NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN LONDON CIRCUIT LOCAL DIVISION)

Case No. EL 595/2018

In the matter between:

ZOLILE VUMAZONKE	**Applicant**
and	
MUNICIPAL MANAGER	**First Respondent**
BUFFALO CITY METROPOLITAN MUNICIPALITY	**Second Respondent**

JUDGMENT

HARTLE J

[1] This matter came before me on the trial roll.

[2] The applicant, an erstwhile legal advisor in the employ of the Buffalo City Metropolitan Municipality, issued out an application to compel the respondents

to pay certain leave benefits due to him as per his contractual entitlement after his resignation from the municipality at the end of February 2018. He included a prayer for an accounting of the amount after learning that what was owed to him was being withheld on the basis of a claim that certain monies were instead owing by him to the second respondent because he had purportedly been overpaid whilst in the municipality's employ.

[3] The respondents opposed the application. Although they admitted that a nett sum of R26 423.10 was due to the applicant as leave pay, they justified their entitlement to have retained this amount because he allegedly owed the second respondent an amount of R109 448.32 based on the overpayment to him during his tenure as acting Head: Governance Compliance and Internal Audit on incorrect TASK Grade 18 instead of TASK Grade 17.

[4] According to the respondents they had sought to engage with the applicant in order to recover the overpayment which had resulted from being remunerated on the incorrect TASK grade even before his resignation and soon after his acting appointment had come to an end, but to no avail. The end result of these discussions is that he was not prepared to agree to repay the amount back in monthly instalments as had been asked of him.

[5] The reason for this, so the applicant clarified in his replying affidavit, is that from his point of view there had been no mistake made in paying him on TASK Grade 18 during his acting stint because the second respondent had especially contracted with him to act on this pay level, which offer he had accepted. Further, leaving aside the issue of his contractual entitlement to be paid on the agreed pay grade, he submitted that the second respondents' retention of his benefits, or set off of them against the monies due to him, could also not be brought within the ambit of the provisions of section 34 (5) of the Basic

Conditions of Employment Act, No. 75 of 1997 ("BCEA") especially since he had not agreed in writing to any deductions from his remuneration neither was there any court order in place that might have authorized the set off, as it were, against the leave pay due to him.

[6] In a late supplementary affidavit filed with the leave of the court, he put up copies of correspondence and documentation which ostensibly confirms his appointment in the acting position of Head: Governance Compliance and Internal Audit for the relevant period on TASK Grade 18. A memorandum from the Acting City Manager to the Head of Department: Corporate Services, which predates his acting appointment, authorizes him to act in the relevant capacity with effect from 1 February 2016 until further notice and recommends that he be paid an acting allowance in the said position. It does not specify the pay grade but in the letter of appointment addressed to him by the first respondent dated 6 February 2016 it is confirmed that he is authorized to act "in the capacity of Head: Governance, Compliance and Internal Audit *on Task Grade 18* with effect from 1 February 2016 until further notice". Other miscellaneous acting allowance forms showing payment calculations similarly reflect the task grade level for the acting allowance as "18".

[7] The respondents contemporaneously with their answering affidavit filed a counter application in which they pray for an order:

> "1. That the respondent (applicant *in casu*) be held liable to the second applicant (second respondent in the main application) for the amount of R109 448.32;
> 2. that the respondent be ordered to repay the amount of R109 448.32 to the second applicant within thirty (30) days of the granting of this order by the above Honourable Court.
> 3. that the respondent pay the costs of this application."

[8] There is no pertinent *causa* stated for the relief sought. The counterapplication was supported by an affidavit of the first respondent which merely asserted that during the applicant's employment with the second respondent he had acted in a position in respect of which he was paid on TASK Grade 18 instead of 17, which resulted in the overpayment. (In the respondents' answering affidavit to the main application the first respondent coincidentally attributes the overpayment to "reason unbeknown to (him) and the second respondent". Of further significance is that in addressing the issue of the supposed overpayment of the acting allowance with the applicant in writing, in correspondence dated 11 October and 2 November 2017 respectively, the second respondent only recorded the conclusion that a mistake had occurred but failed to elucidate what that mistake was.) Nothing else is asserted in the founding affidavit that would justify the remedy claimed by the respondents that the applicant simply "be held liable to the second (respondent) for the amount of R109 448.32", although the apparent motivation for the counterapplication was that the first respondent, in his capacity as accounting officer, has a "legislative and contractual duty to ensure that public funds are utilized in a proper manner"; that the municipality has been "prejudiced by the failure of the (applicant) to repay the money, *which he clearly owes in respect of the overpayment made to him during his acting stint"* and that, if he is not ordered to repay the amount claimed as "an overpayment" (as is claimed in the counterapplication) the second respondent will suffer irreparable harm.

[9] The first respondent repeats the allegation in the founding affidavit that several attempts were made to elicit the applicant's acknowledgement of the overpayment (and error implicit therein) without any success. Evidently, on the assumption that they were entitled to have applied set off, they appear to have

done exactly that.[1] Reading between the lines though they took no formal legal steps to vindicate the second respondent's manifestly compromised position (on their evidence), or to recover the alleged overpayment due to it, over and above retaining the applicant's leave monies that were due to him. The counterapplication before this court represents the sum total of their earnest endeavours in this respect and even in this respect they appear confused as to the basis for their alleged entitlement.

[10] The main and counterapplication were postponed on a number of occasions for various reasons that are not relevant for present purposes. On 7 February 2019 the court made an order referring the "issues" for the hearing of oral evidence and reserved the question of costs. The terms of reference dictated by the court for the referral are stated as follows:

> "1. Oral evidence be heard on
> 1.1 whether or not the applicant was correctly paid an acting allowance on TASK Grade 18 during the period from 1 February 2016 to 31 May 2017;[2]
> 1.2 if it is found that he should have been paid on TASK Grade 17 and accordingly overpaid by R109 448.32, whether the respondents can rely on the provisions of section 34 (5) of the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997);[3]
> 2. the affidavits filed of record to date serve as pleadings;
> 3. any deponent of the affidavits filed of record may appear personally to testify;
> 4. the application be and is hereby postponed *sine die*;
> 5. the costs occasioned by the postponement are reserved."

[1] It is not evident though if the respondents had in fact already applied set off or if they were merely holding back the leave benefits due to the applicant. Up to the point when the counterapplication was issued they had taken no steps to recover the alleged overpayment. The prayers crafted in that application (1 and 2) are a concession in themselves that the second respondent was not entitled to have applied set off which is possibly why they were, prospectively, seeking a declarator that the applicant should be "held liable" (whatever that might mean) for the full alleged overpayment and that he "repay" this amount, at which point a set-off would then have been more palatable.

[2] The real issue was whether his appointment on its terms, more particularly that the applicant be remunerated on Task Grade 18, could be challenged on any basis. There was no dispute whatsoever that he had been appointed on the higher task grade and by obvious implication was entitled to be reimbursed at this level. The referral seems to have missed this nuance.

[3] It is not apparent to what purpose such reliance would conduce.

[11] Later, on 6 October 2020, the court ordered the parties to prepare a stated case which order appears to have been based on a consensual draft order.

[12] A stated case was filed on 27 January 2021.

[13] In it, the parties record that they have reached agreement on all the facts relevant for a determination of the application. They request that the application be determined *on the basis of those agreed facts*.[4]

[14] The simple background facts outlined in the stated case are as follows:

> "3.1 The Applicant Mr Zolile Vumazonke was employed by the 2nd Respondent in the Legal Services Division. He was employed as the Legal Advisor. His Task Grade at the time relevant to this matter was Task Grade 14.
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> 3.2 On or about February 2016, an offer was made by the Respondents to applicant to be appointed (in) an acting capacity as Head: Governance and Internal Audit. The terms of the offer made to the Applicant were as follows:
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> 3.2.1 To appoint the Applicant to act as the Head: Governance, Compliance and Internal Audit Department;
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> 3.2.2 The acting period was from 01st February 2016 – 29th February 2016, with a possibility of extension thereof as and when it is required and at the discretion of the 2nd Respondent;
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> 3.2.3 The level for acting allowance which was offered to Applicant at the time was Task Grade 18;
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> 3.3 The offer to act (in) the position as well as the proposed terms of acting in the position was duly accepted by the Applicant.
>
> 3.4 The acting appointment, as well as the level of acting allowance was also confirmed by the Acting Municipal Manager in a memorandum addressed to the Applicant dated 20th February 2016.
>
> 3.5 The applicant duly acted (in) the position as per agreed terms. He acted from the 01st February 2016 until 31st May 2017, his contract of acting in the position having been extended in writing by the 2nd Respondent periodically.
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> 3.6 On the 11th October 2017, the Applicant was notified by the Respondents that he has been overpaid by the acting allowance. The Respondents stated that according to the payroll system records, he erroneously was paid an acting allowance on Task Grade 18, instead of Task Grade 17 and that this has resulted in the overpayment in the sum of R109 448.32 on the acting allowance.

[4] In terms of Uniform Rule 33(1), parties to a dispute may agree upon a written statement of facts in the form of a special case for the adjudication of the court. This statement sets out the facts agreed upon and the questions of law in dispute between the parties, as well as their contentions. Rule 33(3) gives the court a discretion to draw any inference of fact or law from the facts and documents as if proved at trial.

3.7 The Applicant has disputed any indebtedness towards the 2nd Respondent. The applicant has refused to repay the 2nd Respondent, on the basis that the acting allowance which he had received from the 2nd Respondent, was in terms of the offer that was made

and accepted by him. He duly acted (in) the position on this basis. That the contract of acting by the Applicant has now run its course.

3.8 The Respondents have opposed the Application and have filed a Counter Application for an order compelling the Applicant to repay the difference between the salary which was overpaid, and the salary he ought to have been paid.

3.9 The Respondents allege that the Applicant was overpaid, in that he was paid at a salary scale, which exceeds the position which the Applicant was employed in, whilst acting."

[15] The terms of reference for the referral of the matter to the trial court for the hearing of oral evidence envisaged, so I suppose, that some evidence would be forthcoming to justify a finding that the applicant had "incorrectly" been paid an acting allowance on TASK Grade 18, but the respondents' case sadly disappointed even after the filing of the stated case. At the end of the process nothing was offered by the respondents at all regarding the alleged basis on which they hoped for a declarator to be made that an over or error in payment had been made to the applicant except the reference in paragraph 3.9 of the stated case above to the effect that the scale on which the applicant had been paid exceeded the position in which he was employed while acting. This is however nothing more than an oblique allegation in the stated case that was not given any flesh in the respondents' founding affidavit filed in support of the counterapplication. The respondents failed to adduce any evidence to refute the applicant's allegation that the parties had deliberately contracted on the basis contended for by the applicant, namely that he had been offered the opportunity to act in the position of Head: Governance and Internal Audit on TASK Grade 18. No reason whatsoever is suggested why the offer made to the applicant on its terms should not have been regarded as a lawful one, neither was a basis laid for the offer to be reviewed and set aside under the principle of legality.[5]

[5] The kind of relief envisaged should ideally have been of the nature declaring the placement of the applicant in the acting position on the higher TASK Grade irregular, the basis for which the respondents would no doubt have

[16] In the stated case under the heading "Respondent's contentions" the respondents for the first time suggested that the reason for the error is that the municipality's organogram does not have a TASK Grade 18 for the acting position in which the applicant acted. This fact on its own (even assumed to be correct) does not really assist the respondents' case given the applicant's unchallenged assertion that the parties deliberately intended to settle upon an acting allowance founded on TASK Grade 18.

[17] The proper approach to be adopted in matters where issues have been referred for the hearing of oral evidence has been helpfully stated in Lekup Prop Co. No. 4 (Pty) Ltd v Wright[6] as follows:

> "A referral to trial is different to a referral to evidence on limited issues. In the latter case, the affidavits stand as evidence save to the extent that they deal with dispute(s) of fact; and once the dispute(s) have been resolved by oral evidence, the matter is decided on the basis of that finding together with the affidavit evidence that is not in dispute."

[18] There is after an examination of the evidence nothing really to advance the respondents' case that the appointment of the applicant on TASK Grade 18 was irregular or that the agreement for this reason was constitutionally invalid.

[19] Mr. Malunga who appeared for the respondents conceded that the respondents had "in-eloquently" (sic) pleaded their case yet prevailed upon the court to come to the assistance of the second respondent on the basis of the authority (Sic) provided for in section 34 (5) of the BCEA for them to have

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explained or justified in making out their case. This would then have entitled them to a declarator that the decision to place the applicant on the higher TASK grade was constitutionally invalid; that the agreement be set aside; and that, as a consequence, the incorrect payments be recovered. (But see BCMM v Asla Construction (Pty) Ltd 2019 (6) BCLR 661 (LLC) at [105] where the Constitutional Court declared a municipal tender contract invalid but did not set it aside. The effect of the peculiar order was to preserve the rights which had already accrued under the impugned contract whilst not permitting the party which had contracted with the municipality from obtaining further rights thereunder.)

[6] [2012] 4 All SA 136 (SCA) at para [32].

withheld the salary benefits due to the applicant, on the basis that a factual premise exists or existed for the invocation of this provision. He submitted that this was a classical case where these provisions should apply.

[20] Before testing this proposition, I point out that the parties were not even on the same page concerning the supposed premise for the respondents' reliance on the provisions of section 34 (5) of the BCEA, if these provisions are applicable at all.

[21] This is best demonstrated by the following excerpts from the transcript of the arguments placed before the court:

> "MR MALUNGA: ... the respondents case is that the applicant, and I thought this was common cause between the parties, the applicant was offered a position at task grade 18. And the position at which the applicant was acting in, M'Lady, is task grade 17. The organogram of the respondent does not have a task grade 18 for that position and the only party who has a task grade 18 at the respondent is the municipal manager. Then with that background, M'Lady, it is the respondent's contention that the very offer itself of task grade 18 is the error which resulted in the erroneous payment or overpayment of the salary. And M'Lady, this was previously done by an acting municipal manger, as is evident from all the annexures given by the applicant."

[22] Reminded by the court that there had been no antecedent enquiry into the supposed illegality in the contract (from which to deduce that there had been an incorrect payment in consequence) Mr. Malunga evidently skipped ahead to the assumption that the payments that had been made to the applicant on TASK grade 18 were erroneous:

> "MR MALUNGA: But I thought this is the common cause – if I may just quickly take – yes, M'Lady. I cleared that up. It is common cause between the parties that the position in which the party was acting in is in fact task grade 17 and not 18. And the only other task grade 18 within the organogram of the municipality is the municipal manager. That is common cause. So that is then the error upon which the respondent relies on, M'Lady. And if Her Ladyship is then with the respondent that that error itself of the task grade created the overpayment then 35 or 34(5) would then be the provision which the respondent relies on.

> COURT: But can I just ask you to backup and tell me was there in fact an overpayment or is this all still just ...[intervenes]
>
> MR MALUNGA: No, no, no, there indeed was an overpayment in that – I think, M'Lady, to best explain this, the position which the applicant acted in, it is common cause it is task grade 17 and it is common cause that the only party that is task grade 18 is the municipal manager. Now having been offered task grade 18 as opposed to 17 that is what created the overpayment, M'Lady. Because the position ought to have been at 17 and the payment ought to have been at 17 ...[indistinct] was at 18. But if Her Ladyship is not with me there, then I think everything else then crumbles and falls to the wayside. If her Ladyship is with me that that initial offer created the error then 34(5) is the administrative error that created the payment."

[23] Asked how the error contended for by the respondents (that is having been made the offer on the wrong TASK grade level) ought to be corrected, he insisted that section 34 (5) of the BCEA would be that remedy. Put to him that the invocation of the section would on its own also require some factual substratum that brings it within the ambit of the respondents' claimed entitlement to have withheld the monies due to the applicant or applied a set off (assuming a scenario in either subsection (1) (a) or (b) to also exist), he went on to submit that:

> "... it would be the respondent's contention on that issue that upon the parties agreeing that that position does not hold task grade 18 the parties then are ad idem that the applicant ought to have been paid at 17 as opposed to 18. And that is the administrative error that created the overpayment."

[24] On the basis of his belief that the applicant's consent would not have been necessary before effecting the deduction (or applying a set off as it were),[7] he suggested that the issue was "quite crisp":

> "M'Lady, it is quite a – this matter is quite crisp. If Her Ladyship finds or is with the respondent finds that the error in the offer for task grade 18

[7] The respondents relied on the following authorities for the proposition that the consent of an employee is not required to recover against his remuneration any overpayments of the kind envisaged by section 34 (5) (a) of the BCEA: Sibeko v CCMA (2001) JOL 8001 (LC) at para 6; Jonker v Wireless Payment Systems CC (J1137109) [2000] ZALC 150 at para [21]; and SA Medical Association on behalf of Boffard v Charlotte Maxeke Johannesburg Academic Hospital and Others (J2469/13) [2014] ZALCJHB 78 at [39].

> constitutes an error and so as to kick in 35 – 34(5) then the respondent ought to succeed. But if Her Ladyship finds that that error of the offer of task grade 18 is not one that constitutes the – the error as envisaged in 35 – 34(5) then the applicant ought to succeed, M'Lady. It is as simple as that.
> (The) Respondent's case is that there is no such position. The offer to the applicant created that error and as such now the municipal manager who now ...[indistinct] place as the accounting officer noted that error and having noted that error then brought this counter application, M'Lady. And if Her Ladyship is with the applicant that there is no such error, or the task grade 18 does not constitute an error Her Ladyship could find for that."

[25] Mr. Nduli who appeared for the applicant reminded the court that in the applicant's view, there was nothing wrong with the calculation. Instead, it had been within the terms of the contract. He appeared to concede however that what seems to have been "wrong" was the actual offer made to the applicant, which the latter had accepted, but in this respect, he contended that it was up to the second respondent, if it was so minded, to have sought a judicial self-review of the appointment before a basis could exist to justify the deduction from his outstanding benefits.[8]

[26] Indeed, he went further in explaining why the applicant submitted that the respondents could not succeed in relying on the provisions of section 34 (5) of the BCEA, even assuming benevolently in their favour that a basis (which they had not pertinently alluded to in their papers) could be extrapolated from the convenient facts agreed between the parties, as follows:

> "Just one last issue that I would want to make in respect of the cases that we have been referred to. M'Lady, there is one threat on those particular cases, the fact that the parties have had an agreement and in the calculation of the remuneration to be made in pursuant of that particular agreement, that is where the deviation had actually happened. And this is not what we are actually dealing with where a deviation would be at the time when the calculation is made. The calculation, there is nothing wrong with it. The calculation is quite correct. The calculation is in terms of the contract. What seems to have been wrong was an offer that was made by the applicant – by the respondents to the applicant. And all that the applicant is actually

[8] See footnote 5 above.

seeking is for the Court to return and uphold the sanctity of the contract between the parties.

If the Court just to bear with me. The other issue that my client has actually instructed me to admit is the fact that yes, it is indeed correct that task grade 18 was not available for this particular position, it was task grade 17. However, it is not that task grade 18 does not obtain in the – in the municipality organogram, it actually does obtain. Thank you.

COURT: Sorry, Mr Nduli, can I ask you just to clarify that last point. So you are – you are in agreement that your client should have been paid on task grade 17 or that was not possible?

MR NDULI: I am sorry, M'Lady?

COURT: Are you – are you admitting or conceding rather that your client should have been reimbursed on task grade level 17 and not 18?

MR NDULI: No.

COURT: Not.

MR NDULI: We are not conceding on that, we are actually saying that he was made an offer and he was actually paid in terms of that particular offer. In fact to put the same set of facts the other way around would be to say had the municipality in fact paid him on task grade 17 they would have been in breach of the contract that they entered into with him.

COURT: Okay.

MR NDULI: Regardless of the fact that they would be doing correct thing in terms of the organogram of the municipality. But in terms of the contract of offer and agreement that had – offer and acceptance that had happened between the parties it would have been incorrect, they would have been in breach of the contract had they paid him on task grade 17."

[27] It is apparent from the foregoing submissions that the respondents misconceived the nature of the mistake and what was required to be addressed in the evidence antecedently before it could even be suggested that there had been an error of the kind envisaged by the section 34 (5) (a) of the BCEA. The respondents also appear to have missed the fact that the only way to get to that point (of justifying the premise of an erroneous overpayment as envisaged in section 34 (5) (a)), was for the respondents to have first sought an appropriate declarator in the counterapplication reviewing and setting aside the Municipality's agreement with the applicant on the basis that the offer to have paid him on TASK grade 18 was irregular or legally invalid. The applicant's stance though was that the parties deliberately contracted on the basis that he would be paid on TASK grade 18. The respondents appeared to be in agreement with him in this respect but reading between the lines their standpoint is that an administrative error was perpetrated when the offer was made to the applicant.

This stance is unfortunately not pertinently pleaded in the counterclaim. Evidently the applicant's concession that the offer to him to pay him in the acting position on a pay grade that may not have been applicable or administratively correct was at all times conditional on his view that the respondents ought first to have applied to review and set aside his appointment on TASK Grade 18 before they could legitimately call on him to refund the alleged overpayment.

[28] But even assuming both errors (in appointing him on the wrong grade and then the error in consequence by the overpayment), I am not convinced that section 34 of the BCEA provides the panacea in the respondents' contemplation to have withheld the applicant's leave benefits that were due to him when they fell to be paid.

[29] Section 34 of the BCEA provides as follows:

> "34 **Deductions and other acts concerning remuneration**
> (1) An employer may not make any deduction from an employee's remuneration unless-
> (a) subject to subsection (2), the employee in writing agrees to the deduction in respect of a debt specified in the agreement; or
> (b) the deduction is required or permitted in terms of a law, collective agreement, court order or arbitration award.
> (2) A deduction in terms of subsection (1) (a) may be made to reimburse an employer for loss or damage only if-
> (a) the loss or damage occurred in the course of employment and was due to the fault of the employee;
> (b) the employer has followed a fair procedure and has given the employee a reasonable opportunity to show why the deductions should not be made;
> (c) the total amount of the debt does not exceed the actual amount of the loss or damage; and
> (d) the total deductions from the employee's remuneration in terms of this subsection do not exceed one-quarter of the employee's remuneration in money.
> (3) A deduction in terms of subsection (1) (a) in respect of any goods purchased by the employee must specify the nature and quantity of the goods.
> (4) An employer who deducts an amount from an employee's remuneration in terms of subsection (1) for payment to another person 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.
> (5) An employer may not require or permit an employee to –
> (a) repay any remuneration except for overpayments resulting from an error in calculating the employee's remuneration.
> (b) acknowledge receipt of an amount greater than the remuneration actually received."

[30] The BCEA is concerned with fair labour practices. Its object is stated as follows:

> "To give effect to the right to fair labour practices referred to in section 23 (1) of the Constitution by establishing and making provision for the regulation of basic conditions of employment; and thereby to comply with the obligations of the Republic as a member state of the International Labour Organisation; and to provide for matters connected therewith.."

[31] Section 34 promotes fair labour practices by regulating deductions from an employee's remuneration which he/she would ordinarily be entitled to be paid together with other benefits whilst in service and when his/her earnings and benefits are due. (In this instance the leave monies claimed by the applicant fell to be paid within seven days of the applicant's resignation from the Municipality.)[9]

[32] The section underpins the employee's entitlement to receive his full remuneration for which he has worked. It achieves the objective of fairness by setting forth protection and by rendering illegal any deductions against his earnings and benefits unless he has agreed to it in respect of a specified debt, or unless deductions are required or permitted in terms of a law, collective agreement, court order or arbitration award.[10] (An example of a permissible deduction given in *Workplace Law* by John Grogan would be one for the payment of an employee's unions dues in terms of section 13 of the Labour Relations Act.)[11]

[33] It can fairly be stated that the applicant did not agree to any deductions *in casu*. The questions remains then whether the provisions of subsection (1) (b)

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[9] Section 32 (3)(b) of the BCEA.
[10] See section 34 (1) (a) and (b) of the BCEA.
[11] 8th Edition, at pages 68 - 69.

carry the day. Certainly there was no court order in place that sanctioned the deduction at the time it was made.

[34] Deductions may be effected to reimburse an employee for loss or damage caused by the employee in the course of their employment, but only, apparently, with the employee's consent and under the strict conditions outlined in subsection 2 (b)– (d), evidently to ensure fairness.[12] That situation is certainly not applicable here either.

[35] Section 34 (5) (a) does not on its own permit a unilateral deduction unless in the two instances made provision for in subsection (1), even if brought within the exception contemplated in subsection (5) (a). In my view it merely establishes the premise that an employee cannot expect the same protection against deductions where he has been overpaid due to an error in calculating his remuneration. It follows logically that if there has been no error in calculating remuneration due to him, he cannot be required or permitted to repay any amounts paid to him as remuneration as that would violate the protection afforded to him by the section. He is entitled to his unadulterated remuneration. A different situation pertains though if the exception referred to in subsection (5) (a) is established on the factual premise. A historical mistake in calculating his remuneration, which I believe may notionally arise even where he was thought to have been on a higher level and paid in excess of what the actual position warrants, may ground a fair request to repay the alleged overpayment previously made to him.

[36] But the section does not, as Mr. Malunga suggests, provide a *causa* in itself or a remedy to recover the alleged overpayment. If the employee does not agree as is provided for in subsection (1) (a) to repay the amount paid to him in error,

[12] Workplace Law, *Supra* at page 69.

then the next step is for the employer to recover the alleged overpayment in legal proceedings as is provided for in subsection (1) (b). For the moment leaving aside what I find in respect of the counterapplication, there would have been no legal justification for the second respondent to have retained the leave benefits due to the applicant when they fell due to him, or to have applied set off. It was simply put *ultra vires* the protection afforded to the applicant by the section. The reason why that is, is because the deduction was arbitrarily made. It was, firstly, not sanctioned by the applicant's consent, which consent appears to be prospectively required before such a deduction can be made. The applicant had made it abundantly plain that he was not prepared to agree that any mistake had been made at all. Secondly, there was no other law, collective agreement, arbitration award or court order in place at the time that permitted the deduction. To the contrary there remains a dispute between the parties concerning whether there was any overpayment at all. It is that dispute that he was entitled to the benefit of a hearing in respect of (with a judicial pronouncement or award arising therefrom in the second respondent's favour) before the respondents could claim to have been acting within the prescripts of section 34 (1) by holding over, withholding, or applying set off.

[37] In Public Servants Association of South Africa obo Ubogu v Head of the Department of Health, Gauteng and Others[13] the Constitutional Court confirmed that the provisions of subsections (1) and (5) of section 34 of the BCEA do not authorize arbitrary deductions.

[38] The Court had reason in confirmation proceedings before it to refer to the provisions of section 34 of the BCEA as providing a more constitutionally justifiable alternative to the provisions of section 38 (2)(b)(i) of the Public Service

[13] 2018 (2) BCLR 184 (CC).

Act, No. 103 of 1994 ("PSA") which (before the court's confirmation of the labour court's order declaring the section unconstitutional) allowed the State to recover monies wrongly paid to an employee out of state coffers without recourse to a court of law.

[39] In holding up the provisions of section 34 (1) of the BCEA in comparison to section 38 (2)(b)(i) of the PSA, the court stated in this regard that:

> "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.*"[14]
> (Emphasis added)

[40] Against this understanding of the impact of section 34 of the BCEA, absent the applicant's consent to any deductions in respect of the alleged overpayment or any court order or arbitration award that authorized the purported set off against his leave benefits when they fell due to be paid, the deduction against the applicant's remuneration *in casu* can only have been arbitrary and therefore unlawful.

[41] Mr. Malunga sought to persuade this court that the respondents' obligations as responsible stewards of public funds to recover any ostensible overpayments would constitute "the law" that gave them the necessary authority to recover the alleged overpayments, but I am not convinced that this proposition is a sound one. Even the argument in PSA obo Ubogu that section 38 (2)(b)(i) of the PSA constituted "the law" for the purposes of section 34 (1) (b) of the BCEA as a basis to have exempted the impugned provision from the limitation imposed

[14] *Supra*, at par [78].

in terms of section 34 (5) of the BCEA, did not fly. Further, how can that be "the law" where the applicant *in casu* has disputed that the offer to him to act on TASK Grade 18 was a mistake?[15]

[42] A court, as was stated in PSA obo Ubogu, is expected to respect the employee's fair trial rights referred to in section 34 of the Constitution which guarantees everyone the right to "have any dispute that can be resolved by the application of law decided in a fair public hearing before a court".

[43] The mischief to be guarded against, where the employee disputes liability for the alleged overpayments in the first place, is that his/her entitlement to judicial redress to determine that dispute cannot be compromised by a perceived mechanism for recovery, even one that undergirds the second respondent's general obligations to guard public funds.

[44] The significance of the fair trial right was at the heart of the court's reasoning in PSA obo Ubogu for confirming the declaration of the invalidity of section 38 (2) (b) (i) of the PSA as follows:

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[15] In reasons furnished recently in T A Gqithekhaya & Others v Amathole District Municipality (EL Case No. 601/2021) I issued an interim order prohibiting arbitrary deductions summarily effected or about to be effected against the applicants' salaries all of whom were engaged in unlawful industrial action. I observed that the authority in section 34 (1)(b) of the BCEA by one of the four instruments indicated in the sub-section had to be specific in relation to their authorisation for the relevant deductions to be made rather than being of general effect. In that scenario there had been a general order simply declaring the strike in which the applicants were involved as an unprotected one. I refer to the seminal paragraph [4] in which I justified that:

> "[4] In this respect it is contended that the deduction ought to have been made consistent with the provisions of section 34 of the Basic Conditions of Employment Act, No. 74 of 1997 ("BCEA") which requires a court order or arbitration award authorizing the deductions made by it, rather than a general order of court simply declaring the strike in which they were involved as an unprotected one, or the applicants' consent in writing to the deductions. This is particularly so since on the face of it a settlement agreement deriving from the earlier unlawful industrial action suggests that the respondent would not adopt a one-size fits all approach with regard to the acceptance of a no work no pay principle concerning the employees who participated in the unprotected strike. There is also the suggestion that some of the days involved over which the unprotected strike extended should have conduced to the benefit of the applicants who would not in the ordinary course have been required to report for duty because of a rotation roster system imposed during the COVID state of emergency. (Whatever disputes exist between the parties on the papers in this respect does not detract from the fact that the *sequelae* to the unlawful industrial action, giving rise to each employee's supposed indebtedness to the respondent by the salary payment that were not due to them because of the no work no pay principle, is not reflected in any final order or arbitration award or collective agreement.)"

"[61] The foundational values of the Constitution include the supremacy of the Constitution and the rule of law. This supremacy connotes that "law or conduct inconsistent with [the Constitution] is invalid, and the obligations imposed by it must be fulfilled."

[62] In any event, to the extent that it is necessary to deal with the limitation of the right to have judicial redress as self-help denotes, section 34 of the Constitution guarantees everyone the right "to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court". This section not only guarantees everyone the right to have access to courts but also "constitutes public policy" and thus "represents those [legal convictions and] values that are held most dear by the society." As this Court has repeatedly said before, the right to a fair public hearing requires "procedures . . . which, in any particular situation or set of circumstances, are right and just and fair". Notably, none of the respondents has suggested that the limitation of the right to have judicial redress is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

[63] Regarding the principle of fair procedure, this Court remarked in De Lange:

> "[a]t 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 matter - and that the other side should be heard [*audi alteram partem*] - aim toward eliminating the proscribed arbitrariness in a way that gives content to the rule of law. They reach deep down into the adjudicating process, attempting to remove bias and ignorance from it. . . . *Everyone has the right to state his or her own case*, not because his or her version is right, and must be accepted, but because, in evaluating the cogency of any argument, the arbiter, still a fallible human being, must be informed about the points of view of both parties in order to stand any real chance of coming up with an objectively justifiable conclusion that is anything more than chance. Absent these central and core notions, any procedure that touches in an enduring and far-reaching manner on a vital human interest . . . points in the direction of a violation".

[64] Although section 38(2)(b)(i) is a statutory mechanism to ensure recovery of monies wrongly paid to an employee out of the state coffers, the provision gives the state free rein to deduct whatever amounts of money allegedly wrongly paid to an employee without recourse to a court of law. The alleged indebtedness here is R675 092,56. The state determined, arbitrarily, the amount of the monthly instalments so as to avoid what it believed was the necessity for Treasury approval of an instalment plan over 12 months. Given that the alleged indebtedness was R675 092,56, the monthly deduction was in the sum of about R56 257,72 from Ms Ubogu's gross salary of R62 581,42. It meant that, even at the rate of her downgraded gross salary of R40 584,85, Ms Ubogu could not afford to pay the alleged debt.

[65] The effect of the provision is to impose strict liability on an employee. The deductions may be made without the employee concerned making representations about her liability and even her ability to pay the instalments. The impugned provision also impermissibly allows an accounting officer unrestrained power to determine, unilaterally, the instalments without an agreement with an employee in terms of which the overpayment may be liquidated.

[66] Section 38(2)(b)(i) undermines a deeper principle underlying our democratic order. The deductions in terms of that provision constitute an 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. Self-help, as this Court held in *Chief Lesapo*, "is inimical to a society in which the rule of law prevails, as envisaged in section 1(c) of our Constitution." Although there may be circumstances when good reasons exist − justifying self-help − this is however not a case of that kind.

[67] By aiding self-help, the impugned provision allows the state to undermine judicial process − which requires disputes be resolved by law as envisaged in section 34 of the Constitution. This provision does not only guarantee access to 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. It is not insignificant that section 31 of the Act envisages recovery of money, in the case of unauthorised remuneration, "by way of legal proceedings". The Minister of Public Service argues that Ms Ubogu's section 34 right was not violated because that protection applies only to disputes that are capable of resolution by application of law. This contention is flawed. The Minister does not explain why the existing dispute was not capable of resolution by the application of law in a fair public hearing before a court. The mechanism through section 38(2)(b)(i), as currently formulated, is clearly unfair. It promotes self-help and imposes strict liability on an employee in respect of overpayment irrespective of whether the employee can afford the arbitrarily determined instalments and was afforded an opportunity for legal redress.

[68] On those bases, section 38(2)(b)(i) does not pass constitutional muster."

(Footnotes omitted.)

[45] The court went further and denounced as flawed the contention that a deduction under section 38 (2)(b)(i) of the PSA regulates the common law right of set off, as follows:

"[69] Before I deal with the remedy, it is necessary to address the question whether the section 38(2)(b)(i) deductions regulate set-off. The appellants submit that section 38(2)(b)(i) regulates the right of set-off, which is not self-help, arbitrary or unfair. The underlying premise to the argument that common law set-off does not amount to a form of self-help, is not correct.

[70] The doctrine of set-off is recognised under the common law. The Appellate Division, as the Supreme Court of Appeal was then known, pointed out in *Schierhout* that:

> "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".

[71] In *Harris*, Rosenow J remarked that the "origin of the principle appears rather to have been a common-sense method of self-help". In my view, the mechanisms in the impugned provision are not comparable to set-off under the common law. The doctrine of set-off does not operate *ex lege* (as a matter of law). Besides, there are no mutual debts. Here, the deductions in terms of section 38(2)(b)(i) are made from an employee's salary. The dispute regarding whether the translation of her position as Clinical Manager: Medical affected her starting package on the new position remains unresolved. Therefore, the parties cannot be said to be mutually indebted to each other. It is arguable that the alleged debt can, in the circumstance, be said to be fully due.

[72] The doctrine cannot be invoked to defeat the employee's claim in relation to her salary. Particularly, where a dispute surrounding the translation of her position that, allegedly, did not affect her starting package, had not been resolved by the application of law in a fair hearing before a court. At the risk of repetition, the mechanism in the impugned provision constitutes self-help. As the Labour Appeal Court correctly observed in *Western Cape Education Department*, the state has an obligation to exercise its power under section 38(2)(b)(i) reasonably and with regard to procedural fairness. Indeed, the notions of fairness and justice inform public policy − which takes into account the necessity to do simple justice between individuals. The contention that a deduction under section 38(2)(b)(i) regulates the right of set-off is, in the circumstance, flawed. However, this should not be understood to suggest that there can never be instances in which the doctrine of set-off, especially where there are mutual debts in existence, may be invoked."

(Footnotes omitted.)

[46] By parity of reasoning the doctrine of self-help cannot be invoked *in casu* to defeat the applicant's claim to his leave benefits that were admittedly due to him, that is not unless the parties real dispute is resolved in the respondents' favour.

[47] The Constitutional Court's suggestion in PSA obo Ubogu that the provisions of section 34 of the BCEA might present a point of reference to remedy the unconstitutionality of section 38 (2)(b)(i) of the PSA is exactly because deductions against an employee's remuneration under this provision will not be countenanced unless, as in this instance where the applicant disputes that he is liable for the alleged overpayment, there is proper judicial redress for him culminating in an order that sanctions the set off proposed.

[48] The *dicta* that were held up to me by Mr. Malunga that assert to the contrary that an employee's consent need not be obtained for set off to apply or for the deductions of erroneous salary payments to be made are in my view wrong against the authority of PSA obo Obogu that section 34 (5) read with 34 (1) of the BCEA do not authorise arbitrary deductions. The employee will either consent or there will be a need to go the judicial route to determine the applicant's liability, if any, before prevailing upon such employee to pay back the money that was allegedly erroneously paid to him/her.

[49] In summary the answer to the first issue referred for oral evidence is indeterminate. There is no evidence to suggest that the applicant was incorrectly paid on Task grade 18 but even taking into account the applicant's concession that the error may have come about because of a mistake in his appointment, there is no basis for this court to find that the offer and acceptance falls to be said aside

on the basis of any illegality. The respondents have simply failed to establish a case at all on the counterapplication that they are entitled to recover the alleged overpayment from the applicant.

[50] In the result the counterapplication falls to be dismissed and the applicant succeeds in respect of his claim.

[51] Concerning the issue of costs. I am not in agreement with Mr. Malunga that the costs ought to be paid on the magistrate's court scale. The declaratory order sought by the respondents would not have been competent in that court in any event. It is further evident that the matter turned on fairly complex legal issues.

[52] In the result I issue the following order:

1. The respondents' counterapplication is dismissed, with costs on the high court scale.
2. The second respondent is directed to pay to the applicant all sums due to him as leave pay (pegged at TASK Level Grade 18 in respect of the acting period), together with interest at the legal rate on the said sum calculated from seven days after the termination of his contract with the Buffalo City Metropolitan Municipality, to date of payment.
3. The respondents are directed to pay the cost of this application and of the application for the referral for oral evidence (which were reserved on 7 February 2019) jointly and severally, the one paying the other to be absolved on the high court scale of party and party.

B HARTLE
JUDGE OF THE HIGH COURT

DATE OF HEARING: 26 July 2021
DATE OF JUDGMENT: 15 December 2021*

*Judgment delivered electronically on this date by email to the parties at 19h40.

APPEARANCES:

For the applicant: Mr. B Nduli of B Nduli & Co., East London (ref. Mr. Nduli)
For the respondents: Mr. Y Malunga instructed by Smith Tabata Inc., East London. (Ref. Mr. Mutizamhepo).