Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case No: J 1034/16

In the matter between:

MABOZA HILDA MOROESI **Applicant**

and

MATJHABENG LOCAL MUNICIPALITY **First Respondent**

M LEPHEANA (MUNICIPAL MANAGER) **Second Respondent**

Heard: 25 October 2017

Delivered: 23 November 2017

Summary: (unlawful deductions – issue estoppel in respect of due wage – deductions in breach of s 34(1) of BCEA – absence of counterclaim in the alternative)

JUDGMENT

LAGRANGE J

Background

[1] The applicant in this case is claiming reimbursement of salary deductions purportedly made to recover salary overpayments, which she claims were unlawful. The deductions were made between 1 May 2014 and November 2016. Both parties have applied for condonation for the late filing of an answering affidavit in the main application and an answering affidavit in respect of the respondents' condonation application. I am satisfied that no material prejudice has been suffered by the parties in respect of those late affidavits and that the explanations for the delays are not unreasonable. In relation to the fact that at the pre-enrolment hearing the applicant's attorney, *Mr Schöltz*, did not advise the court of the current attorneys of record and gave the court the impression that since the previous attorneys of record had withdrawn, no new attorneys had been appointed even though his firm had corresponded with the respondent's current attorneys, it also ill-behoves the applicant to complain of the delay in filing the condonation application and answering affidavit. As a matter of professional ethics, I leave that to the respondent to take up with the Law Society. Consequently, I am inclined to grant both condonation applications.

[2] The municipality had implemented the deductions because it maintained that the applicant had irregularly been appointed as an electrician on post level 8 when she should have been employed on past level 9. It was common cause that electrician posts at the municipality at the time of her appointment were post-level 9 posts. The applicant claimed that she had negotiated a salary at a higher post level with the former municipal manager after she had told him that she could not leave her existing job for the salary offered at post level 9. The applicant claimed that the letter of the municipal manager dated 9 April 2014 which notified her of the municipality's intention to rectify her appointment amounted to an unfair labour practice.

[3] Her unfair labour practice claim was referred to arbitration and the arbitrator concluded that she failed to establish the existence of the unfair

labour practice. Having failed to obtain redress through the unfair labour practice mechanism, the applicant launched this application.

[4] In the course of arriving at this final conclusion, the arbitrator made the following subsidiary findings:

4.1 She had applied for the post which was advertised at post level 9 and her appointment at that level was approved.

4.2 There was no advertisement for a post at level 8 and she had failed to provide proof that former municipal manager had agreed that she could be appointed at that level.

4.3 The letter purportedly appointing her to level 8 was a matter of dispute and in any event was irregularly issued.

4.4 The letter did not demote her but was "rectifying the irregularity"

In essence, the arbitrator found that the applicant's appointment at level 8 was invalid and the municipality was entitled to assert the true position, namely that she was appointed in a level 9 post. As such there was no demotion which could lay the basis of an unfair labour practice.

[5] The respondent raised three essential defences to the claim, namely that the contract was rectified by the letter of 9 April which corrected the erroneous designation of the applicant's post as a level 8 post. Consequently, the deduction was permissible both in terms of the correct contractual position and in terms of s 34(1)(b) read with s 34(5)(a) of the Basic Conditions of Employment Act, 75 of 1997 ('the BCEA'). In addition, the respondent contends that in any event, the arbitrator effectively decided issues underpinning the applicant's current claim, which accordingly are *res judicata* in relation to this claim, even though the award concerned an unfair labour practice.

[6] I will address the latter issue as it is dispositive of the applicant's application. The municipality contends that even though the cause of action in the arbitration (an unfair labour practice) is different from the cause of action in this application (based on alleged unlawful deductions) and therefore does not conform to the original formulation of the *exceptio res judicata* principle which requires that three conditions must be met, it is

sufficient that the parties in both matters are the same and same issue has to be determined in both instances. In its original formulation the principle only applied if, in effect, the subsequent proceeding was in respect of the same subject matter and cause of action and between the same parties, and that judgement had been given in the original proceedings. The principle has been relaxed to the extent that the 'issue estoppel' is also recognised as a form of the *exceptio.*

[7] The current thinking on the principle was recently reaffirmed in ***Transalloys (Pty) Ltd v Mineral-Loy (Pty) Ltd***[1], where the SCA stated:

> "In *Prinsloo NO & others v Goldex 15 (Pty) Ltd & another* [2012] ZASCA 28; 2014 (5) SA 297 (SCA) described the *res judicata* and the issue estoppel as follows:
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> '[10] The expression "res iudicata" literally means that the matter has already been decided. The gist of the plea is that the matter or question raised by the other side had been finally adjudicated upon in proceedings between the parties and that it therefore cannot be raised again. According to Voet 42.1.1, the exceptio was available at common law if it were shown that the judgment in the earlier case was given in a dispute between the same parties, for the same relief on the same ground or on the same cause (*idem actor*, *idem res et eadem causa petendi*) (see eg *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA) ([2001] 1 All SA 417) at 239F – H and the cases there cited). In time the requirements were, however, relaxed in situations which gave rise to what became known as issue estoppel. This is explained as follows by Scott JA in *Smith v Porritt and Others* 2008 (6) SA 303 (SCA) para 10:
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> "Following the decision in *Boshoff v Union Government* 1932 TPD 345 the ambit of the *exceptio res iudicata* has over the years been extended by the relaxation in appropriate cases of the common-law requirements that the relief claimed and the cause of action be the same (*eadem res* and *eadem petendi causa*) in both the case in question and the earlier judgment. Where the circumstances justify the relaxation of these requirements those

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[1] (781/2016) [2017] ZASCA 95 (15 June 2017)

> that remain are that the parties must be the same (*idem actor*) and that the same issue (*eadem quaestio*) must arise. Broadly stated, the latter involves an inquiry whether an issue of fact or law was an essential element of the judgment on which reliance is placed. Where the plea of *res iudicata* is raised in the absence of a commonality of cause of action and relief claimed it has become commonplace to adopt the terminology of English law and to speak of issue estoppel. But, as was stressed by Botha JA in *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* 1995 (1) SA 653 (A) at 669D, 667J – 671B, this is not to be construed as implying an abandonment of the principles of the common-law in favour of those of English law; the defence remains one of *res iudicata*. The recognition of the defence in such cases will however require careful scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case-by-case basis (*Kommissaris van Binnelandse Inkomste v Absa* (supra) at 670E – F). Relevant considerations will include questions of equity and fairness, not only to the parties themselves but also to others. . . .'"
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> (See also *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC & others* [2013] ZASCA 129; 2013 (6) SA 499 (SCA) paras 21 and 22.)"[2]

(emphasis added)

[8] In the arbitration award, the arbitrator found that given there was no electrician's post at level 8 in the municipality's establishment and the absence of other evidence supporting the applicant's contention that she had been lawfully appointed at that level. This had prompted the letter being written to her on 9 April 2014, which asserted that the letter purportedly appointing her on the higher level had been irregularly issued.

[9] It was an essential part of the arbitrator's reasoning in coming to his decision that the applicant was not validly appointed at level 8 and therefore had suffered no demotion when the anomaly was corrected. This court cannot consider her entitlement to the higher salary without covering the same ground as the arbitrator. I am satisfied that in so far as she

[2] At para [22].

asserts she was lawfully entitled to the higher rate of pay the principle of *res juidcata* in the sense of 'issue estoppel' would apply to that question.

[10] What the arbitrator did not have to decide in the course of his decision was whether the deductions made to recover the overpayments were lawful. That the court can determine but premised on the finding that she was overpaid for the period she received a salary at level 8 and the respondent is entitled to recover the overpayments from her. In this respect the decision in ***Jonker v Wireless Payment Systems CC*** [3] applies. The Labour Court held in *Jonker* that :

> "[21] 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).
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> [22] In Sibeko v CCMA (2001) JOL 8001 (LC) Revelas J in dealing with the issue of the deductions said:
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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.' "[4]

[11] The applicant relies on s 34(1)(a) and (b) of the BCEA. To contextualise those sections, it is useful to quote s 34 in its entirety, viz:

[3] **(2010) 31 *ILJ* 381 (LC)**

[4] At 386

'(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.

[12] The deductions made must satisfy the requirements of s 34(1) to be lawful. If no agreement to the deduction is concluded in accordance with s 34(1)(a) then there must be some other source for the legal authority to make it in terms of s 34(1)(b), which *inter alia* authorises a deduction 'permitted in terms of a law'. Section 34(5) is a provision in terms of the same Act, which permits deductions to be made for overpayments, but only if the reason for the overpayment was an error in calculating the employee's remuneration. The error in this case was not one of calculation but one relating to the true level on which the applicant had been employed, so the employer cannot rely on s 34(5)(a).

[13] The municipality sought to rely on its powers under s 32(2) of the Local Government: Municipal Finance Management Act 56 of 2003 ('the MFMA'), which states:

> "(2) A municipality must recover unauthorised, irregular or fruitless and wasteful expenditure from the person liable for that expenditure unless the expenditure-
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> (a) in the case of unauthorised expenditure, is-
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> (i) authorised in an adjustments budget; or
>
> (ii) certified by the municipal council, after investigation by a council committee, as irrecoverable and written off by the council; and
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> (b) in the case of irregular or fruitless and wasteful expenditure, is, after investigation by a council committee, certified by the council as irrecoverable and written off by the council."

Clearly, the overpayment of the applicant was unauthorised and the respondent is obliged to recover it. However, that provision does not permit the imposition of salary deductions *per se* as a permissible means of recovering the payments. Accordingly, the respondent cannot rely on s 32(2) of the MFMA as authority for the deductions even though the applicant is obliged to repay the overpayments. Unless the applicant agrees to waive reliance on the judgement and permits the remainder of the overpayment to be recovered by further deductions, the respondent will have to obtain a court order to recover the overpayments.

[14] However in the circumstances, I have no option but to declare the deductions made to be unlawful as they were in breach of s 34(1) of the BCEA and accordingly must be refunded simply because they were unlawful, not because the municipality was not entitled to recover the overpayment and has not made a counter claim in the alternative. Hopefully, common sense will prevail to make further litigation to that end unnecessary.

[15] Because of the existence of an underlying obligation to repay the respondent the overpayments she received, I do not believe the applicant should receive more than half her costs for the main application. In respect of the condonation applications, it is equitable that the parties bear their own costs in my view in the circumstances.

<u>Order</u>

[1] The First Respondent is interdicted from making further deductions from the Applicant's remuneration as a consequence of or in relation to the Applicant's former appointment by the First Respondent as an electrician, unless a court orders otherwise or in terms of an agreement reached in terms of s 34(1)(a) of the Basic Conditions of Employment Act, 75 of 1997 ('the BCEA').

[2] The deductions made by the First Respondent from the Applicant's monthly remuneration to recover overpayments made as a result of her being paid as an Electrician at level 8 instead of level 9 ('the overpayments') are unlawful by virtue of being in breach of s 34 of the BCEA.

[3] Within 20 days of this judgement,

3.1 The First Respondent must reimburse the Applicant R 112, 968.00 as well as any further deductions made pursuant to recovery of the overpayments after 1 September 2016.

3.2 The First Respondent must pay interest on the amounts payable to the Applicant in terms of paragraph 3.1 of this order, as prescribed by the Prescribed Rate of Interest Act 55 of 1975 with effect from the date on which each deduction was made from the Applicant's monthly remuneration.

[4] The First Respondent must pay half the Applicant's costs of this application.

[5] Each party must pay their own costs for the condonation applications.

Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: W P Schöltz of Schöltz Attorneys

RESPONDENT: Adv Mushet instructed by Lebea & Associates