee was overpaid “*in error*”, the employer is entitled, without the employee’s consent, to “adjust” the income so as to reflect what was agreed upon between the parties.<sup>73</sup>

However, it does not appear, it is submitted, that the facts in *Stein*, carefully considered, necessitated reliance on the *Sibeko* decision. The *Sibeko* decision contemplated a scenario where an employee has been overpaid in terms of the contractually agreed amount, and therefore that the employer is, in such circumstances, entitled to “adjust” future remuneration to reflect the remuneration to which the employee is contractually entitled. Narrowly considered, the same principle cannot be said to apply where an employer seeks to recover remuneration paid for unauthorised leave of absence.

In the *Stein* decision, the Labour Court considered the *Padayachee* decision in which it was held that the purpose of the deductions in dispute ought to be considered. Against this background and having regard to the fact that the contract of employment only entitles an employee to remuneration in return for services rendered, it is arguable that an employer should be entitled, without obtaining the employee’s consent, to deduct amounts paid where the employee has not rendered services. However, the employer should nevertheless follow a fair process in doing so.

The Labour Court reasoned that an employee is required to be at work and render service to the employer in exchange for payment.<sup>74</sup> In this regard, the Labour Court held that where an employee absents themselves and fails to submit the leave form in accordance with the employer’s policy, the employer is entitled to withhold payment, and in instances where the employer has already effected payment, the employer should be allowed to recover it without the employee’s consent.<sup>75</sup>

Notably, the Labour Court circled its reasoning back to section 34(5) of the BCEA, being the empowering provision, stating that the payment made to the employee, in respect of the days on which he was absent, constituted an “overpayment”, and was susceptible to recovery under the provisions of

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<sup>71</sup> *Stein v Minister of Education and Training supra* par 10.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Stein v Minister of Education and Training supra* par 11.

<sup>74</sup> *Stein v Minister of Education and Training supra* par 13.

<sup>75</sup> *Stein v Minister of Education and Training supra* par 14.

section 34(5), in that the payment was made when it was not due, meaning that the payment was made in error.<sup>76</sup>

### 3 2 4 *Recovering erroneous remuneration paid to striking employees*

In *North-West Provincial Legislature v National Education Health and Allied Workers Union obo 158 Members*,<sup>77</sup> the LAC had to determine an appeal from the Labour Court, which had interdicted and restrained the employer from deducting any remuneration from employees until it had complied with section 34 of the BCEA.

In this matter, the employees had engaged in an unprotected strike. The employer issued a communiqué to the employees informing them that, given the unprotected industrial action, the principle of “no work, no pay” would apply to those employees who did not attend work. Despite the communiqués issued, all the striking employees received their remuneration, apparently because the employer failed to halt its payroll run in respect of the striking employees. Following this, the employer advised the employees that it would deduct the remuneration paid to them from their remuneration over a number of months. After negotiations failed between the parties, the employer proceeded to inform the employees that it would deduct three working days’ remuneration each month.

In response, the National Education, Health and Allied Workers’ Union (NEHAWU) approached the Labour Court on an urgent basis in terms of section 77(3) of the BCEA. NEHAWU asked the Labour Court to restrain the employer from effecting the deductions from the employees’ remuneration on the basis of their alleged participation in the unprotected strike. NEHAWU further sought an order declaring that the deductions were made in contravention of the BCEA and were, therefore, unlawful.

The Labour Court considered section 34(1) of the BCEA and held that since no written agreement had been concluded with the employees and no law permitted the deduction, the employer was not permitted to effect any deduction from the employees’ remuneration.<sup>78</sup> The Labour Court found further that there was no conflict between section 67(3) of the Labour Relations Act<sup>79</sup> (LRA),<sup>80</sup> which provides for “no work, no pay” during a

<sup>76</sup> *Ibid.*

<sup>77</sup> (2023) 44 ILJ 1919 (LAC).

<sup>78</sup> *North-West Provincial Legislature v NEHAWU obo 158 Members supra* par 5.

<sup>79</sup> 66 of 1995.

<sup>80</sup> S 67 of the LRA states:

- “(1) In this Chapter, “protected strike” means a strike that complies with the provisions of this Chapter and “protected lock-out” means a lock-out that complies with the provisions of this Chapter.
- (2) A person does not commit a delict or a breach of contract by taking part in—
  - (a) a protected strike or a protected lock-out; or
  - (b) any conduct in contemplation or in furtherance of a protected strike or a protected lock-out.
- (3) Despite subsection (2), an employer is not obliged to remunerate an employee for services that the employee does not render during a protected strike or a protected lock-out, however—

protected strike, and section 34 of the BCEA.<sup>81</sup> Consequently, it found that the deductions made, or those intended to be made, were unlawful. The employer was interdicted from effecting the deductions until it had complied with section 34 of the BCEA.<sup>82</sup>

On appeal in the LAC, the employer contended that (i) section 34 of the BCEA did not apply where the principle of “no work, no pay” finds application and (ii) the “no work, no pay” principle constituted “a law” as contemplated in section 34(1)(b), with the result that there had been compliance with section 34; therefore, the recovery of unearned remuneration did not amount to “self-help”, with set-off applicable. These contentions were all disputed.

Insofar as the “no work, no pay” principle was concerned, the employer argued that that it was entitled to effect the deductions since section 34 did not apply to the deductions made – on the basis that “no work, no pay” falls under the LRA, which deals with collective bargaining, and not the BCEA. This is an interesting point. This argument is, however, untenable in circumstances where, in this matter, the employer had already made the payments and, therefore, any deductions from already paid remuneration falls within the purview of the BCEA, irrespective of whether the deductions derive from the application of the “no work, no pay” principle.

The LAC rightfully dismissed the employer’s “no work, no pay” argument on the basis of its being unmeritorious.<sup>83</sup> This is because there is a clear distinction between an entitlement not to make payment of remuneration under certain circumstances, such as those that prevail in a strike, and the entitlement to make deductions under the circumstances specified in section 34 of the BCEA.

The LAC noted that, despite the employer not being obliged to remunerate the employees for services they did not render during the unprotected strike, it did so, and thereafter sought unilaterally to deduct such remuneration, without agreement or order obtained through an adjudicative or judicial process.<sup>84</sup>

In addition, the LAC held that it was not common cause on what days or over what period all employees were on strike. Therefore, to allow deductions to be made unilaterally by the employer, without any agreement or impartial adjudication on the issue, would be patently unfair, unjust and in violation of the express limitations of section 34 of the BCEA.<sup>85</sup> It was further noted that it has been made clear by the Constitutional Court in *Lesapo* that

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- (a) if the employee’s remuneration includes payment in kind in respect of accommodation, the provision of food and other basic amenities of life, the employer, at the request of the employee, must not discontinue the payment in kind during the strike or lock-out; and
  - (b) after the end of the strike or lock-out, the employer may recover the monetary value of the payment in kind made at the request of the employee during the strike or lock-out from the employee by way of civil proceedings instituted in the Labour Court.”

<sup>81</sup> *North-West Provincial Legislature v NEHAWU obo 158 Members supra* par 5.

<sup>82</sup> *Ibid.*

<sup>83</sup> *North-West Provincial Legislature v NEHAWU obo 158 Members supra* par 14.

<sup>84</sup> *North-West Provincial Legislature v NEHAWU obo 158 Members supra* par 12.

<sup>85</sup> *North-West Provincial Legislature v NEHAWU obo 158 Members supra* par 17.

the rule against “self-help” is necessary for the protection of the individual against an adversary’s arbitrary and subjective decisions and conduct. It serves as a guarantee against partiality and consequent injustice that may arise.<sup>86</sup> The employer’s appeal was, therefore, dismissed.

Interestingly, in this matter, the employer founded its justification for the deductions on the “no work, no pay” principle. It is submitted that this principle only applies at the time that the employer is determining what remuneration is payable to the employee (thus not constituting a deduction) and not as an underlying basis for unilateral deductions at a later stage, when remuneration has already been paid to the employee.

In addition, it is noteworthy that the payment of the remuneration was due to the employer’s failure to halt its payroll run in respect of the striking employees. It is possible that the employer anticipated that mounting its defence in terms of section 34(5) of the BCEA would not have been sustainable – that the failure to halt payroll could possibly not be argued to constitute an error in calculating an employee’s remuneration as contemplated in section 34(5) of the BCEA.

#### 4 THE COMMON-LAW DOCTRINE OF SET-OFF

In the simplest terms, the common-law doctrine of set-off allows one debt to be cancelled by another. It applies in instances where debts are mutually owing between two parties so that each party is simultaneously the debtor and creditor of the other party.<sup>87</sup>

In *Harris v Tancred*,<sup>88</sup> Rosenow J observed that the “origin of the principle appears rather to have been a common-sense method of self-help”.<sup>89</sup> The Appellate Division, as the Supreme Court of Appeal was then known, in *Schierhout v Union Government (Minister of Justice)*,<sup>90</sup> held the following with regard to the application of the doctrine:

“When two parties are mutually indebted to each other, both debts being liquidated and fully due, then the doctrine of compensation comes into operation. The one debt extinguishes the other *pro tanto* [only to the extent of the debt] as effectually as if payment had been made.”<sup>91</sup>

Based on the Appellate Division’s description of the doctrine of set-off, the following requirements must be met for the doctrine to apply: (i) there must be reciprocal debts between the parties; (ii) the debts must be of the same kind; (iii) the debts must be liquidated; and (iv) both debts must be due and payable.

In the case of deductions from an employee’s remuneration, it can easily be contended that scenarios involving deductions may not always be

<sup>86</sup> *Lesapo v North West Agricultural Bank supra* par 18.

<sup>87</sup> *National Credit Regulator v Standard Bank of South Africa Limited GP* (unreported) 2019-06-27 Case No 44415/16.

<sup>88</sup> 1960 (1) SA 839 (C).

<sup>89</sup> *Harris v Tancred supra* 843H.

<sup>90</sup> 1926 AD 286.

<sup>91</sup> *Schierhout v Union Government (Minister of Justice) supra* 289.

comparable to circumstances that give rise to the application of the doctrine of set-off, in that the deductions do not come into effect by operation of law, but rather, pursuant to an employer's unilateral determination to effect the deductions.

In the *Ubogu* decision, it was contended that section 38(2)(b)(i) of the Public Service Act permitted deductions by way of set-off under the common law. The Constitutional Court held that the doctrine of set-off did not operate as a matter of law in the matter. This is because there were no mutual debts between the employer and employee. Therefore the parties could not be said to be mutually indebted to each other.<sup>92</sup> As a result, the Constitutional Court confirmed that the set-off doctrine could not be invoked to defeat an employee's claim to their remuneration.<sup>93</sup> Notably, Nkabinde ADCJ (as she then was) remarked in *Ubogu* that this should not be understood to suggest that there could never be instances in which the doctrine of set-off, especially where there are mutual debts in existence, may be invoked.<sup>94</sup>

It may nevertheless, depending on the facts, certainly be arguable that the alleged debt (overpayment to an employee) is due and payable. However, this does not, in and of itself, give rise to the application of the common-law doctrine of set-off.

In *North-West Provincial Legislature*, the LAC confirmed the principle emanating from *Ubogu* and held that the doctrine of set-off does not operate *ex lege* (as a matter of law), and where there are no mutual debts, but rather an unresolved dispute about deductions from an employee's remuneration, it cannot be applied.<sup>95</sup>

Turning to whether section 34(5) of the BCEA permits the application of the doctrine of set-off, the Labour Court in *Padayachee* held:

"The respondent's contention that set-off constitutes a rule of the common law and that a rule of the common law is 'a law' as contemplated in section 34(1)(b) is accepted on the basis that the phrases 'a law of general application' and 'notwithstanding anything contained in any other law' have been held to refer to statute and the common law.

However, the respondent's contention that, in the absence of an agreement with the employee, an employer may rely on section 34(1)(b) and ignore sections 34(1)(a) and [34(2)] to make a deduction from an employee's remuneration in respect of damage or loss caused by the employee is rejected for the reasons set out below."<sup>96</sup>

The *Padayachee* decision confirms the applicability of the doctrine of set-off in terms of section 34(1)(b) of the BCEA in that it constitutes "a law" as contemplated by that provision. However, it is submitted that this finding does not give employers carte blanche to effect deductions by relying on the doctrine of set-off. In order for the doctrine to apply, the employer needs also

<sup>92</sup> *PSA obo Ubogu v Head of the Department of Health supra* par 71.

<sup>93</sup> *PSA obo Ubogu v Head of the Department of Health supra* par 72.

<sup>94</sup> *Ibid.*

<sup>95</sup> *North-West Provincial Legislature v NEHAWU obo 158 Members supra* par 21.

<sup>96</sup> *Padayachee v Interpak Books (Pty) Ltd supra* par 25–26.

to ensure that legal requirements of set-off are met. In *Padayachee*, the Labour Court held further:

“It is also clear that sections 34(1)(a) and 34(2) also require the damages to be liquidated through the process of a hearing and a written agreement which sets out the specific amount owed and due. The provision thus requires the existence of a liquid document.”<sup>97</sup>

Having regard to the above, the doctrine may not always be applicable in circumstances where there are no mutual debts between the parties. A mutual debt typically exists where an employer has suffered quantifiable loss or damages arising in the course of employment, through the employee’s fault. The loss or damages need to be quantified. To permit otherwise would entitle the employer to determine arbitrarily the amount due to the employee in respect of which set-off is sought to be applied.

It is further noted that the employer needs to follow a fair procedure in the quantification process, and provide the employee with a reasonable opportunity to show why the deduction should not be made. This is in accordance with section 34(2)(b) of the BCEA – in the fuller context of section 34(2), which provides:

“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;...”

An additional requirement is that the amount in respect of which set-off is sought to be applied should be reflected in a written agreement. This is in accordance with section 34(1) of the BCEA. Practically, the written agreement follows the process in terms of which the quantification of the amount due and payable is determined.

The *Padayachee* decision is not entirely at odds with the Constitutional Court’s decision in *Ubogu*. This is because the Constitutional Court accepted that there may be instances when the doctrine of set-off may apply. Such situations include where there is a mutual debt between the parties.

The concept of a “mutual debt” also requires some consideration. Does a mutual debt only exist in situations where an employer has suffered quantifiable loss or damages or does it extend to situations where the employer has made an overpayment to an employee? In both *Ubogu* and *North-West Provincial Legislature*, the factual matrix involved overpayments to an employee. In both cases, it was, however, found that the doctrine of set-off did not apply. The reasoning in *Ubogu* was that there was no mutual debt between the parties.<sup>98</sup> The reasoning in *North-West Provincial Legislature* was that there was an unresolved dispute about deductions made from employees’ remuneration for work that was not performed during a strike – meaning that the employees’ debts had not been determined.<sup>99</sup>

<sup>97</sup> *Padayachee v Interpak Books (Pty) Ltd supra* par 32.

<sup>98</sup> *PSA obo Ubogu v Head of the Department of Health supra* par 71.

<sup>99</sup> *North-West Provincial Legislature v NEHAWU obo 158 Members supra* par 21.



In the *Padayachee* decision, by contrast, the factual matrix involved the employer having suffered loss or damages as a result of the employee's fault, and thus it was found that the doctrine of set-off applied.

It can certainly be contended that where an employer has made overpayments to which an employee was not entitled, such overpayments constitute a debt that the employee owes the employer. Such amounts would, in ordinary circumstances, be easily ascertainable. An employer would similarly be indebted to remunerate the employee for services rendered, thus establishing mutual debts between the parties. As a result, there is no reason, on the face of it, to conclude in such circumstances that there would be no mutual debts between the parties.

In *Gqithekhaya v Amathole District Municipality*,<sup>100</sup> the High Court held:

"The provisions of subsection (5) do not in itself grant the employer a remedy or right to apply set off (even in a scenario where there has been an error in calculating the employees' remuneration). The section merely in my view confirms the category of deductions that an employee cannot be expected to challenge on the basis that she/she had no entitlement to in the first place due to it constituting an obvious overpayment or arithmetic miscalculation."<sup>101</sup>

The High Court, however, similarly did not discount the possibility of the doctrine of set-off being applicable under certain circumstances. In this regard, it was suggested that the doctrine would only apply where the employee has admitted the debt and payment terms, or if a judgment debt already exists as provided for in terms of section 34(1) of the BCEA, because only then can parties be mutually indebted to each other. The High Court also noted the Constitutional Court's observation in *Ubogu* that the doctrine of set-off cannot be invoked to defeat an employee's claim to their salary.<sup>102</sup>

## 5 CONCLUSION

The deduction of any amount from an employee's remuneration without consent remains a contentious issue that may be subject to challenge based on unlawfulness. It is trite that the Labour Court has exclusive jurisdiction in respect of all matters arising out of the BCEA.<sup>103</sup> Accordingly, the Labour Court is empowered to determine any challenge regarding the lawfulness of any deductions from an employee's remuneration.

There will be no controversy in respect of deductions that are effected in accordance with an agreement between the parties. However, where an employer has erroneously made overpayments to an employee, it is submitted that the employer is not required to obtain the employee's consent prior to making the deduction. The employer may proceed to effect deductions in accordance with section 34(5) of the BCEA. The employer would be entitled to do so under this provision. However, the employer

<sup>100</sup> (2023) 44 ILJ 627 (ECL).

<sup>101</sup> *Gqithekhaya v Amathole District Municipality supra par 54*

<sup>102</sup> *Gqithekhaya v Amathole District Municipality supra par 62.*

<sup>103</sup> S 77(1) of the BCEA. See also *Amalungelo Workers' Union v Philip Morris South Africa (Pty) Limited* (2020) 41 ILJ 863 (CC) par 20.

would first need to satisfy itself that the amount sought to be deducted constitutes an overpayment resulting from an error in calculating the employee's remuneration. This section cannot be relied upon for purposes of recovering loss or damage incurred owing to the employee's fault or for the repayment of debts.

Although section 34(5) is the enabling provision and thus does not expressly require the employee's consent, it is submitted that the provision should not be interpreted as allowing employers unfettered "self-help" and *carte blanche* to deduct whatever amount they deem appropriate, and without following any due process. It is important for an employer to allow an employee to make representations as to why the deductions should not be effected and their ability to pay the instalments sought to be deducted. The notion of a fair procedure is implicit in all employment legislation.

Notably, unlike deductions effected in terms of an agreement under section 34(1), read with section 34(2), the provisions of section 34(5) do not expressly require an employer to follow a fair procedure. Despite this, employers should, at the very least, advise employees in writing, prior to effecting deductions under section 34(5), and follow a fair procedure in doing so.

To date, our courts have not been called upon to pronounce on the constitutional validity of section 34(5) of the BCEA. However, the Constitutional Court in *Ubogu* nevertheless remarked on section 34(5) in the course of determining the unconstitutionality of section 38(2)(b)(i) of the Public Service Act. The Constitutional Court stated:

"There can be no doubt that the recovery of monies overpaid by the state engages multi-faceted interests. Section 34(1) of the BCEA may be a point of reference when the defect in the impugned legislation is remedied. This section prohibits an employer from making deductions from an employee's remuneration unless by agreement or unless the deduction is required or permitted in terms of a law or collective agreement or court order or arbitration award. It bears mentioning that section 34(5) read with section 34(1) of the BCEA does not authorise arbitrary deductions. Therefore, the appropriate forum for balancing different interests is Parliament and it will be open to it to consider, among other things, the impact of section 34 of the BCEA and the potential inequality between public service employees and those falling outside the public service who have been overpaid."<sup>104</sup>

Although this remark appears to be obiter in the *Ubogu* decision, employers should nevertheless be circumspect and avoid arbitrarily relying on section 34(5) when the facts do not give rise to its application. Where the facts do give rise to its application, employers should follow a fair procedure.

Regarding the principle of fair procedure, the Constitutional Court in *De Lange v Smuts NO*<sup>105</sup> held:

"When contemplating the essential purpose of the protection afforded through the notion of procedural fairness, my sight is arrested by this fact: at heart, fair procedure is designed to prevent arbitrariness in the outcome of the decision. The time-honoured principles that no-one shall be the judge in his or her own

<sup>104</sup> *PSA obo Ubogu v Head of the Department of Health supra* par 78.

<sup>105</sup> 1998 (7) BCLR 779.

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matter and that the other side should be heard, aim toward eliminating the proscribed arbitrariness in a way that gives content to the rule of law.”<sup>106</sup>

Although section 34(5) is the enabling provision, it does not appear that the legislature found it necessary to require an employer to follow a fair process when it effects deductions in terms of the provision. The reasoning is probably that where there has been an erroneous overpayment, such a case should not be contentious in circumstances where the employee would not have been entitled to an overpayment. An additional consideration is that the overpayment is likely to be easily ascertainable and should not give rise to a dispute. This was similarly noted in *Gqithekhaya*. However, it is submitted that the legislature should consider amending section 34(5) to provide more clarity on the parameters of the application of the provision and the procedure, if any, required to be followed in respect thereof.

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<sup>106</sup> *De Lange v Smuts NO supra* par 131.