



**REPUBLIC OF SOUTH AFRICA**

**THE LABOUR COURT OF SOUTH AFRICA, DURBAN**

**JUDGMENT**

Reportable

Case no: D243-12

In the matter between:

**SHENAAZ PADAYACHEE**

**APPLICANT**

and

**INTERPAK BOOKS (PTY) LTD**

**RESPONDENT**

Heard: 7 January 2014

Delivered: 4 March 2014

**Summary: Declaratory order – claim for substantive relief – Section 34 of the Basic Conditions of Employment Act 75 of 1997 – deduction from wages for damage or loss caused by employee's negligence – deduction not permitted under section 34(1)(b) – substantial consequential relief granted.**

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**JUDGMENT**

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WHITCHER AJ

Introduction

- [1] The applicant seeks an order declaring that the respondent is not entitled to deduct the sum of R86,046.59 from her remuneration. The applicant claims substantive consequential relief, being payment of R86,046.59 together with

interest thereon at the rate of 15.5% per annum from 22 September 2011 to date of payment.

#### Background facts

- [2] The applicant tendered her resignation on 22 September 2011. The respondent requested her to leave immediately and to not work during her notice period; which she did. The respondent also informed her that she would be paid her October salary and all outstanding leave pay during the October salary run, which would be on 25 October 2011.
- [3] On 25 October 2011, the respondent called on the applicant to attend a disciplinary hearing on 27 October 2011 to answer charges of insubordination and gross negligence.
- [4] The applicant did not attend the inquiry. She pleaded that her resignation on 22 September and the respondent's response to this meant that her contract of employment was terminated on 22 September 2011. As a result, the respondent had no authority to discipline her.
- [5] At the hearing of this application, the applicant accepted the respondent's contention that her resignation did not terminate the employment contract on 22 September 2011, but had the effect that the contract would terminate at the end of the notice period which was the 31 October 2011.
- [6] On 15 November 2011, the respondent informed the applicant that she was entitled to R86,046.59 in respect of her October salary and accrued leave pay less income tax.
- [7] The respondent further informed her that she had been found guilty of having caused the respondent financial loss in excess of R180,000.00 and, as a result, the "the sanction of a fine of R180,000.00 had been imposed."
- [8] The respondent advised her that the 'fine' of R180,000.00 had been set off, in terms of section 34(1)(b) of the Basic Conditions of Employment Act, 1997, against the amounts owed to her.

### The material facts

- [9] The parties argued at length about whether the respondent had a statutory or contractual right to impose a fine as a disciplinary sanction. The dispute was based on the label the respondent attached to the sanction, namely that of a “fine.”
- [10] The parties created an issue that does not in fact exist because the deduction sought is not in respect of a fine, but in respect of *damage or loss* allegedly caused by the applicant’s negligence.
- [11] This enquiry will thus proceed on the basis of the following facts: the respondent employer seeks to make a deduction from the applicant’s remuneration in respect of damage or loss caused by the applicant employee, the amount of damages was determined by the chairperson of the disciplinary hearing and the applicant employee did not consent to the deduction.

### Section 34 of the Basic Conditions of Employment Act, 1997

- [12] Section 34 reads as follows:

‘34 Deduction and other acts concerning remuneration –

(1) An employer may not make any deductions 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 deduction 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'.

[13] Regulation 4.6.2 of the General Administrative Regulations, promulgated in terms of the BCEA, 1997 provides that:

'A deduction in respect of damage or loss caused by the employee may only be made with agreement and after the employer has followed a fair procedure'.

### The submissions of the parties

- [14] The applicant contended that, in terms of section 34(1)(a) read with section 34(2), the respondent is not entitled to make the deduction in question because she did not agree to the deduction and the total deduction exceeds one-quarter of her remuneration in money.
- [15] The respondent contended that sections 34(1)(a) and 34(2) have no application in this case because the respondent relied on section 34(1)(b), and, in that regard, set-off, to extinguish the debt.
- [16] The respondent submitted that the phrase 'a law' in section 34(1)(b) contemplates a rule of the common law and that set-off constitutes a rule of the common law.
- [17] According to the respondent, the requirements for set-off have been met in this case in that:
- (i) The remuneration and the debt of R180,000.00 were owed by the respondent and the applicant in the same capacity of employer and employee respectively.
  - (ii) The debts were of the same kind in that they sounded in money.
  - (iii) The fine was due and enforceable on the date on which it was issued.
  - (iv) The debts were liquidated in that they are capable of speedy and easy proof. The applicant's debt can be readily detected from the report of the disciplinary enquiry.
- [18] The applicant contended that the debt did not constitute a liquidated amount because it is a claim for damages which had not been determined and quantified by a court or by agreement between the parties.

### Evaluation

- [19] An important rule of interpretation is to establish the purpose of the relevant provision and to give effect to it. The purpose is either explicitly stated or can be determined logically and from the full text and context of the provision.

- [20] Sections of a legislative provision cannot be construed in isolation. Their meaning and purpose should be weighed up against the broader text and context of the provision.
- [21] There are also presumptions in the field of interpretation of statutes, including that legislation does not contain futile, nugatory or aimless provisions. Legislation should be interpreted in such a way that no provision is regarded as redundant or superfluous.
- [22] There is also a presumption that unreasonable and absurd results are not intended.
- [23] Wessels JA in *Stellenbosch Farmers' Wineries v Distillers Corporation (SA) Ltd* and Another 1962 (1) SA 458 (A) at 476E-F described the process as follows:
- ‘In my opinion it is the duty of the Court to read the section of the Act which requires interpretation sensibly, i.e. with due regard, on the one hand, to the meaning or meanings which permitted grammatical usage assigns to the words used in the section in question and, on the other hand, to the contextual scene, which involves considerations of the language of the rest of the statute as well as the ‘matter of the statute, its apparent scope and purpose, and, within limits, its background’. In the ultimate result the Court strikes a proper balance between these various considerations and thereby ascertains the will of the Legislature and states its legal effect with reference to the facts of the particular case which is before it’.
- [24] Lastly, regulations must be read and interpreted together with the legislation but they cannot influence the meaning of the legislation.
- [25] The respondent's contention that set-off constitutes a rule of the common law and that a rule of the common law is ‘a law’ as contemplated in section 34(1)(b) is accepted on the basis that the phrases ‘a law of general application’ and ‘notwithstanding anything contained in any other law’ have been held to refer to statute and the common law.

- [26] However, the respondent's contention that, in the absence of an agreement with the employee, an employer may rely on section 34(1)(b) and ignore sections 34(1)(a) and 3(2) to make a deduction from an employee's remuneration in respect of damage or loss caused by the employee is rejected for the reasons set out below.
- [27] It is noteworthy that the drafters of section 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 inquiry into section 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.
- [29] In this case, an employer seeks to make a deduction from an employee's remuneration in respect of damage or loss allegedly caused by the employee.
- [30] Section 34 specifically regulates this type of deduction. Section 34(2) confers a right on the employer to make deductions from an employee's remuneration in respect of damage or loss caused by the employee but stipulates that this right cannot be validly obtained unless the prescribed formalities set out in the sections 34(1)(a) and 34(2) are complied with.
- [31] These prescribed formalities include a fair internal hearing to determine the liability of the employee and a written agreement by the employee to reimburse the employer in respect of the damage or loss.
- [32] It is also clear that sections 34(1)(a) and 34(2) also require the damages to be liquidated through the process of a hearing and a written agreement which sets out the specific amount owed and due. The provision thus requires the existence of a liquid document.
- [33] A further purpose of the provision and these formalities is clearly to protect employees against arbitrary conduct and to provide employers with a simple and quick method of obtaining relief without resorting to litigation.

[34] The construction and interpretation of section 34 sought by the respondent would essentially render sections 34(1)(a) and 34(2) and, consequently all the due process provisions and protections contained therein, aimless and superfluous.

[35] The respondent's construction would also directly contradict regulation 4.6.2 of the General Administrative Regulations, promulgated in terms of the BCEA, 1997. This regulation provides that:

‘A deduction in respect of damage or loss caused by the employee may only be made with agreement and after the employer has followed a fair procedure’.

[36] The wording of section 34(2) establishes that an employer is entitled to make a deduction from remuneration for damage or loss caused by the employee, but must use the process stipulated in sections 34(1) and 34(2).

[37] The wording is as follows:

‘A deduction in terms of subsection (1)(a) *may* be made to reimburse an employer for loss or damage *only if*...[emphasis added].

[38] The cases cited by the respondent and described below are distinguishable from the case before this court on the basis of fact and law.

[39] In *The Government v Regna-Adwel Business Machines Africa (Pty) Ltd* 1970 (2) SA 428 (T) the employer held a liquid document signed by the employee for an amount due to the employer and providing for it to be paid by means of set-off.

[40] *Jonker v Wireless Payment Systems CC* (2010) 31 ILJ 381 (LC) dealt with a situation where the employee was overpaid. In such a situation the employer is entitled to adjust the income paid so as to reflect what was agreed upon by the parties in the contract of employment. Section 34(5) expressly permits this.



- [41] In *Rank Sharp SA (Pty) Ltd v Kleinman* (2012) 33 ILJ 2937 (LC), the applicant pleaded set-off in an application to set aside a writ of execution. The applicant relied upon a settlement agreement. The court found that there was no agreement that the amount in question could be deducted and that the money in issue did not amount to “remuneration” as defined in the BCEA.
- [42] *R v Ludick* 1954 (2) SA 625 (C) was determined on the basis of section 14 of the Masters and Servants Act, 1873, which was fundamentally different from section 34 and 34A of the BCEA in wording and purpose.
- [43] In *Barry and African Defence System (Pty) Ltd* (2004) 25 ILJ 1102 (CCMA) the employer was entitled to set-off against severance pay a gratuity paid to the employee.

### Conclusion

- [44] For the reasons set out above, the respondent is not entitled to rely merely on section 34(1)(b) to make the deduction in question from the applicant’s remuneration in respect of loss or damage caused by the applicant.

### Substantive consequential relief

- [45] In the notice of motion, the applicant claimed substantive consequential relief of payment of R86,046.59 and interest thereon from 22 September 2011 to date of payment.
- [46] During the proceedings the applicant conceded the respondent’s plea that her contract of employment had ended on 31 October 2011 and, as a result, amended her claim to seek interest from 31 October 2011 instead of 22 September 2011.
- [47] The respondent contended that the applicant’s adjusted claim must fail because she had not claimed for further and/or alternative relief in her notice of motion.
- [48] There is no merit in this contention since, as the applicant contented, a pray for alternative relief is implied and in any event the amended claim is for a

reduction of the respondent's liability and the respondent has suffered not prejudice as a result thereof.

Order

- [49] It is declared that the respondent is not entitled to deduct money from the applicant's remuneration in the sum of R86,046.59.
- [50] The respondent is ordered to pay the applicant the sum of R86,046.59 plus interest thereon at the rate of 15.5% per annum from 31 October 2011 to date of payment.
- [51] The order is granted with costs.

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Whitcher AJ

Acting Judge of the Labour Court of South Africa

## APPEARANCES:

For the Applicant: Advocate A Christison

Instructed by: Tomlinson Mguni James

For the Respondent: Advocate P Kantor

Instructed by: Woodhead, Bigby & Irving Inc

LABOUR COURT