CASES / VONNISSE

FOLLOWING DUE PROCESS BEFORE DEDUCTING AMOUNTS FROM SALARY: A REFLECTION ON

Ngcangula v Mhlontlo Local Municipality; Nqekeho v Mhlontlo Local Municipality (2022) 43 *ILJ* 2398 (ECM)

1 Introduction

Procedural fairness in labour disputes is an important requirement that employers must adhere to if they are to pass court scrutiny. Employers often focus only on the substantive part of labour disputes, oblivious that due process must also be followed. Such a process, which takes centre stage in this note, embraces the right to make representations and is derived from the principles of natural justice. In the absence of an opportunity to make representations, the outcome of such a process is flawed. Such deficiencies are scrutinised in this note with a view to warn and sensitise employers that any flawed process vitiates the outcome of a disciplinary hearing. The requirement that employers follow due process before making an adverse decision against employees, even if they have a *prima facie* case, is often undermined. South African labour law is grounded in the principles of natural justice to the extent that a wrong procedure or failure to adhere to procedural requirements vitiates any outcome or renders it unfair. This discussion examines the case of *Ngcangula v Mhlontlo Local Municipality; Nqekeho v Mhlontlo Local Municipality* ((2022) 43 *ILJ* 2398 (ECM)), which illustrates the implications for employers when they fail to give employees the opportunity to be heard before deducting amounts from their salary.

2 Factual matrix

The applicants were senior employees of the respondent municipality. Both applicants were employed pursuant to contracts of employment that provided a basic salary and a car allowance. In 2019, the municipal council resolved to grant a 2,5 per cent increase to all employees. The applicants also benefited from this resolution, and their salaries and car allowances were increased. However, in 2020, the municipal council resolution of 2019 was reversed, and deductions were made from the applicants' salaries. The council was of the view that the applicants were not entitled to the 2,5 per cent increase; they did not qualify for the notch increment as the applicants

had to undergo job evaluations, which were not yet complete. Alternatively, the municipality stated that the applicants might be entitled to the notch increment upon the conclusion of the wage curve collective agreement taking place in the bargaining council. The respondent viewed the monies paid thus far as overpayments. The deduction was calculated retrospectively from March 2019 to December 2020.

As a result of the reduction in their salaries, which the applicants considered unlawful, they approached the High Court in terms of section 34(1) and (2) of the Basic Conditions of Employment Act (75 of 1997) (BCEA) for a declaratory order that the decision to reduce their salaries was unlawful.

3 Findings

The applicants contended that the reduction was unlawful because they were not allowed to make representations before the deductions had been effected. They submitted that no legal basis justified the reduction in their remuneration, and that the municipality was the author of its own misfortune should it suffer loss. They then contended that they had no legal obligation to refund any portion of their remuneration because a reduction in their remuneration was a breach of their contractual rights and was made without following due process. On the other hand, the municipality raised numerous special defences – among others, that the High Court lacked jurisdiction and that the contractual entitlement had not been pleaded.

As regards the jurisdictional issue, the court disposed of it on the basis that section 77(1) and (3) of the BCEA confers jurisdiction on the High Court to determine a labour dispute if it concerns a breach of a contractual right that has been specifically pleaded on affidavit. In so doing, the court rejected the municipality's contention that the breach had not been pleaded in the affidavit.

Concerning the merits of the dispute, the court reasoned that the founding affidavits deposed to by the applicants showed that there were contracts of employment between the parties entitling the applicants to the payment of a basic salary and car allowances. The court ruled that the unilateral deduction of the 2,5 per cent notch increment on salaries and allowances amounted to a contractual breach. In so doing, the court found unsustainable the municipality's defence that the payment of the salary and allowance adjustments were unlawful. On the contrary, the court found the payment lawful because no legislation prevented the benefits of the notch increment. In the court's view, the unilateral implementation of the reduction contravened section 34(2)(*b*) of the BCEA, as the applicants were not afforded the right to be heard. The implementation was, therefore, effected without following due process. The court accordingly found that the municipality's unilateral decision to reduce the employees' salaries and allowances was unlawful. The court ordered the municipality to reinstate retrospectively the applicants' salaries and allowances.

As alluded to in the introduction, this case raises the question of the application of the principles of natural justice, which employers quite often ignore. The principles of natural justice are discussed in detail below.

3 1 The concept of natural justice

Subsumed under the concept of natural justice are the Latin maxims "*nemo iudex in sua propria causa*" and "*audi alteram partem*", which, loosely translated, mean "no one may or should be a judge in his/her [own] cause" and "hear the other side" (Burns and Beukes *Administrative Law Under the 1996 Constitution* (2006) 317). These two principles form the epicentre of procedural fairness when dealing with cases of an administrative nature. They are of particular importance when one takes into account the dictates of section 33(1) of the Constitution of the Republic of South Africa, 1996 (Constitution), which guarantees everyone a right to administrative action that is procedurally fair. As evinced in the court's reasoning *in casu*, it is imperative for an administrator to ensure that their decision-making process is not unjustly arbitrary but adheres to fair and legally correct procedures. It is only fair, before taking a decision that adversely affects the rights of an individual, that they should be heard. The applicants *in casu* premised their contentions on this basis and the court confirmed the unlawfulness of their salary reduction. To fully understand the court's decision, it is necessary to unpack the full contents of the Latin maxims above *seriatim*.

3 2 Audi alteram partem

Inspection of the jurisprudence concerning the scope and content of the principle above reveals that compliance with the *audi alteram partem* rule entails:

(i) An individual should be granted an opportunity to be heard before an adverse decision is taken against them.

Thus, an individual must be given proper notice of the intended action; reasonable and timely notice; an opportunity to appear personally to defend the action; an opportunity for legal representation; an opportunity to lead evidence and cross examine the evidence led against them; and finally, a public hearing. The above steps are necessary to give full effect to an individual's right to be heard. These are expatiated on below, *seriatim*:

(1) Proper notice entails furnishing an individual with all the necessary details that will aid them in preparation for the pending case. Lord Denning in *Kanda v Government of Malaya* ([1962] AC 322) affirmed this notion when he held:

> "If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him." (See generally *Minister van Landbou v Heatherdale Farms* 1970 (4) SA 184 (T); *Dhlamini v Minister of Education and Training* 1984 (3) SA 255 (N); *Zondi v Administrator Natal* 1991 (3) SA 583 (A))

Furthermore, where an individual stands accused of more than one charge, they must be informed of all the charges. Merely informing them of one and excluding others would be contrary to natural justice (*Board of Trustees of the Maradama Mosque v Mahmud* [1962] 1 AC

13 24–25). Equally, finding an individual guilty of an offence that differs from the one with which they have been charged contradicts the principles of natural justice (*Lau Luit Meng v Disciplinary Committee* [1968] AC 391).

Finally, a plethora of cases denotes that the confirmation of an order that is premised on facts that an individual has not been allowed to challenge is repugnant to natural justice (*Fairmount Investment Ltd v Secretary of State for the Environment* [1976] 1 WLR 1225, 1260, 1265–1266; *R v Deputy Industrial Injuries Commissioner, ex p Jones* [1962] 2 QB 677 685; *Sabey & Co Ltd v Secretary of State for the Environment* [1978] 1 All ER 586; *Mahon v Air New Zealand* [1984] AC 808).

(2) An exposition of the surrounding jurisprudence suggests that a court will employ a subjective test to determine whether an individual in question has been given sufficient time to process all the relevant information. For example, in the case of *Du Preez v Truth and Reconciliation Commission* (1997 (3) SA 204 (A)), Corbett CJ unequivocally stated that merely affording a person detrimentally implicated an opportunity to make representations or give evidence was not itself enough to dispense with the requirements of fairness; there was a further obligation to ensure that timeous and sufficient notice be given to the person giving evidence. This confirms the findings of the Appellate Division in *Turner v Jockey Club of South Africa* (1974 (3) SA 633 (A)), where the disciplinary action of the Jockey Club was set aside because the jockey was confronted with serious allegations of which the plaintiff had not been given prior notice. Similarly, in *Nkomo v Administrator Natal* (1997 (3) SA 204 (A)), the 48 hours afforded to employees to make representations concerning impending dismissals was found wanting.

(3) It is also imperative that an affected person be afforded the opportunity to appear in person as elucidated in section 3(3)(*c*) of the Promotion of Administration of Justice Act (3 of 2000). However, personal appearance is discretionary, and the administrator exercises a prerogative to determine instances where it is unnecessary to have a statutory provision mandating personal appearance. In *Rutenberg v Magistrate, Wynberg* (1997 (4) SA 735 (C)), Conradie J suggested that due regard must be given to the fairest way of resolving the dispute. In other words, a decision whether to hear oral evidence should be determined by the circumstances of the case and not necessarily be left to the discretion of the administrator. The rationality of this view is best exemplified in the case of *Fraser v Children's Court* (1996 (8) BCLR 1085 (T), *Pretoria*), where Wunsh J considered the denial of a father's request to present *viva voce* evidence prejudicial and amounting to a gross irregularity. In contrast, in *Bam-Mugwanya v Minister of Finance and Provincial Expenditure, Eastern Cape* (2001 (4) SA 120 (Ck)) and in *Imbali 13 and 15 Taxi Association v KwaZulu Natal Provincial Taxi Registrar* (2001 (4) SA 120 (Ck) par 24 and 26), the courts found the absence of oral evidence not prejudicial to an individual's right to procedural fairness.

In *Bam-Mugwanya* (*supra*), the court held that the denial of a request to lead oral evidence to supplement written submissions did not negate the fairness of the procedure. This sentiment is also found in the case of *Imbali* (*supra*), where Nicholson J confirmed the non-essentiality of interested parties appearing before an administrator if they had been granted ample time to make written representations.

(4) Despite not being explicitly included in the *audi alteram partem* rule, the right to legal representation tends to find expression in statutes or through implication. In *Yates v University of Bophuthatswana* (1994 (3) SA 815 (B) 273), the court found that Bophuthatswana's constitution had in its declaration of founding rights expressly provided for the right to legal representation. In *Dladla v Administrator Natal* (1995 (3) SA 769 (N)), the court had to determine whether legal representation was permissible at an employee's disciplinary hearing if the empowering statute was silent. The court found that the administrator had a discretionary power, and that such an exercise of discretion would be subject to review at the instance of an aggrieved party.

(5) Leading evidence and cross-examining witnesses is also not intrinsically rooted in the rules of natural justice. The right to cross-examination in administrative proceedings was not given due regard by courts in the past as they allowed for hearsay and opinion evidence (*Geneeskundige en Tandheelkundige Raad v Kruger* 1972 (3) SA 318 (A) and *Davies v Chairman Committee of the Johannesburg Stock Exchange* 1991 (4) SA 43 (W)). It has, however, been posited that section 34 of the Constitution changed this as it guarantees everyone the right to a fair public hearing or, where appropriate, an independent and impartial tribunal (Burns *et al Administrative Law Under the 1996 Constitution* 171).

(6) The right to a public hearing is also not absolute under common law and, despite the "fair public hearing" guarantee of section 34, some cases require confidentiality. Such cases include disciplinary hearings and matters dealing with state security (Devenish, Govender and Hulme *Administrative Law and Justice in South Africa* (2001) 287). The court in *Botha v Minister van Wet en Orde* (1990 (3) SA 937 (W)) denied the request of a respondent who sought to have their proceedings heard *in camera*. The request had been based on a similar application involving the release of a detainee that had received wide media coverage. In rejecting the request, the court held that where the exercise of a discretion relates to the detention of a person, the public should be apprised of how the judiciary addresses the issue.

(ii) An individual ought to be privy to the considerations that count against them.

For a person to be effectively heard, they must know what the essential factors are that may negatively impact them so they can adequately prepare a sound defence (Devenish *et al Administrative Law and Justice in South Africa* 88). *Loxton v Kenhart Liquor Licensing Board* (1942 AD 287–315) is a *locus classicus* in this regard, but it was subsequently

qualified in *Down v Malan* (1960 (2) SA 734 (A)): the court reasoned that, where an interested party could foresee the prejudicial facts and failed to act accordingly, such a person cannot use non-disclosure of the facts as a factor constituting an impediment to their fair trial. In *Lawson v Cape Town Municipality* (1982 (4) SA 1 (C)), the applicant was denied a licence to run a massage parlour – based on a confidential report in the licensing board's possession to which the applicant was not privy. The court considered this non-disclosure to be a defect in the applicant's right to a fair trial and consequently the decision was set aside (*Lawson v Cape Town Municipality supra*).

The importance of the disclosure of facts was further buttressed in *Tseleng v Chairman Unemployment Insurance Board* (1995 (3) SA 162 (T)), where an applicant for unemployment benefits had their application denied based on a policy that was unknown to the applicant. Heher J held:

> "It is beyond the question administratively unfair to fail to draw the attention of an applicant [to the fact] that the board relies on a particular policy and that by such failure to deprive the applicant of the opportunity of making submissions as to why he should be treated as one who qualifies within the terms of that policy." (*Tseleng v Chairman supra* 178j–179A)

Thus, in the spirit of strict compliance with the *audi alteram partem* rule, an administrator who stumbles upon information that is prejudicial to an affected person must disclose such information. Even in instances where a hearing has taken place and more information comes to light, a further hearing must be held in order for the affected person's side of the story to be heard (*Tseleng v Chairman supra* 178j–179A).

In *Maharaj v Chairman of the Liquor Board* (1997 (2) BCLR 248 (N) 251 G-1), the court ruled that an applicant must also be alerted to deficiencies in their application and afforded an opportunity to supplement their application. Nicholson J observed the following:

> "It is trite law that a party whose rights are subject to an enquiry is entitled to be informed of the facts and information gleaned by the authority in question which may be detrimental to her interests and that she be given an opportunity to reply thereto." (*Maharaj v Chairman supra* 260)

This finding was confirmed in *Kotzé v Minister van Onderwys en Kultuur* (1996 (3) BCLR 417 (T)), where the court found that the Director-General's consideration of information not contained in the applicant's application constituted a denial of procedurally fair administrative action. The court was of the view that the applicant should have been allowed to deal with the information that did not form part of their application, yet was taken into account when their application was considered (*Kotzé v Minister van Onderwys en Kultuur supra* 418).

(iii) An individual is entitled to the reasons for the decision taken by the administrator.

The importance of furnishing reasons for an administrative action cannot be gainsaid, especially when considering the history of apartheid in South Africa. Whether an administrator acted lawfully or unlawfully, rationally or

arbitrarily, can be inferred from the reasons the administrator provides (Baxter *Administrative Law* (1984) 290). Baxter articulates the importance of furnishing reasons for administrative action as follows:

(1) It is submitted that the requirement to provide reasons entails a duty to rationalise the decision, as the administrator must subsequently justify their mindset and thought process in deciding the question (Baxter *Administrative Law* 290).

(2) Reasons may console the affected individual as they have insight into why the administrator took the decision they did. It is submitted that this instils confidence in the public's view of administrative decisions (Baxter *Administrative Law* 290).

(3) Constructive criticism of administrative decisions may only ensue if the critics are privy to the thought process of the administrator. Being privy to these thoughts also provides a basis for appeal or review (Baxter *Administrative Law* 290).

(4) The reasons furnished serve a genuine educational purpose in that an affected applicant may remedy future applications of a similar nature (Baxter *Administrative Law* 290).

Prior to the 1996 Constitution, furnishing reasons for administrative actions was seldom applied. This phenomenon is largely attributed to the absence of this right at common law and to its exclusion by the enabling statutes of that time (Burns *et al Administrative Law under the 1996 Constitution* 328*).*

This position has been changed by section 33(2) of the Constitution, which specifically provides for a right to written reasons for any administrative action taken. Courts have consequently abandoned their previous acquiescence to administrators' not giving reasons for their decisions, and they now enforce section 33(2). Examples of such enforcement are evident in the following cases.

In *Maharaj* (*supra*)*,* the court found that reasons should still be furnished despite doubts that the licence was in the public's best interests. The court reasoned that the denial of an applicant's application, without informing them of the Board's doubts and allowing them an opportunity to address these doubts, was unjust and unfair.

In *ABBM Printing and Publishing (Pty) Ltd v Transnet Ltd* 1998 (2) SA 109 (W)*,* the court found that an applicant was entitled to written reasons on why their tender bid had been rejected and awarded to another.

In summation, the *audi alteram partem* rule ultimately fosters rationality, fairness and transparency in administrative acts. It creates due process procedures that hold an administrator accountable for their decisions, ultimately instilling public confidence in administrative decisions.

3 3 Nemo iudex in propria causa

The second principle of natural justice is against bias, which finds expression in the Latin maxim "*nemo iudex in propria causa*"*.* Loosely

translated, the maxim means “no one should be a judge in their own cause”. This guards against the partiality of an arbitrator who may be called upon to decide a case in which they have a vested interest. In *President of South Africa v South African Rugby Union* (2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC)), the court held that the impartiality of a court in adjudicating disputes that come before it is the cornerstone of any fair and just legal system.

The court in *Rose v Johannesburg Local Road Transportation Board* (1947 (4) SA 287 (W)) stated:

> “The right of everyone to equal justice before the law, … requires that every party in a matter upon which a judicial body is called upon to give a decision should be entitled to what must appear to be a fair, impartial and unbiased consideration of their case.”

Bias can manifest in three ways: pecuniary interest, personal interest and prejudice. Whether a reasonable suspicion of bias exists in the mind of an adjudicator remains subjective, and must be determined based on the evidence available. It follows that it would be wasted for the *audi alteram partem* rule to be followed meticulously only to have this exercised before an adjudicator who has a vested interest in the outcome.

4 Analysis

The *Ngcangula v Mhlontlo Local Municipality; Nqekeho v Mhlontlo Local Municipality* (*supra*) case raises the fundamental applicability of natural justice, which entitles everyone to be given an opportunity to be heard before a decision is made against that person. The principles of natural justice are embedded in the maxim of *audi alteram partem*. The *audi alteram partem* rule is imported from administrative law and applied in the employment context. Thus, in *Modise v Steve’s Spar Blackheath* (2000 (21) *ILJ* 519 (LAC)) (*Modise*), although in the context of dismissal, the Labour Appeal Court held that a worker is, as a general rule or requirement, entitled to an opportunity to be heard before they can be dismissed. Such a general rule is consonant with the principle of fairness, which underpins labour disputes. Hence in *Modise*, procedural fairness was found to be a dominant thread in both administrative and labour law. In administrative law, a decision-maker must give an affected person an opportunity to make representations and to be heard before any adverse decision is taken against them. Similarly, in labour law, fairness dictates that an employer must afford the employee an opportunity to tell their side of the story to mitigate any decision that may be taken against them. Fairness is therefore an important principle of labour law; it mandates that fair procedure be followed in all labour disputes, regardless of whether an employer has a *prima facie* case against its employee.

Thus, in *Department of Education (Province of the Northern Cape) v Kearns NO* (2019 (40) *ILJ* 1764 (LAC)), the Labour Appeal Court held that the *audi alteram partem* principle was the cornerstone of procedural fairness because it provides any accounting officer with an opportunity to obtain information that may be relevant for the proper exercise of the power. The *audi alteram partem* rule is therefore indispensable for any proceedings to

be fair. This means that procedural fairness gives a party who is likely to be affected by the outcome of any decision the opportunity to make representations and to be heard before an adverse decision is made. This accords with the prescripts of section 188 of the Labour Relations Act (66 of 1995) (LRA), which requires that dismissal be effected in accordance with a fair procedure. The LRA also requires, in section 188(2), that a fair dismissal be made in accordance with the Code of Good Practice: Dismissal (Schedule 8 to the LRA).

Indeed, clause 4 of the Code of Good Practice clearly provides guidance for a fair procedure. The employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision.

Thus, in the case under consideration in this note, the municipality that decided through its council to reverse the salary and allowance increment that it had implemented after its earlier council meeting fell short of the requirements of procedural fairness. This is because the municipality did not give the applicants any opportunity to make representations, nor were they heard before the decision was made. The deduction was unlawful and made unilaterally. This conduct was clearly against the rule of natural justice. Thus, the court correctly found that the reduction was not authorised by any law and constituted self-help because the applicants were not at fault. The finding against self-help was the subject of the Constitutional Court judgment in *Lesapo v North West Agricultural Bank* (2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC)) (*Lesapo*). Although the case concerns the validity of section 38(2) of the North-West Agricultural Bank Act (14 of 1981) (which permits the Bank to seize the property of defaulting debtors with whom it had concluded loan agreements, and to sell such property to recover its debt, without recourse to a court of law), its finding is relevant for present purposes. The court in *Lesapo* stressed the importance of the rule proscribing self-help. The prohibition protects individuals against arbitrary and subjective decisions; it guarantees impartiality and protects against the injustice that may arise therefrom (par 18). In a constitutional democracy underpinned by the rule of law, there is no place for legislation that is inimical to and infringes the fundamental principles enshrined in the Constitution (par 17), especially when the tendency for aggrieved persons to take the law into their own hands is a constant threat.

Almost two decades later, the finding in *Lesapo* was applied in *Public Servants Association obo Ubogu v Head of the Department of Health, Gauteng, Head of the Department of Health, Gauteng v Public Servants Association obo Ubogu* (2018 (2) BCLR 184 (CC); (2018) 39 *ILJ* 337 (CC); [2018] 2 BLLR 107 (CC); 2018 (2) SA 365 (CC)). Again, the issue was constitutionality – this time that of section 38(2)(*b*)(i) of the Public Service

Act (103 of 1994), which the Labour Court had declared invalid. The issue was whether section 38(2)(*b*)(i) of the Act entitles the State to deduct amounts from an employee's salary in respect of incorrect payments, without due process or the employee's knowledge, or an agreement between the parties. The court per Nkabinde ADCJ held that section 38(2)(*b*)(i) does not pass constitutional scrutiny as it permits unfettered self-help in violation of the principle of legality enshrined in section 1(*c*) of the Constitution. The court reasoned that section 38(2)(*b*)(i) was not only unfair, but also imposed strict liability on an employee for overpayments, irrespective of whether the employee could afford to pay the arbitrarily determined instalments or had been afforded an opportunity for legal redress before the deductions were made (par 64–67). The court then found that self-help, in such instances, undermines the judicial process as protected by section 34 of the Constitution. Section 34 of the Constitution not only guarantees access to the courts but also safeguards the right to have a dispute resolved by the application of law in a fair hearing before an independent and impartial tribunal or forum. Relying on *Ubogu*, the Labour Court per Steenkamp J in *Bux v Minister of Defence & Military Veterans* ((2018) 39 *ILJ* 2298 (LC)) also found that the continuing deductions from the applicant's remuneration, purportedly in terms of section 8 of the Public Service Act, were unlawful.

From the *Lesapo* (*supra*) and *Ubogu* (*supra*) judgments, two important issues are raised in relation to self-help. The first is that any deductions should be made subject to an employee's prior agreement. On this score, it is imperative that both employer and employee agree on a number of points. They must first agree that there is an overpayment that warrants reimbursement and subsequent deduction. Thereafter, both parties should agree on the monthly instalment amount to be deducted from the employee's salary. If the employer and employee fail to agree on the deduction, or whether there is an overpayment, then the second option is to approach a court or impartial forum for a determination as to whether there is an overpayment warranting reimbursement and what the deductible amount should be.

Any deduction from an employee's salary that is outside the two options mentioned above amounts to self-help. Borrowing from *Ubogu*, that would amount to the employer being a judge in its own case. It is precisely to avoid arbitrary decisions that may adversely affect employees that the court guards against self-help. This would avoid a situation like *Ubogu* where the deducted amount may be more than what the employees could afford. Thus, instead of helping itself, an employer should approach a court if an employee refuses to agree to the deduction. The Labour Appeal Court in *North-West Provincial Legislature v National Education Health & Allied Workers Union on behalf of Members* ((2023) 44 *ILJ* 1919 (LAC)) reiterated that self-help is prohibited, even if negotiations have failed. In this case, the employer informed striking employees of the application of the principle of "no work, no pay", but then erroneously paid the employees. The employer later attempted to deduct the overpayment from remuneration, but negotiations failed, and the employer unilaterally proceeded with making deductions. The court ruled that an employer is only entitled to make deductions if the employee agrees in writing to a deduction, or if the deduction is permitted by law, collective agreement, court order or award.

That an employee should consent in writing to the deduction, it is argued, is no more than the *audi* rule. It is in the process of engaging or allowing the employee to make representations as to the veracity of the overpayment that an agreement may arise.

In casu, although the court did not specifically refer to the *audi alteram partem* rule, it nevertheless correctly ruled that the salary reduction contravened section 34(2)(*b*) of the BCEA. In terms of section 34(2)(*b*), read with section 34(1), an employer may not make any deduction from an employee's salary unless the employer has followed a fair procedure and has given the employee a reasonable opportunity to show why the deductions should not be made. Although the Act is silent as to what fair procedure entails, guidance may be sought from the employer's policy. In the absence of such a policy, a fair procedure would entail engaging with the employee about the overpayment and the deduction to be made. As stated above, if an employee does not consent to the deduction, the employer should refer the dispute to the relevant tribunal. Any deduction that falls short of this process would amount to self-help and be potentially arbitrary. In this case, the municipality decided that the applicants were not entitled to the increases because they did not meet the requirements, and so it resolved to reduce the salary and car allowance increments. The reduction, as the court found, amounted to self-help and was therefore unfair. Evidently, the municipality, through its council, flouted the principles of natural justice, which are embedded in labour law. For most employees, a salary is their only income and that is why the legislator has enacted stringent conditions before deductions may be made from an employee's salary. Thus, section 34 of the BCEA makes any deduction from salary subject to the written approval of an employee, and ensures that an employer must follow a fair procedure and give an employee a reasonable opportunity to show why the deductions should not be made. Without meeting the requirements of section 34, it cannot be said that a deduction is lawful.

Clearly, in the discussed case, the municipality's decision to implement the deduction was unilateral and in contravention of *pacta sunt servanda*, which principle underpins the law of contract and emphasises that parties must honour their contractual obligations. The municipality failed to meet its obligations when it made the deduction, amounting to a breach of contract and entitling the applicants to claim specific performance in the form of payment of their salaries, hence the court's order of reinstatement of the applicants' salaries with retrospective effect.

5 Conclusion

Section 34 of the BCEA makes a deduction from an employee's salary subject to prior agreement between the parties. When an employer forms the view that there has been an overpayment to an employee, the employer is required to engage with the employee on the overpayment and the deduction that should be made. Both parties should agree on the monthly instalment amount and the period over which deductions will be made. If parties cannot agree on either the overpayment or the deductible amount, the employer should refer the dispute to the relevant tribunal. In the event

that an employer resorts to deducting from an employee's salary outside the prescripts of section 34, this amounts to self-help. Such a practice is in violation of the fundamental principle of the rule of law and the principle of legality. It is against this backdrop that the proscription of section 34 should be understood.

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