OF INTEREST

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

Case No. EL 601/2021

In the matter between:

THANDOKAZI AMANDA GQITHEKHAYA	First Applicant
THEMBEKA MBADLAYANA	Second Applicant
BUSISIWE NZWANA	Third Applicant
NANDI YANTOLO	Fourth Applicant
SIYABULELA PHINDA	Fifth Applicant
TIZININI MATSHAYA-PITYI	Sixth Applicant
OLIVIA KELLY	Seventh Applicant
YVONNE MFUKUZO	Eighth Applicant
SIBUSISIWE GUBEVU	Ninth Applicant
SIYASANGA WENDY MBANJWA	Tenth Applicant
LINDA SIMAKUHLE	Eleventh Applicant

and

AMATHOLE DISTRICT MUNICIPALITY Respondent

JUDGMENT

HARTLE J

[1] The eleven applicants form part of a large group of employees of the respondent who it is common cause took part in an unprotected strike between 9 November and 15 December 2020.[1]

[2] The applicants continued on the face of it to receive payment of their ordinary remuneration (payable monthly in arrears) after the strike despite the hiatus in their services rendered, but five months after the event, between 28 April and 5 May 2021, they were furnished with notices by the respondent informing them of its decision to make deductions against their salaries over a period of two months (end of May and June 2021 respectively) in order to give effect to the "no-work no-pay" rule adopted by them with regard to their participation in the unprotected strike. Preceding the personal notices received by them the respondent had announced its intention in the media on 9 March 2021 to implement the principle of no-work no-pay against *all* the employees who had taken part in the strike. The media statement had forewarned that deductions would be spread over four months effective from 25 March 2021, contrary to the two-month regime imposed on the present applicants.

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[1] On 10 November 2020 the respondent obtained a rule *nisi* in the Labour Court, returnable on 10 December 2020, interdicting the striking workers from participating in an unlawful strike, but this did not deter them. The order was made final on an extended return date despite opposition to the application by SAMWU.

[3] The applicants claim that they were not afforded any opportunity to show cause why the deductions should not be made vis-à-vis each of them or to make representations concerning how the recovery strategy was to be implemented. To the contrary they averred that the recovery plan concerning them was being undertaken without their consent or judicial process.

[4] They initially approached this court (under Part A) for a prohibitory interdict on the basis that the respondent had not followed the provisions of section 34 of the Basic Conditions of Employment Act, No. 75 of 1997 ("BCEA") in implementing their recovery strategy, alternatively section 67 (3) of the Labour Relations Act, No. 66 of 1995 ("LRA"), which is the ostensible premise upon which the respondent had intimated via the press release it was relying on to justify its implementation of the no-work no-pay principle.[2]

[5] The argument advanced in support of the interim interdict was premised on the applicants' allegation that by making the impugned deductions without following due process, the respondent was engaging in unfettered self-help which by its very nature justified the urgent intervention of this court by the relief sought.

[6] They averred that without any prior engagement with them or their consent having been obtained, without following legal process, without applying the *audi alteram partem* rule in respect of the application of its practical decision to implement their recovery strategy or considering whether the amount of the deductions in relation to their remuneration was allowable (assuming the

[2] In the media statement the respondent announced that it would implement the no-work no-pay principle "as prescribed by section 67 (3) of the Labour Relations Act".

provision of section 34 (2) of the BCEA to have been of application)[3], without any contractual entitlement or concession by virtue of a collective agreement or authority of an arbitration award or order of court, the deductions were, simply put, not legally permissible and fell to be interdicted.

[7] Inasmuch as a prior legal process was claimed necessary,[4] the applicants alluded to the uncertainty regarding whether in all the circumstances it had been proper for the respondent to invoke the no-work no-pay rule vis-à-vis any of the affected employees at all (given that it had created a precedent in prior unlawful industrial action in 2019 not to dock anyone's salary), the inexplicable delay in making the decision after the fact to invoke the principle concerning them, as well as the lack of uniform treatment of all the striking employees concerning the manner and practical implementation of its recovery strategy.

[8] The matter co-incidentally came before me under Part A on 25 May 2021. After hearing argument, I issued an interim order on 27 May 2021 in the following terms:

> "1. The respondent is interdicted from making deductions against the salaries of the applicants under the pretext of the "no work no pay" principle and, where applicable, to pay back any money it may by the time of the grant of this interdict already have deducted against the salaries of the applicants under the mantle of the "no work no pay" doctrine, pending the final determination of the relief sought by the applicants in Part B of the notice of motion.[5]
> 2. The respondent is directed to pay the costs of the application for interim relief on a party and party scale."

[3] They complained that the then anticipated deductions amounted to more than 25% of their take home pay, leaving them with a paltry balance which would have rendered them unable to meet their monthly financial commitments.

[4] The applicants submitted that the respondent ought to have approached the Labour Court (which in any event has exclusive jurisdiction to deal with the issue of just and equitable compensation for any loss or damage attributable to the strike) for "an appropriate order" to give effect to the no-work no-pay principle.

[5] It was common cause that the anticipated deductions were to be made on the same day the interim application was argued before me, ostensibly in accordance with the respondent's programmed salary run already in place.

[9] At the time I provided brief reasons for my ruling, the crux of which I repeat below:

> "[1] In brief the applicants do not as the respondent suggests simply seek payment of remuneration they were (not) paid during the two month unprotected strike.[6]
> [2] To the contrary the harm they seek to avert *pro tempore* by the grant of the interim relief is against the arbitrary deductions summarily effected or about to be effected against their salaries, the payment of which they are lawfully entitled to,[7] by a method in respect of which they were not consulted and without following any legal process and in a scenario where the common law principles of set off cannot in my view apply (because the issue of what amounts the respondent is entitled to collect as against each of the applicants has not yet been resolved) and remains yet to be determined.[8]
> [3] The rights of the applicants affected by the unlawful and arbitrary deprivation of their present and future lawful salaries is their right to have the rule of law enforced or respected, the contention being that the respondent has resorted to self-help by taking the law into its own hands without following any legal process or by the undermining of the applicable judicial process.
> [4] In this respect it is contended that the deductions 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 payments 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.)
> [5] The effect of the respondent's conduct thus far in the whole debacle, and the threat of its unlawful future conduct, lies in the fact that they have or will be arbitrarily and summarily dispossessed of their property (their salaries to which they are contractually entitled)[9] and materially aggrieved thereby without following the prescribed legal process, thus rendering the deductions as constituting self-help.

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[6] By this I meant that the challenge was not in respect of their entitlement to be paid for the period that they did not work. Their concern was that they had not consented to any deductions against their present-day remuneration.

[7] Here I am referring to their ordinary remuneration which according to the respondent is paid to municipal staff monthly in arrears.

[8] I considered it arguable that there was a mutual indebtedness to speak of at the time.

[9] These would be their ordinary salaries to which they are contractually entitled, against which the respondent was purporting to justify the set-off.

[6] The violation of the applicants' fundamental rights, although it also co-incidentally entails an infringement of their rights to fair labour practices, certainly makes it the business of this court and clothes it with the necessary jurisdiction.[10]

[7] The current dispute or affliction is further one that is decidedly between the applicants (who have individually become indebted in principle to the respondents) and the respondent and the argument of a misjoinder of the unions involved in relation to the unprotected strike accordingly holds no merit.[11] The present relief seeks to address the mischief of the unique impact to each applicant by the actual or threatened deductions in each instance which have arbitrarily been imposed.

[8] On the issue of urgency, once the true nature of the parties' individual grievances are seen for what they are, it becomes abundantly clear why the matter takes on urgent proportions. Self-help should not be countenanced under any circumstances and in this instance I accept that the applicants fall to be grievously impacted by the deductions as that will wreak financial penury for each of them.[12]

[9] In all the circumstances I am satisfied that that the applicants have established the necessary requirements for the grant of the interim relief sought in Part A of the Notice of Motion."

[10] The matter came before me again for a determination under Part B.

[11] Under this mantle the applicants claim the following:

"Subject to the interim relief in Part A above:

6. Declaring the Respondent's decision to implement the 'No Work No Pay' deductions, ostensibly in terms of Section 67 (3) of the LRA, against the salaries of the Applicants to be unlawful.[13]
7. Declaring that the deductions to be made from the salaries of the Applicants are not in accordance with the provisions of Section 34 of the BCEA.
8. Declaring that the Respondent's decision to implement the 'No Work No Pay' deductions from the Applicant's salaries amounts to self-help.
9. Declaring that it is incompetent for the Respondent to belatedly (five months later) make deductions from Applicants' salaries in terms of 'No Work No Pay'.
10. Directing the Respondent to pay back any money it may have deducted against the salaries of the Applicants before the granting of this Order.

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[10] See section 157 (2) of the Labour Relations Act, No. 66 of 1995 ("LRA"") which confers concurrent jurisdiction on the Labour Court with the High Court in respect of any alleged or threatened violation of any fundamental right arising from *inter alia* employment and labour relations.

[11] In this respect the respondent had suggested that SAMWU, representing the interests of the employees affected by the strike, ought to have been joined. The applicants averred that they were however not satisfied with the assistance rendered by the union and elected to appoint their own attorneys.

[12] The court held in South African Informal Traders Forum and Others v City of Johannesburg and Others 2014 (4) SA 271 (CC) at para [31] that the ability of people to earn money and support themselves and their families is an important component of the right to human dignity. Without it they faced "humiliation and degradation" meaning that it is a vital interest worthy of seeking to protect on an urgent basis. See also Mpumulanga Economic Growth Agency v Mthembu Qinisi Christocentric ZALCJHB 2015/352 at paras [17] - [19].

[13] Evidently the offence registered by the applicants is that the respondent purported to rely on the provisions of section 67 (3) of the LRA for its authority to make deductions against their salaries. They were not in my view questioning the respondent's entitlement, in principle, to invoke the universal no-work no-pay rule.

11. Ordering the Respondent to pay (the) costs of this application, on an attorney and client scale in the event of opposition."

[12] Although maintaining that my interim order was "erroneously granted", the respondent in the meantime paid back the money (which it had deducted on pay day on 25 May 2021) and have held off the implementation of its recovery plan in respect of the applicants. The applicants nonetheless persisted that the relief claimed under Part B be "confirmed" by way of "final relief" (sic) claimed under Part B which the respondent challenged.[14] It also raised the same technical objections concerning the jurisdiction of this court to adjudicate the matter and the supposed non-joinder of SAMWU (both of which aspects I had dealt with under Part A), but these points were abandoned at the commencement of the hearing on 21 April 2022.

[13] The simple stance adopted by the respondent in opposition to the application is that since the applicants by their own admission had participated in the strike, which was found by the Labour Court to have been unlawful, the order of that court gave it the green light so to speak to implement the "no work no pay" rule and hence (as a necessary consequence) to make the disputed deductions without the applicants' consent or any further legal process because it in effect rendered the payments which it did make to the applicants in respect of the disputed period to have been made in error. This, according to the respondent, justified its entitlement to act, if not in terms of the common law by applying the doctrine of set-off, then in terms of section 34 (5) of the BCEA.

[14] This was probably because the relief claimed under Part A had been construed in a rule *nisi* format. The order which I issued was however crafted differently, although more or less of the same effect. The "declarator" sought by the applicants in paragraphs 6 to 9 is confusing, but once that relief is qualified by the introductory premise that it is subject to what was granted under Part A, and otherwise read in its factual context, the confusion is resolved. Prayer 3 under Part A required a rule *nisi* calling upon the respondent to show cause on the return date "why a final order should not be granted".

[14] Any suggestion of self-help and/or collective agreements which had the effect of rendering the intended deductions taboo (emanating from prior industrial action in 2019) were denied.

[15] The respondent threatened in its answering affidavit, ironically since its claimed justification was expressed in emphatic terms, to file a counter-application in terms of which it intended to determine the period of each employee's absence from work without lawful reason during November/December 2020, the amount owing by each of them to it, and to seek a direction that it was entitled to "recover the payments made to the applicants as remuneration during that period in instalments over (not two but) four consecutive months following the granting of such order", but evidently did not follow through in this respect.[15]

[16] Concerning the nature of the claimed error which the respondent sought to rely on as its justification for simply deducting the owed monies from the applicant's salaries under the mantle of section 34 (5) of the BCEA, the respondent explained that the applicants were initially assumed to not have been involved in the strike. It was only during its investigations into who had participated and who not that it was informed by other employees of their complicity on the basis of which they were then included after the fact. But even before this juncture the respondent averred that it made a conscious election to pay all of their employees on the premise that they were entitled to their full remuneration despite their involvement, until it was proven to the contrary that they were indeed among those who had participated.

[15] The respondent asserted that the counterapplication would and should have removed any concern and/or complaint seated in the accusation about self-help, a concession in itself that recognises in my view that the manner in which they had purported to implement their recovery strategy, without any adjudication or prior process, was perhaps found wanting. It is a pity that they did not press ahead with their intended counterapplication as this would have put this matter to its final rest.

[17] The first question is whether the respondent was entitled, even in principle, to assume a debt owing to it by the applicants who had been paid their full salaries (on 25 November and 25 December 2020 respectively) even though they had not rendered their services in those two months during the strike.

[18] As indicated above, the respondent had intimated in the media notice that was relying on the provisions of section 67 (3) of the LRA as a basis for its decision to implement the no-work no-pay rule.

[19] This subsection caters for a situation where there is a *protected* strike.[16]

> "(3) Despite subsection (2), an employer is not obliged to remunerate an employee for services that the employee does not render during a protected strike or a protected lock-out, however-
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> (a) if the employee's remuneration includes payment in kind in respect of accommodation, the provision of food and other basic amenities of life, the employer, at the request of the employee, must not discontinue payment in kind during the strike or lock-out; and
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> (b) after the end of the strike or lock-out, the employer may recover the monetary value of the payment in kind made at the request of the employee during the strike or lock-out from the employee by way of civil proceedings instituted in the Labour Court."[17]

[20] Section 68 of the LRA deals with the situation where there is an *unprotected* strike. It is not necessary to record what it states except to observe that it does not deal at all with the issue of the employer's obligation to

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[16] The parties were *ad idem* that these provisions were not of application to the relevant factual matrix here. It is however worth mentioning what the Act provides concerning the employer's obligation to remunerate an employee for services not rendered during a *protected* strike in order to appreciate that the converse applies in a scenario where the strike is unlawful. It follows logically that in the case of an unprotected strike, the employee should not expect to be remunerated for any hiatus in his/her services rendered as a result of his/her unlawful participation in a strike. This in any event accords with the universally accepted no work no pay principle in the context of labour relations.

[17] Exclusive jurisdiction is also conferred on the Labour Court in sub-section (1) (b) to order the payment "of just and equitable compensation for any loss attributable to the strike or lock-out, or conduct …" having regard to certain factors which are not relevant for present purposes. It is clear however that we are not presently concerned with such a loss attributable to the strike within the contemplation of that provision.

remunerate an employee for services not rendered during such unlawful industrial action.

[21] It follows logically in my view however that an employee has no legal entitlement to be remunerated in such an instance and should in principle pay back the money if he/she was paid for his/her hiatus in services rendered whilst participating in an unlawful strike.

[22] But this logical assumption is not easily made in the context of messy industrial action in the midst of a COVID pandemic when employee's comings and goings had to be managed and adjusted to meet the exigencies of that situation, or even in the cold clear light of day in its aftermath because of the vast number of employees who had participated in the strike.[18] The interdict application in the Labour Court was notably also opposed by SAMWU, which delayed the granting of final relief until 23 December 2020 by when the respondent could claim with absolute certainty that its employees had engaged in an unprotected strike.

[23] I imagine that if the respondent had withheld the *pro rata* portions of the applicants' salaries (to which they cannot in principle claim to have been entitled) on 25 November and 25 December 2020 respectively and contemporaneously with the unprotected strike, that its act of withholding at these junctures would probably have passed without demur by the applicants since they have owned up to their participation in the strike and acceptance of its implications. The complaint here though is that the respondent made its decision months after the fact that the applicants were among those who had participated in the unlawful

[18] COVID protocols no doubt made it difficult to appreciate whether one was staying home to give effect to the state of emergency objectives or in support of a strike.

industrial action and against whose "remuneration" (as defined in the BCEA) deductions were now expected to be effected.[19]

[24] There can be no suggestion that the respondent was not entitled in the aftermath to have embarked upon a careful inquiry to determine who participated in the strike and who not and thereupon to have taken a positive decision (even five months after the fact) to implement a recovery strategy to give effect to the no-work no-pay rule, although I take the applicants' point that the delay might have conduced to the impression that it had chosen not to implement the no-work no-pay rule after such a lengthy passage of time and certainly not vis-à-vis themselves.

[25] The respondent's initial diplomacy, in having given the participating employees the benefit of the doubt that they had not so participated and were entitled to their full remuneration pending such an enquiry, is in my view commendable and demonstrates its fair and cautious dealing with a sensitive situation. But it was certainly not precluded from making the decision which it did to recover the overpayments as late in the day as it did. Indeed, as Mr. Schultz submitted, provided the respondent sought to recover the overpayments within the permissible period allowed for the recovery of a debt, the applicants could have no quarrel with its election to insist on being reimbursed at the end of the day.

[26] The complaint by the applicants that in making their decision to implement the no-work no-pay rule the respondent were precluded by a 2019 collective agreement from doing so, or did not do so consistently vis-à-vis other employees, is in my view nothing but a red herring in the whole scheme of things. I gave the

[19] It is arguable that the act of contemporaneously withholding might be different from the act of making a deduction against an employee's salary in respect of which there are obvious legal constraints.

thought weight in granting the interim relief, but on the basis of the Plascon Evans Rule[20] I am obliged under Part B to accept the respondent's version that there was indeed consultation with the unions before implementing the rule, and that the decision to recover applied uniformly across the board to all the employees who had taken part in the strike action.[21] The respondent was therefore entitled, in principle, to have adopted the stance which it did that those who had participated in the strike in question would not be paid for the days on which they had not rendered services by virtue of their participation in the strike.

[27] The question of what days their absence from work made a difference to the accounting because of the Covid rotation roster is certainly a significant one in the context of fair labour practices. I imagine that it would have caused controversy if the extent of each employee's indebtedness was a product of assumption rather than agreement possibly requiring a declarator concerning the basis for the respondent's calculations. Not surprisingly this is an eventuality the respondent seems to have reconciled itself with by its suggestion that it intended to file a counterapplication aimed at settling these rands and cents disputes.

[28] The issue for determination under Part B is whether the applicants are justified in their entitlement to a final interdict so to speak restraining the respondent from recovering the amounts for which the applicants are in principle indebted to them for *without their consent or judicial process*, in other words automatically by way of set-off.

[29] This necessarily entails an introspection into the provisions of section 34 of the BCEA. The parties certainly do not hold a common understanding of the effect of its provisions.

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[20] Plascon-Evans Paints (TVL) Ltd v Van Riebeeck Paints (Pty) Ltd [1984] 2 All SA 366 (A).

[21] The applicants made no attempt to negate the respondent's version in their replying affidavits.

[30] The contentious section, which deals with deductions that are lawfully permissible against the remuneration of employees, 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 previously made by the employer resulting from an error in calculating the employee's remuneration; or
> (b) acknowledge receipt of an amount greater than the remuneration actually received."

[31] Shortly before the present matter was due to be argued before me, I furnished counsel with a copy of a recent judgment which I had delivered in Zolile Vumazonke v Municipal Manager and Another as I considered that the approach adopted by me therein concerning the application of the provisions of section 34 of the BCEA might hold sway.[22]

[32] In that matter the applicant had resigned from the employ of the Buffalo City Metropolitan Municipality. Instead of paying resignation monies that were due to him, the municipality had applied set-off against his remuneration claiming

[22] (595/2019 [2021] ZAECELLC 24 (15 December 2021).

that the parties were mutually obligated to one another, the municipality to him for his final benefits and he to it since he had purportedly been paid "in error" in respect of a prior acting stint at a higher Task Grade than the position he had acted in at the time had warranted. The applicant did not accept that the grade level on which he had been appointed for the acting stint period was incorrect. The offer to pay him on this basis had been consciously made and accepted by him and the municipality had not sought by way of a self-review to correct any claimed illegality in his appointment on the higher task grade level. Although I found that the payment might notionally have been made in error to him on the basis contemplated in section 34 (5) of the BCEA, I was however not satisfied that its provisions could be invoked, at least not without his consent or an order of court, to justify the retention of the applicant's resignation benefits.

[33] I concluded in this respect that:

> "[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 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."

[34] I went on to explain why in Vumazonke the provisions of section 34 (5) of the BCEA could not be of application without his consent or an order of court authorizing the deduction:

> "[30] The BCEA is concerned with fair labour practices. Its object is stated as follows:
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> > "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."
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> [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.)[23]
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> [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.*[24] (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.)[25]
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> [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) carry the day. Certainly there was no court order in place that sanctioned the deduction at the time it was made.
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> [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.[26] That situation is certainly not applicable here either.
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> *[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.*
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> *[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*

[23] Section 32 (3)(b) of the BCEA.
[24] See section 34 (1) (a) and (b) of the BCEA.
[25] 8th Edition, at pages 68 - 69.
[26] Workplace Law, *Supra* at page 69.

subsection (1) (a) to repay the amount paid to him in error, 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."

(Emphasis added for present purposes.)

[35] In Public Servants Association of South Africa obo Ubogu v Head of the Department of Health, Gauteng and Others[27] the Constitutional Court confirmed, that the provisions of subsections (1) and (5) of section 34 of the BCEA do not authorize arbitrary deductions in any manner.

[36] 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 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.

[37] 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 observed in this respect 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

[27] 2018 (2) BCLR 184 (CC).

> 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.*"[28]
> (Emphasis added)

[38] Counsel in Vumazonke had sought to persuade me that the municipality's 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 was not convinced that this proposition was a sound one.[29]

[39] Ironically, I referred to my interim order issued in the present matter as establishing the requirement that "the law" contemplated by section 34 (1) (b) of the BCEA, had to be specific in this respect:

> "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."[30]

[40] In PSA obo Ubogu the Constitutional Court reiterated that a court is required to respect an employee's fair trial rights referred to in section 34 of the

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[28] *Supra*, at par [78]. For present purposes the effect of this principle is that even assuming an overpayment (thus a factual premise for the practical invocation of subsection (5) by a request to the applicants to repay the amounts that should have been docked) the employee must still agree to the deduction if a court or labour forum has not authorised it. The Labour Court went no further than pronouncing that the strike was un unprotected one. There is further no general collective agreement in place between the parties that outlines the steps to be taken to recover salaries paid to staff to which they are or were not entitled as a result of their participation in an unlawful strike.

[29] This was the driving force behind the respondent's perceived obligation in this instance as well, namely, to recover the monies owing to them by the employees by applying set-off against their remuneration on the indisputable basis that the law does not countenance any entitlement to be paid a salary where services are withheld.

[30] See footnote 15 in the Vumazonke judgment.

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".

[41] The mischief in Vumazonke which I found had to be guarded against, where the employee had disputed liability for the claimed deduction 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 a municipality's general obligation to look after public funds.[31]

[42] The significance of the fair trial right, 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, was eloquently articulated as follows:

> "[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

[31] Self-evidently the municipality's public duty *in casu* to recover the monies that it should not have paid to the applicants intersects with the applicants' rights to fair labour practices and to have their (notional) disputes resolved by the application of law decided in a fair public hearing.

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*,[32] "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."

[43] The Constitutional Court went further and denounced as flawed the contention that a deduction under section 38 (2)(b)(i) of the PSA regulated the common law right of set-off:

"[69] (I)t 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.

[32] Chief Lusapo v Northwest Agricultural Bank 2000 (1) SA 409 (CC).

> [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:
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> > "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."

[44] Having intimated to counsel in the present application what my *prima facie* views were based on Vumazonke, Mr. Schultz on behalf of the respondent put forward several submissions why I should not apply it *in casu*, the first being that the facts of the two matters are obviously distinguishable from each other and that in his opinion the respondent in the present scenario had had every right to invoke the doctrine of set-off. His second point was that section 34 of the BCEA in the present factual scenario provides a constitutionally endorsed instrument through which the respondent was and is entitled, employer *qua* employee, to recover the payments that were purportedly paid to the applicants in error. Thirdly he submitted that the respondent was entitled to invoke the provisions of section 34 (5)(a) of the BCEA specifically (in the peculiar fact set) based on the respondent's claimed "error." Fourthly, he contended that its machinery as a tool

for recovery of salary overpayments or errors in calculation is distinct and disjunctive from subsections (1) and (2) and not subordinate thereto, this based on a finding of a full court of this division in Mnquma Local Municipality v Mgongwana[33] which, so he pointed out to me, is binding on this court. His fifth submission is that the comments made by the Constitutional Court in PSA obo Ubogu relative to the practical effect of section 34 of the BCEA were made *obiter*.

[45] Let me begin with what the full court held in Mnquma Local Municipality. That matter went about the municipality's withholding of a car allowance it had previously paid to the respondent (employee) without her written consent or a court order entitling it to do so. It appeared that the respondent had in motion court proceedings sought an order reviewing and setting aside the municipality's decision to discontinue the payment of the allowance to her which she alleged had been paid to her since 2014. Bizarrely the respondent contended in the court below that the provisions of section 34 (1) of the BCEA were applicable to her circumstances. The "central issue" in the appeal was stated by the full court to be "whether the court *a quo* was correct in its conclusion that the cessation by the appellant of its payment of a monthly sum of R5 000.00 to the respondent without her consent amounted to a deduction of (her) remuneration in violation of the provisions of section 34 of the (BCEA)".

[46] I can understand the full court's concern that the whole premise of the judgment appealed against was wrong and that it had been a fundamental error of law (leaving aside the court *a quo's* further mistake in concluding, as a fact, that the car allowance formed part of her remuneration) for the court below to have found that the provisions of this section were applicable to her circumstances at all.

[33] (CA86/2019) [2020] ZAECMHC 16 (19 May 2020).

[47] But given the arguments before the full court as to the applicability of section 34 of the BCEA, it happened to traverse the various cases dealing with its provisions and concluded that the application of section 34 (5) of the BCEA was "different" from subsection (1) "because it concerns repayments" and supposedly set apart in the sense that subsection (5) does not require the prior consent of an employee for its invocation and application.

[48] It is useful to set out the summary of the cases mentioned by the full court:

> "[14] The application of section 34 (5) is different, not only because it has no bearing on deductions but because it concerns repayments. This subsection has been considered in a number of cases:
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> [14.1] In *Jonker v Wireless Payment Systems CC*[34] Molahlehi J held as follows:
>
> "In support of her case that her right had been interfered with the applicant relied on the provisions of s 34(1) of the Basic Conditions of Employment Act. That section prohibits an employer from making any deductions from an employee's remuneration unless the employee agrees in writing. It is indeed correct that as a general rule the Basic Conditions Employment Act prohibits deductions from employees' salaries without their prior consent. However, deductions without consent are permitted where they are permitted by the law, a collective bargaining agreement and a court order or arbitration award. In these instances all that the employer needs to do is to advise the employee of the error in payment and the deduction made or to be made. See *Papier & others v Minister of Safety & Security & others* (2004) 25 *ILJ* 2229 (LC)."
>
> [14.2] In *Sibeko v CCMA*[35] Revelas J, dealing with the issue of deductions, stated:
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> "It is indeed so that in terms of the Basic Conditions of Employment Act, an employer may not deduct amounts from the salary or remuneration of an employee without the employee's consent. Where an employee was however overpaid in error, the employer is entitled to adjust the income so as to reflect what was agreed upon between the parties in the contract of employment, without the employee's consent."
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> [14.3] In *Padayachee v Interpak Books (Pty) Ltd*[36] Whitcher AJ (as she then was) observed:
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> "[27] It is noteworthy that the drafters of s 34 chose to identify and deal separately with a number of different types of deductions. This must mean that the purpose of the provision is to regulate these deductions.
>
> [28] It thus follows that any enquiry into s 34 should commence by identifying the nature and purpose of the deduction in dispute and then ascertain whether the section requires employers to regulate such deductions in a particular manner."
>
> [14.4] Ngcukaitobi, AJ in *SA Medical Association on behalf of Boffard v Charlotte Maxeke Johannesburg Academic Hospital & Others*[37] also appeared to accept, albeit

[34] (J1137/09) [2009] ZALC 150; (2010) 31 ILJ 381 (LC) (23 June 2009) para [21].
[35] (2001) JOL 8001 (LC).
[36] (D234/12) [2014] ZALCD 4; (2014) 35 ILJ 1991 (LC) (3 March 2014).
[37] (J2469/13) [2014] ZALCJHB 78; (2014) 35 ILJ 1998 (LC) (20 March 2014).

> perhaps *obiter*, that the repayment of overpayments made in error could warrant deductions without the requirements of section 34 (1) (a) being met. In particular, commenting on *Jonker* and other decisions, he stated as follows:
>
> > "[39] It is apparent from these decisions that the view taken by the Labour Court is that an overpayment as a result of an administrative error does not constitute remuneration as defined in terms of the BCEA. Since it is outside the parameters of the BCEA, an employer is not required to obtain the consent of an employee before effecting the deductions as required by s 34(1) of the BCEA."

[49] The full court in Mnquma Local Municipality made no particular finding in my view that binds this court or states unequivocally that the requirements stated by section 34 (1) (a) of the BCEA *do not have to be met* before repayments envisaged under sub-section (5) can be recovered in the peculiar circumstances of the present matter. Indeed, the facts in each scenario simply cannot be equated. Neither was a purported precedent created by the full court in Mnquma Local Municipality which can be held up as clear authority for the proposition contended for by the respondent that the applicants' consent to implement the proposed deductions did not first have to be obtained.

[50] As for the several cases documented by the full court on the subject of the practical application of the provisions of section 34 (5) of the BCEA, their impact seems to have been neutralized by the observations made by the Constitutional Court in PSA obo Ubogu, even if made *obiter*. Indeed, it would be counterintuitive to promote arbitrary deductions where the Constitutional court has held up the provisions of section 34 of the BCEA as a mechanism that does not permit arbitrary deductions but instead requires that due respect be given to an employee's constitutional rights to fair labour practices, of access to court, and the right not to be arbitrarily deprived of their property.[38]

[38] Ironically the provision struck down permitted the state, as an employer, to recover monies wrongly paid to its employees directly from their salaries and wages in the absence of any due process or agreement between the parties. This is exactly what the respondent purported to do here, albeit under the mantle of section 34 of the BCEA, which the Constitutional Court held does not permit arbitrary deductions.

[51] In Vumazonke I held that the municipality's perception of an error in payment could notionally have been brought within the ambit of an overpayment of salary as is contended for in section 34 (5) of the BCEA, but to what purpose? The same situation applies here in the sense that the sum equivalent to the portion of the applicant's salary the municipality was entitled to withhold in lieu of the period when they failed to render services, probably represents an objective overpayment.

[52] But even so, how does the fact that the applicants were paid in error (classification wise) assist an employer in the position of the respondent when it wants to recover the overpayment five months after the fact against present remuneration owing to the employee. Perhaps only by giving an employer the licence to require that the overpayment, adjudged an "error" in its view in terms of subsection (5), be recovered by way of deductions against the employee's future remuneration with his or her consent in terms of subsection (1). If the employee disagrees that there was an error within the contemplation of section 34 (5) of the BCEA he or she would be able to say no, I do not believe that there has been an overpayment or error in calculation and to declare a dispute, I would venture to suggest at the risk to the employee of being held liable for the unnecessary costs of any dispute resolution where the refusal to agree in writing to the deduction(s) or its proposed terms, is unreasonable.

[53] In this instance the respondent by its own admission made a conscious election to pay the applicants notwithstanding their participation in the strike initially giving the impression that it was not invoking the no-work no-pay rule. Then after an enquiry it determined that it had made a mistake, not an error in calculating the employees' remuneration on the basis envisaged in subsection (5), but by not having included them in the category of employees against whom they

intended to implement the no-work no-pay rule. This set of circumstances does not suggest an error within the contemplation of section 34 (5) of the BCEA, but even so it does not matter because unilateral deductions are not countenanced in subsection (1). The applicants appear to have raised other disputes that in any event are required to be resolved.

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

[55] Mr. Schultz submitted that my interpretation of section 34 (5) of the BCEA in Vumazonke in effect renders its utility or the subsection itself obsolete or nugatory. He maintained that the intention behind its inclusion is to not busy the court with arithmetical calculations and the like and that this is why the provision is there without legal imprimatur or judicial oversight.

[56] However I cannot agree that it provides a machinery for recovery against the remuneration of an employee (the payment of which is sacrosanct and protected under the mantle of section 34 of the BCEA) except on the basis of one of the four criteria made provision for in subsection (1) being satisfied.

[57] I have also said above that notwithstanding the universal no-work no-pay principle its invocation does not elevate it to one that is "permitted in terms of a law" as is envisaged by section 34 (1)(b). The respondent should have gone further in the interdict proceedings and have asked for leave to deduct

remuneration it was entitled to withhold on the basis of the established principle in the event of the court finding in its favour that the strike was unlawful.

[58] The penultimate question concerns the permissibility of the extent of the deductions representing more than 25% of the applicants' gross remuneration. In this respect the provisions of section 34 (2) of the BCEA appear to be self-contained and pertain to the unique scenario where loss or damage is sought to be recovered from an employee that occurred in the course of employment and was due to his/her fault.[39] The enquiry envisaged by subsection (2)(b) calls for a fair procedure.[40]

[59] Despite the respondent's argument that the recovery of the mistaken payment to the applicants in four instalments is an "indulgence", a "fair procedure" is implicit in the provisions of section 34 (1) of the BCEA as well. The employee may, for example, agree to the extent of his/her liability but not to the terms of the repayment which an employer wishes to implement. The employee in that instance will not in writing agree to the deduction, but take his/her recourse to the court or labour forum to determine what is fair in all the circumstances.

[60] In PSA obo Ubogu the Constitutional Court was alive to the fact that an employer unilaterally imposing its terms on an employee concerning a repayment might be unfair and wreak havoc. In the case of Ms. Ubogu it expressed the reservation that the proposed monthly deduction in relation to her gross salary was palpably unaffordable. The preferable outcome it seems is to obtain the

[39] Grogan opines that punitive fines for negligence or other misconduct are thus precluded.
[40] Grogan suggests that the same established principles that apply to hearings would be applicable in respect of the "fair procedure" indicated.

employee's agreement not only to make the deductions, but also in respect of the terms under which the overpayment may be liquidated. [41]

[61] In this respect the ceiling envisaged in section 34 (2)(d) of the BCEA might be a guide as to what amount would be fair to deduct in relation to an employee's gross monthly remuneration, but in my view would depend on the relevant circumstances.

[62] The final question is whether the common law doctrine of set-off finds application here. I would suggest that it can, but only in circumstances where the employee has admitted the debt and payment terms, or if a judgment debt already exists, as provided for in subsection (1) because only then can it be said that the applicants and the respondent are mutually indebted to each other.[42] One ought to be mindful of the Constitutional Court's observation that the doctrine cannot be invoked to defeat an employee's claim to his or her salary.

[63] In the result I am inclined to find that the applicants are entitled to "final relief", but limited to the single prayer below.

[64] This entails substantial success in my view for the applicants and that costs should follow that result. The scale however requires some elaboration. It is so as Mr. Metu indicated that it was not until the last moment that Mr. Schultz who appeared on behalf of the respondent conceded that my previous interim order was dispositive of the two technical objections raised. Mr. Schultz however submitted that it had appeared necessary for the respondent to persist with its objection to the jurisdictional challenge because the same challenge had been

[41] *Supra* at paras 64 – 67.
[42] PSA obo Ubogu *supra* at 70 - 72.

successful in a related matter running concurrently with the present matter where the issues are identical but involve a different category of employees.[43]

[65] I take the respondent's further point that the respondents could not have conceded the relief sought under Part B as crafted in the notice of motion even at the doors of the court hence my tailoring of the relief I am prepared to grant specific to the unique facts of the matter rather than as a generalized declarator. It is not by any stretch of the imagination unlawful for the employer to have implemented a no-work no-pay stance after the fact, albeit the manner in which they went about their recovery in my judgment fell foul of the provisions of section 34 (1) of the BCEA. Neither can it be said to have been incompetent for the respondent to have declared belatedly that the applicants had to pay back the money.

[66] There is the further misfortune that the applicants themselves have not stepped forward to try and resolve the issue of the repayments, whereas they concede that they were involved in an unlawful strike and that this will ineluctably lead to their having to reimburse the respondent. Why they have made no tender to date is quite alarming, bearing in mind that the costs of the further litigation they are driving the respondent to may prove to be prohibitive.

[67] Mr. Schultz added that until the Vumazonke judgment had come across his desk he was inclined to follow the authority in Mnquma Local Municipality. This position adopted by the respondent was therefore according to him not spurious, frivolous or reckless. Whilst I do not agree that Mnquma Local Municipality has the persuasive force he professes it to have, I accept that the line of cases cited in the judgment involve an interpretation of section 34 (5) as providing a self-

[43] Case No. EL 626/2021 refers. I was informed from the bar that there is an application for leave to appeal in that matter

standing recovery mechanism apart from the provisions of section 34 (1) of the BCEA.

[68] He submitted further that his client, who is a custodian and functionary in the public space, has a duty to try and recover public funds where they could and should. I accept in this respect that the respondent has acted within its constitutional mandate to recover the public funds due to it and should not be mulcted in costs on a punitive scale for doing so.

[69] Regarding the reserved costs of the last failed joinder application, these are in reality not between the applicants and the respondent. It appears that they should rather according to the usual success rule be borne by SAMWU. The present parties accept that they will have to take appropriate steps to recover these from the union, after giving them notice in this respect.[44]

[70] I issue the following order:

1. It is declared that the deductions effected against the applicants' salaries on 25 May 2022 (already reimbursed to them) were not permissible or at the time properly effected in accordance with the provisions of section 34 (1) of the BCEA and amounted, in those circumstances, to self-help.
2. The respondent is directed to pay the costs of the application under Part B on the party and party scale.

[44] The answer probably lies in the provisions of Uniform Rule 41 (1)(c) appropriately adapted by the court to meet the unique circumstances. See Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk 1972 (1) SA 773 A at 783 - 6.

B HARTLE
JUDGE OF THE HIGH COURT

DATE OF HEARING: 21 April 2022

DATE OF JUDGMENT: 5 August 2022*

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

APPEARANCES:

For the applicants: Mr. B Metu instructed by Sotenjwa Attorneys of East London (ref. NS/30/ADM)

For the respondent: Mr. N C G Schultz instructed by Lionel Trichardt & Associates of East London (ref. Mr. Trichardt)