

Employment Law

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SOUTH AFRICA

Erroneous payments to employees:
Is a deduction from salary a
contractual breach?



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Erroneous payments to employees: Is a deduction from salary a contractual breach?

On 17 January 2024, the Supreme Court of Appeal (SCA) handed down an interesting judgment in *Mhlontlo Local Municipality and Others v Ngcangula and Another* (1154/2022) 2024 ZASCA 5 (17 January 2024) that, amongst other things, dealt with the concurrent jurisdiction of the Labour Court and the High Court to determine a matter related to a contract of employment, and clarified whether an erroneous payment made by an employer over a period becomes a term and condition of employment.

Background

In 2019, the Mhlontlo Local Municipality (Municipality) passed a resolution to pay a 2,5% notch increase to employees who had been placed on salary scales (in terms of the Industrial Council) and who had not yet reached the top of the salary scales. The increase was applied retrospectively to 2015. This increase was erroneously applied to all municipal employees, including the Chief Traffic Officer and the Deputy Director: Economic Development (respondents), who did not qualify for the notch increase.

The Auditor-General's office flagged these payments as irregular payments. In November 2020, the Municipality sent letters to the respondents and other employees, informing them that the office of the Auditor-General had identified their 2,5% notch increases as an irregular expense, and demanded repayment by 30 June 2021.

In February 2021, the Municipality started making deductions from the respondents' remuneration.

The respondents then launched separate cases in the High Court. They contended that the deductions were unlawful as the increases were a contractual entitlement and that they had not agreed to the deductions in terms of section 34(1) of the Basic Conditions of Employment Act 75 of 1997 (BCEA). Section 34(1) prohibits any deduction from an employee's salary (except for loss or damage due to the fault of the employee) unless the employee agrees in writing to the deduction or the deduction is required or permitted in terms of a law, collective agreement, court order or arbitration award.

The Municipality challenged the jurisdiction of the High Court to hear the matter and argued that the removal of the 2,5% notch increase did not constitute a deduction in terms of section 34(1) of the BCEA, as the respondents had erroneously been overpaid.

The High Court agreed with the respondents. It held that it had jurisdiction in terms of section 77(3) of the BCEA to adjudicate the disputes, since they related to a breach of the respondents' employment contracts. On the merits, it held that the Municipality's decision to unilaterally reduce the respondents' remuneration was unlawful and of no force and effect and ordered the Municipality to reinstate the amounts deducted. It also ordered a punitive costs order against the Municipality.

The Municipality appealed both judgments.

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Employment Law practice is ranked in Tier 1.

CDH Kenya's Employment Law practice is ranked in Tier 3.

Leading Individuals:
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Recommended Lawyers:
Anli Bezuidenhout | Jose Jorge
Rizichi Kashero-Ondego | Imraan Mahomed
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The appeal

The Municipality argued that the High Court was wrong in finding that its decision to stop paying the respondents the 2,5% notch increase was unlawful. Firstly, it contended that the High Court had no jurisdiction to hear the matters under section 77(3) of the BCEA. Secondly, it contended that the respondents had failed to establish that the non-payment of the 2,5% notch increase constituted a breach of their employment contracts.

The High Court's concurrent jurisdiction

Section 77(1) of the BCEA records that the Labour Court has exclusive jurisdiction in respect of all matters in terms of the BCEA, subject to the Constitution and the jurisdiction of the Labour Appeal Court.

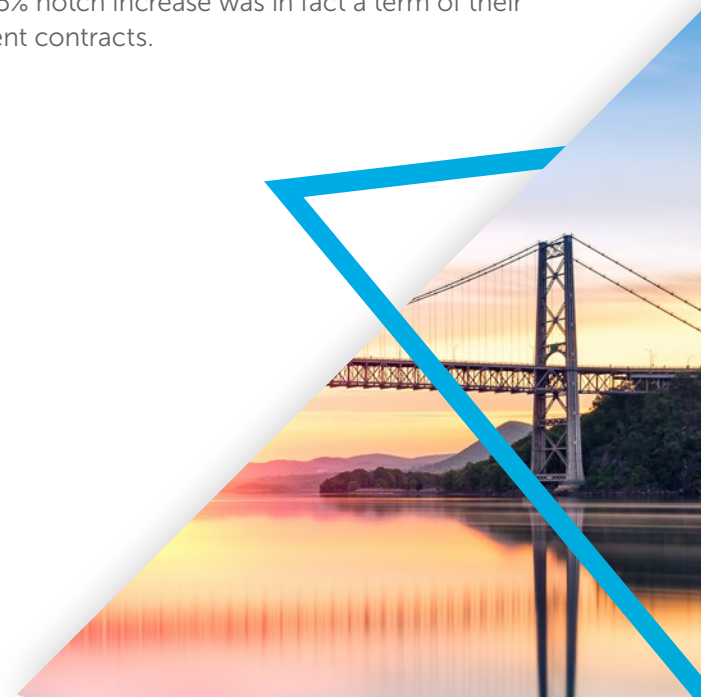
Section 77(3) of the BCEA records that civil courts, such as the divisions of the High Court, have concurrent jurisdiction with the Labour Court to adjudicate any matter concerning an employment contract, irrespective of whether any basic condition of employment constitutes a term of the contract.

The SCA confirmed that jurisdiction is determined on the case that has been pleaded and not on the merits of the case. The pleadings contain the legal basis for the claim. Where a court's jurisdiction is challenged, the applicant's pleadings are the determining factor for whether a court has jurisdiction to adjudicate a matter.

The SCA noted that while the notices of motion made no mention of a breach of an employment contract, the founding affidavits in both cases argued that the Municipality's conduct in deducting the 2,5% notch increase from the respondents' remuneration constituted a breach of their employment contracts. Accordingly, the SCA agreed that the High Court had jurisdiction to hear the matter. The SCA did make the point that whether or not the cause of action was well founded was an entirely different enquiry which had no bearing on the question of a court's jurisdiction.

Was the notch increase a term of the employment contract?

The SCA found that although the respondents had successfully established the court's jurisdiction by pleading that their employment contracts had been breached, they did not show on the merits of the matter that the 2,5% notch increase was in fact a term of their employment contracts.



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The contract of employment did not contain any reference or entitlement to a notch increase. Furthermore, implicit in the 2019 resolution was that it did not apply to all employees. The SCA rejected the High Court's finding that the fact that the 2,5% increment was applied to all employees over a period amounted to the acceptance by conduct on the part of the Municipality that the payments were lawful. It found that there were qualifying criteria for the notch payment which the respondents did not meet. Furthermore, payments made erroneously to the respondents could not give rise to a contractual claim. This would effectively entrench an illegality and permit the respondents to enforce continued payments into the future.

Peremption and mootness

Interestingly, the respondents raised the issues of peremption and mootness.

In respect of peremption, the respondents contended that in 2022 the Municipality had resolved to condone the payment of the backpay which had been paid to all employees, including the respondents. Furthermore, they contended that the mayor and acting municipal manager had stated in writing that they would not appeal the High Court judgment. The principle underlying the doctrine of peremption is that a litigant cannot take two inconsistent positions. The argument in this case was that the Municipality could not appeal a judgment it had

acquiesced to. Peremption safeguards the integrity of the judicial process in preventing a litigant from oscillating between contradictory positions. This ensures consistency, fairness and finality in legal proceedings. The Municipality argued that these payments were made in error and should not be construed as any indication that it had abandoned its right to proceed with the appeal. The onus to show peremption rests on the party alleging it. The respondents, however, did not provide any evidence in their papers to show that the Municipality had clearly and unconditionally demonstrated that it intended to waive its right to appeal.

In respect of mootness, the respondents argued that the wording of the 2022 resolution and the minutes of the council meeting in terms of which the Municipality resolved to pay the respondents constituted an admission that their claim was well founded and made the appeal academic. The SCA rejected this argument. It considered that there were two other judgments (in the Labour Court and Labour Appeal Court) after the High Court decisions regarding the 2019 resolution, in which both the Labour Court and Labour Appeal Court set aside the 2019 resolution and declared it null and void. The Labour Court found that the Municipality had acted outside of the scope of its powers in awarding the notch increase to all employees without having regard to the qualifying criteria. The Labour Appeal Court found that the 2022 resolution to pay the increment to all employees was not only fundamentally irrational and illegal but also reckless.

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Cliffe Dekker Hofmeyr

2023 RESULTS

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ranked our Employment Law practice in
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Aadil Patel ranked by
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in Band 2: Employment.

Fiona Leppan ranked by
Chambers Global 2018 - 2023
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Imraan Mahomed ranked by
Chambers Global 2021 - 2023
in Band 2: Employment.

Hugo Pienaar ranked by
Chambers Global 2014 - 2023
in Band 2: Employment.

The Municipality was constitutionally obligated to recover the monies erroneously paid over. Therefore, the appeal was not simply academic; there was a live controversy and the interests of justice justified looking beyond peremption and mootness.

Conclusion

Jurisdiction is a question of fact, which is determined on the basis of an applicant's pleadings. If an applicant pleads that their employment contract has been breached, that will establish the High Court's concurrent jurisdiction in terms of section 77(3) of the BCEA. However, the applicant will have to make sure that the evidence it has, supports the pleadings. The court will interrogate the merits of the matter to determine exactly which term of the employment contract, if any, has been breached. If this cannot be established, then the case must fail.

Getting into the High Court by claiming that an employer has breached an employment contract is one thing. Proving it, once in court, is another matter.

An employer must be able to recoup payments that were made to an employee erroneously. The fact that these payments may have been made consistently over a period does not necessarily give rise to a contractual entitlement.

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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