

EMPLOYMENT

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DEDUCTIONS THAT AN EMPLOYER CAN MAKE FROM AN EMPLOYEE'S REMUNERATION

Section 34 of the Basic Conditions of Employment Act, No 75 of 1997 (BCEA) regulates deductions that an employer can make from an employee's remuneration. The general rule is that a written agreement is required from an employee prior to any deduction being made from their remuneration.

However, s34(1)(b) of the BCEA permits an employer to make deductions from an employee's remuneration if required or permitted to do so in terms of a law, collective agreement, court order or arbitration award. This allows for a deduction without the need for a written agreement or compliance with the further limitations on deductions for loss or damage imposed in s34(2).

The Labour Court was recently tasked with determining whether an employer may apply set-off against one of its former employees' remuneration. In the case of *Shenaaz Padayachee v Interpak Books (Pty) Ltd* (case number D243-12), the judge held that set-off constitutes a rule of common-law which constitutes a 'law' for the purposes of s34(1)(b) and, thus, requires no written agreement from the employee, nor is there a limit on the amount which may be set-off.

The Court followed the recent decision of the Supreme Court of Appeal in *Capricorn Beach Home Owners Association v Potgieter t/a Nilands and Another* 2014 (1) SA 46 (SCA) which confirmed that set-off is a recognised principle of common-law and as such constitutes 'a law'.

In contrast, in *Botha and British American Tobacco SA (Pty) Ltd* (2008) 29 ILJ 1301 (CCMA), the Commission for Conciliation, Mediation and Arbitration (CCMA) previously held that set-off is not 'law' as contemplated in s34(1)(b) and that an employee's indebtedness can only be set off against an employee's remuneration in terms of a written agreement.

In the Padayachee case the employer contended that a 'fine' it imposed on a former employee for damages suffered, could be set-off against the employee's remuneration without a written agreement. The employer set-off the amount of the 'fine' from the employee's remuneration relying on the reference to 'law' in s34(1)(b).

However, the Court in Padayachee held that the circumstances of the 'fine' fell squarely within the realm of a claim of damages and, as such, was not a liquidated amount. The employer was required to comply with the requirements of s34(1)(a) and 34(2). The employer was therefore not entitled to rely on the principle of set off as it could not satisfy the legal requirements for set-off to apply.



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Christie The Law of Contract (4 ed) states that set-off is a method whereby contractual and other debts may be extinguished against one another. The basic conditions of set-off are that:

- i. the existence of mutual indebtedness must be present;
- ii. both parties' debts must be liquidated and be the same in nature; and
- iii. both debts must be fully due and payable.

The BCEA specifically addresses deductions in respect of damages. S34 (2) permits an employer to deduct from an employee's remuneration for reasons related to loss or damage provided the employer complies with the following prior to a deduction being made:

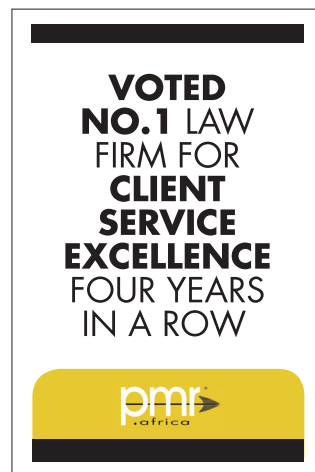
- the damage must be as a result of the fault of the employee;
- fair procedure must be followed in that the employee is given fair opportunity to make representations why the deduction should not be made;
- the total amount of the debt cannot exceed the loss or damage; and
- the total deduction does not exceed one-quarter of the employee's remuneration in money.

The BCEA also specifically deals with the recovery of any overpayment made to an employee. The statute permits an employer to deduct any such overpayment unilaterally. Whenever an employer is permitted to apply set-off it is not limited in any way as in the case of recovering damages in compliance with s34 (1)(a) and (2).

The court in a recent judgment of *Rank Sharp SA (Pty) Ltd v Kleinman* (2012) 33 ILJ 2937 (LC) held that a company could not set-off a loan account against a settlement sum agreed upon. The reason for this is because it could not be shown that the one claim was due and payable.

The provisions for a deduction permitted in 'law' includes the common law which includes set-off and thus fall within a deduction that does not require agreement in terms of s34(2) of the BCEA. Accordingly, there may be scope for an employer to set-off an amount against an employee's remuneration provided that the three requirements for valid set-off described above are met.

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