SIDONSELWA IHOLO NGOKUNGEMTHETHO. "NO WORK, NO PAY": LAWFUL DEDUCTIONS OR EMPLOYER'S SELF-HELP? IN SEARCH OF PRACTICAL GUIDELINES*

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SUMMARY

The employment relationship is reciprocal in nature in that it entails obligations for both parties. The employee has an obligation to work, and the employer has a duty to pay remuneration. If the employee does not render services for various reasons, the employer is entitled to withhold remuneration. Moreover, there are cases where the employer overpays what is due to an employee and is entitled to recoup the overpayments. The question is how to go about this within the parameters of the law. This article discusses the common-law principle of "no work, no pay", the legislative protections against arbitrary deductions from employees' remuneration, and how the courts have interpreted these. The discussion shows that there is much misunderstanding and uncertainty among both employers and employees on how the issue of deductions must be handled, fuelling exasperation for both parties. Fortunately, the pronouncements of the courts have given us certain principles to work with when considering the issue of deductions from employee remuneration.

KEYWORDS: employee remuneration, arbitrary deductions, "no work, no pay"

1 INTRODUCTION

Sidonselwa iholo ngokungemthetho is a Zulu expression which, loosely translated, means "there are unlawful deductions against our remuneration". Deductions from employees' remuneration can arise for several reasons, such as unauthorised absenteeism (unpaid leave), a loan advance to an employee, damage to an employer's property, or overpayments as a result

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of calculation errors.[1] Employers are faced with the challenge of finding lawful means of recouping their funds in any one of these situations. Both employers and employees in South Africa are still uncertain, as is seen from the sample of cases discussed below, on how to deal with the issue of salary deductions. Compounding the problem is the fact that deductions are often implemented by applying the "no work, no pay" principle, with statutory and common-law procedures being jettisoned. The South African labour law endeavours to protect employees in their unequal employment relationship with the employer through legislative provisions such as section 34(1) of the Basic Conditions of Employment Act[2] (BCEA), which prohibits the deduction of employees' remuneration unless the employee consents in writing, or the deduction is required or permitted in terms of a law, collective agreement, court order or arbitration award. Thus, the point of departure axiomatically prohibits deductions unless the qualifications in the proviso are met. Section 34(5)(*a*) also makes provision for a repayment where there was an overpayment to the employee as a result of a calculation error. The legislature chose to use the words "repayment" instead of "deduction" in this subsection to signal that the qualifications in section 34(1)(*a*) and (*b*) do not apply here. A repayment should therefore not be treated as a deduction. To safeguard the interests of affected employees, the common-law *audi alteram partem* rule applies in these transactions, allowing them to be heard.[3] This contribution discusses the common-law principle of "no work, no pay", the legal protections against certain deductions from employees' remuneration, and the prohibition on employers' "self-help" methods of recouping monies purportedly owed to them. Relevant case law is used as a vehicle to showcase these principles in action and to depict the legal haziness from which both employers and employees operate. The conclusion of this contribution collates a few practical guidelines from case law that may be used as a reference point when faced with analogous issues in future.

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1 See S*ibeko v Commission for Conciliation, Mediation and Arbitration* [2001] ZALC 17, where a CCMA commissioner was overpaid for a period of five months as a result of being placed at a higher salary scale by error. See *Padayachee v Interpak Books (Pty) Ltd* [2014] ZALCD 4; (2014) 35 *ILJ* 1991 (LC) where the (former) employer wanted to deduct monies from the (former) employee for damages caused as a result of the employee's negligence; see also *Stein v Minister of Education and Training* [2021] ZALCJHB 420 (*Stein v Minister of Education*) where the employer had informed the employee of its intention to make deductions for unpaid leave after the employee refused to complete leave-application forms in respect of periods over which he was absent from work.

2 75 of 1997.

3 Choma and Kgarabjang "Application of Audi Alteram Partem Rule on Salary Deduction & Benefits" 2018 8(3) *Risk Governance and Control: Financial Markets & Institutions* 66. See also Ncamane "The Administration of Social Security in the Midst of Covid-19: A Need for a Specialised and Independent Social Security Adjudication System in South Africa" 2022 43(4) *Obiter* 831.

2 THE COMMON-LAW PRINCIPLE OF "NO WORK, NO PAY"

In the past, the courts have made it clear that the enactment of rights in the Labour Relations Act[4] (LRA), and by extension, the BCEA, does not divest employees of their common-law rights.[5] It is argued that this principle applies to employers *mutatis mutandis*. The concept of "no work, no pay" refers to the labour-law principle that employees are only paid for the hours they have worked. In *Coin Security (Cape) (Pty) Limited v Vukani Guards and Allied Workers Union,*[6] the court said that the employment contract is reciprocal in that it provides for rights and responsibilities. The employee has an obligation to work, and the employer has a duty to pay remuneration.[7] If the employee does not render services, the employer is entitled to withhold the remuneration.[8] Mclean describes the "no work, no pay" principle as an important common-law tool in the employer's arsenal, complementing statutory limitations on strikes.[9] It is submitted that the "no work, no pay" principle is "a law", as used in section 34(1)(*b*), and its application should be determined *inter alia* by the purpose of the deduction.[10] Moreover, its application may be regulated through a collective agreement where the parties agree in advance when and how it may be invoked.[11] In this context, "no work, no pay" becomes a permissible deduction in section 34(1)(*b*) as it would constitute a deduction permitted in terms of a collective agreement. It is submitted that the *audi alteram partem* rule provides a safeguard to employees adversely affected by the activation of "no work, no pay", by allowing them to state their case.

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4 66 of 1995.

5 See *Fedlife Assurance Ltd v Wolfaard* [2001] ZASCA 9 par 15–16 and 22. See also *Denel (Pty) Ltd v Vorster* [2004] ZASCA 4, where an employee sued his employer for damages for breach of contract and damages for *injuria* under the common law. Grant and Whitear-Nel ("Proving Damages Under the Common Law in Labour Cases: A Discussion of *South African Football Association v Mangope* (2013) 34 *ILJ* 311 (LAC)" 2015 27(2) *SA Mercantile Law Journal* 354–355) allude to s 195 of LRA and 77(3) of the BCEA as indicators that common-law actions are axiomatically contemplated, *and not excluded,* by legislation (author's emphasis in italics).

6 (1989) 10 *ILJ* 239 par 1–2.

7 *Ibid*.

8 McLean "Contract of Employment – Negative Covenants and No Work, No Pay" 1990 *The Cambridge Law Journal* 29, citing with a comment made by the House of Lords in *Miles v Wakefield Metropolitan District Council* [1987] AC 539. Philip Sales also explores the "no work, no pay" principle as early as 1988 in Sales "Contract and Restitution in the Employment Relationship: No Work, No Pay" 1988 8(2) *Oxford Journal of Legal Studies* 301. See also Mead ("We're Miles Apart: Disproportionate Deductions From Wages, Industrial Action and Human Rights" 2023 52(1) *Industrial Law Journal* 3), who discusses the common-law position regarding the remuneration of workers on strike in the English jurisdiction. Also see McGregor and Dekker (eds) *Labour Law Rules!* 4ed (2021) 237.

9 McLean 1990 *The Cambridge Law Journal* 31. As will be seen in the discussion of cases below, there are many instances where the "no work, no pay" rule is used in the context of a strike.

10 *Stein v Minister of Education supra* par 12.

11 See *NEHAWU obo Members Employed by the UNISA v UNISA* J100/22 where there was a clause in a collective agreement between the parties authorising the employer to invoke the "no work, no pay" principle whenever there is a strike.

"No work, no pay" is accepted as valid law in other jurisdictions as well. In Nigeria, for example, the "no work, no pay" provision in section 42(1)(*a*) of the Trade Disputes Act is considered to be consistent with the suspension theory, which states that when workers embark on a strike, the employees' and employer's obligations to work and to remunerate respectively are suspended. The Nigerian courts have deemed it inconsiderate, inequitable and even illegal to expect an employer to remunerate workers for periods during which they withhold their labour.[12] The English Supreme Court has recently reiterated that an employee who refuses to work in accordance with their employment contract forfeits their right to remuneration for the duration of the breach.[13] This principle is important in that it encapsulates a fundamental aspect of employment relationships, and it is critical for both employers and employees to comprehend its implications. The next part of this article explores a body of jurisprudence in which the courts were confronted with disputes regarding the application of "no work, no pay" and the legality of deductions made from employees' remuneration. The cases are presented in no particular chronological sequence.

3 A JUDICIAL PERSPECTIVE ON DEDUCTIONS

Over the years, the courts have grappled with the question of the lawfulness of deductions levelled against employees' remuneration under different circumstances. Over and above the misinterpretation of the BCEA provisions on deductions, employees in the public service were faced with a bold provision in the Public Service Act[14] (PSA) that did not pass constitutional muster upon being challenged. The article now succinctly discusses eight cases where employees challenged the lawfulness of deductions made from their salaries.

3 1 *Cenge v MEC Department of Health, Eastern Cape*[15]

In *Cenge,* three employees approached the court on an urgent basis to prevent salary deductions aimed at refunding special skills allowances paid to them over a period of nine months.[16] When the employer implemented the Occupation Specific Dispensation (OSD) in August 2011, it was applied retrospectively to June 2010. The employer then required the employees to pay back the allowances they had received under the old system. The

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12 Maximus and Casmir "The Jurisprudential Position of Strike in Nigeria: Interrogating the Principle of No Work No Pay" 2022 1(1) *Caritas Journal of Management, Social Sciences and Humanities* 24.

13 See Adams ("'Wage', 'Salary' and 'Remuneration': A Genealogical Exploration of Juridical Terms and their Significance for the Employer's Power to Make Deductions From Wages" 2019 48(1) *Industrial Law Journal* 34–35) where the impact of the House of Lords judgment in *Hartley v King Edward IV College* [2017] UKSC 39 (SC) is discussed, albeit in the context of English law. See also Mead (2023 *Industrial Law Journal* 1), who provides a critique of the "no work, no pay" principle as recognised by the English courts in *Miles v Wakefield Metropolitan District Council supra*.

14 103 of 1994.

15 *Cenge v MEC Department of Health, Eastern Cape* [2011] ZALCPE 15 (*Cenge*).

16 *Cenge supra* par 2.

employees were amenable to the repayment, albeit under different terms.[17] They averred that the proposed deductions by the employer would be in contravention of section 34 of the BCEA. The employer sought refuge in the resolution of the bargaining council to justify the proposed deductions, but to no avail.[18] The court held that the deductions were prohibited in terms of section 34 and that the offer by the employees to repay the allowances over 12 months was more sensible.[19] Effectively, this meant that the employer could deduct the amount due to it according to the terms agreed upon by the employees.

While the court might have been trying to prevent a perceived arbitrary action by the employer to deduct higher amounts from the employees' salaries over a shorter repayment period, the effect of its judgment is that when there has been an overpayment that needs to be repaid by the employees, it is left up to the employees on how they wish to do the repayment. It is submitted that this is at odds with what the scheme of section 34 aims to achieve.[20] Section 34(5) was designed specifically for the purpose of recouping erroneously overpaid amounts and does not require the consent of the employees concerned.

3 2 *Sekhute v Ekurhuleni Housing Company SOC*[21]

In *Sekhute,* the employer embarked on job evaluations and regrading in 2016 and resolved to increase the salaries of the applicant employees. The second to seventh applicants received letters to this effect. Their new, increased salaries were paid from February 2017 but backdated to December 2016.[22] In July 2017, the employees received letters informing them that there had been an overpayment on their February 2017 salaries, and this was due to a calculation error in the system. The employees were requested to complete salary deduction forms to enable the employer to recoup the erroneous payments over a period of seven months, but the employees refused.[23] They contended that there was no error and that the total sum they received was due to them. They also averred that the proposed deductions were contrary to clause 13.2 of the employer's human resources policy, which stated that the employer may not make deductions without an employee's consent unless there is a legal instruction such as a collective agreement, court order or arbitration award.[24] The employer proceeded to effect the deduction despite the employees' refusal to sign. Upon noticing the deductions, the employees addressed a letter to the employer through their attorneys, demanding a reversal of the deductions and a cessation of future deductions. The court was satisfied that there had

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17 *Cenge supra* par 5.

18 *Cenge supra* par 8–9.

19 *Cenge supra* par 14 and 16.4.

20 That is, to protect employees from unauthorised and arbitrary self-help actions by the employers on their remuneration. It is definitely not to shield employees from legal accountability.

21 *Sekhute v Ekurhuleni Housing Company SOC* [2017] ZALCJHB 318 (*Sekhute*).

22 *Sekhute supra* par 2.

23 *Sekhute supra* par 3.

24 *Sekhute supra* par 4.

been a genuine overpayment error and that the employees were not entitled to the overpaid salaries.[25] The court proceeded to deal with whether the employer was entitled to recoup the overpayments through these deductions.

The court distinguished the two categories of deduction permissible under section 34(1) of the BCEA. The first relates to a deduction made after an acknowledgement of debt and requires the employee to consent to the deduction. The second relates to deductions mandated by law, court order, arbitration award or collective agreement, and which do not require consent.[26] The court cited with approval Ngcukaitobi AJ's remarks in *SA Medical Association obo Boffard v Charlotte Maxeke Johannesburg Academic Hospital*[27] that overpayments as a result of an administrative error do not constitute remuneration as defined in the BCEA, and that an employer does not require permission before effecting deductions.[28] The court found that clause 13.2 of the human resources policy did not prohibit the employer from recouping the overpayments, and the application was dismissed.

3 3 *NEHAWU v North West Provincial Dept of Social Development*[29]

In *NEHAWU v North West Department of Social Development,* a health and safety officer from the Labour Department visited the respondent's offices for an inspection on 12 July 2021 and found that there was poor ventilation in some of the offices. The inspector issued a notice prohibiting occupation of the offices until the safety issues were corrected. This affected 114 employees, and the employer made alternative arrangements for office space, which was made available on 9 September 2021.[30] The health and safety inspector revoked the prohibition notice with effect from 16 September 2021, meaning that all workers could go back to their offices.[31] NEHAWU, on the other hand, had incited its members to stop working irrespective of whether they were affected by the notice (effectively calling for a strike), which call they heeded, and they even went further to prevent non-strikers from accessing the building (workplace).[32] From 16 September 2021, there was no legitimate reason for the work stoppage, and this prompted the employer to categorise the stoppage as unauthorised absence and to resolve that the participants were not entitled to be paid for those days on which they didn't work.

On 27 September 2021, the employer issued a circular wherein workers were advised that the "no work no pay" principle would be applied with effect

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25 *Sekhute supra* par 9.
26 *Sekhute supra* par 12.
27 (2014) 35 *ILJ* 1998 (LC) (*SA Medical Association*).
28 *Sekhuthe supra* par 14.
29 *NEHAWU v North West Provincial Dept of Social Development* [2021] ZALCJHB 376 (*NEHAWU v North West Dept of Social Development*).
30 *NEHAWU v North West Dept of Social Development supra* par 4.
31 *NEHAWU v North West Dept of Social Development supra* par 6.
32 *NEHAWU v North West Dept of Social Development supra* par 4.

from the 15 October 2021 salary.[33] NEHAWU approached the court on an urgent basis in terms of section 77(3) of the BCEA on the basis of breach of employment contracts. The court found that there was no urgency in the matter and that there was no reason to depart from the rule that financial hardship alone does not constitute urgency. Van Niekerk J noted that, on its own, financial hardship, as pleaded by the union, is not a sufficient ground for urgency. [34]The case was struck off the roll. The employer continued with the proposed deductions.

Although this case was struck off the roll for lack of urgency, it is submitted that the employer was legally justified in invoking the "no work, no pay" rule.

3 4 *Public Servants Association obo Olufunmilayi Itunu Ubogu v Head of Department of Health, Gauteng*[35]

In *Ubogu,* the employee had been employed in 2006 as the CEO of a hospital in Tshwane and transferred in 2010 to Charlotte Maxeke Hospital as a Clinical Manager: Allied. In September 2015, five years after the redeployment, the employer informed the employee that she had been incorrectly placed on salary level 12 as Clinical Manager: Medical, whereas she was supposed to be on level 11, and that this had resulted in the overpayment of R794 014.33, which the employee had to pay back.[36] In fact, the employer started making deductions from her salary in the same month that she was notified. The employee approached the Bargaining Council as she maintained that the employer had no right to make unilateral deductions. The employer decided to reverse the deduction, and the matter was withdrawn from the bargaining council.[37] She was placed back on salary level 12.

In July 2016, the employer once again made deductions from her salary. The employee, through the Public Servants Association, approached the Labour Court in terms of section 77 of the BCEA to challenge the legality of the deduction on the ground that there had been no overpayment and that even if there had been, part of the overpaid amount had prescribed, and that section 38(2)(*b*)(i) of the PSA was unconstitutional.

The Labour Court found that the protections in section 34 of the BCEA (prohibiting deductions to set off past overpayments without employees' agreement or a court order) did not apply to deductions made in terms of section 38(2)(*b*)(i). In short, section 38(2)(*b*)(i) provides that if a public service employee has been overpaid or has received any benefit not due to them as part of their salary, allowance or benefit, then the State (as the employer) shall make deductions from their salary in instalments determined

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33 *NEHAWU v North West Dept of Social Development supra* par 7.

34 *NEHAWU v North West Dept of Social Development supra* par 10.

35 *Public Servants Association obo Olufunmilayi Itunu Ubogu v Head of Department of Health, Gauteng* [2017] ZACC 45 (*Ubogu*).

36 *Ubogu supra* par 7.

37 *Ubogu supra* par 9.

by a relevant accounting officer to recover the overpayment if the employee is still in service. If the employee is no longer in service, the recovery is by way of deduction from any money owing to them by the State, or by way of legal proceedings.

The court found that the distinction between employees in the service of the State and those who work for private employers sanctions self-help in relation to state employees while requiring legal proceedings in respect of those who work for private employers. The court held that the provision violated the spirit and purport of the Bill of Rights.[38] The court found the provision untenable in that it gave the State as an employer unrestrained power to be a judge in its own case and make deductions without the application of the *audi alteram partem* rule. Consequently, the court declared section 38(2)(*b*)(i) unconstitutional, which was later confirmed by the Constitutional Court.

3 5 *Siwela v City of Tshwane Metropolitan Municipality*[39]

In *Siwela,* the employee had been employed by the City of Tshwane as Deputy Director: Funds and Benefits and was alleged to have absented herself without authorisation from her work on several occasions. The employer invited her in writing to show cause why she should not be subjected to a disciplinary process.[40] The employee also responded in writing, stating that she would respond to the substantive allegations levelled against her at a properly constituted forum. Later that month, the Acting Divisional Head: Human Capital, Recruitment and Provision, acting on behalf of the employer, issued an instruction that a deduction of R43 184.16 be made from the employee's salary in the following month's salary run. This amounted to 90 per cent of her monthly salary. Upon learning of this instruction, the employee wrote to the relevant offices and even escalated the matter to the Acting City Manager, requesting their intervention and assistance, but to no avail, and the deduction was made from her salary the following month.[41] The court noted that section 34 debarred an employer from making deductions, subject to exceptions.[42] In this case, these exceptions were not applicable since there was no consent to the deduction, and there was no collective agreement or court order to that effect.

Nkutha-Nkothwane AJ, dealing with procedural fairness and substantive fairness separately, held that, in terms of procedure, the employer had failed to give the employee a fair chance to state her side of the story in line with the *audi alteram partem* rule.[43] She was given notice that a disciplinary process would be instituted, and she indicated in her response that she would ventilate her version at that forum. The employer jumped the gun and predetermined her guilt and decided to make the deduction arbitrarily as a

38 *Ubogu supra* par 16.
39 *Siwela v City of City of Tshwane Metropolitan Municipality* [2020] ZALCJHB 251 (*Siwela*).
40 *Siwela supra* par 1–4.
41 *Siwela supra* par 5–7.
42 *Siwela supra* par 18.
43 *Siwela supra* par 23–24.

sanction for her alleged absence without leave. The court relied on the approach of the court in *Ubogu* to emphasise the importance of the *audi alteram partem* rule to avoid arbitrariness and to underscore the point that no one is entitled to be a judge in their own case.[44] The court found that the employer's conduct was capricious self-help and should not be allowed.

With regard to substantive fairness, the court considered that the employee had tendered a detailed explanation of her whereabouts on the dates on which she was alleged to have been absent.[45] It was conceded on behalf of the employer that she was at work on those dates, save for some dates that were in dispute. Based on the evidence presented, the court found that she was indeed at work during the alleged period of absence and on leave, which she had applied for, on the disputed dates.[46] The "no work, no pay" principle was therefore found to be not applicable in this case; the deduction offended section 34 of the BCEA and was thus unlawful, and the employer was ordered to pay the employee.[47]

The circumstances under which the deductions were effected in this case are conspicuously suspect because the alleged unauthorised absence was subject to a disciplinary process that had been initiated through the charge sheet but not yet finalised. The employer decided the guilt of the employee and issued a sanction without following even the basic rules of justice, hence the two-legged fairness enquiry by the court. The proper process that should have been followed was to allow the disciplinary process to play out and then make a finding that the employee was indeed absent without leave and impose the deductions as a sanction.

3 6 *Mpanza v Minister of Justice and Constitutional Development*[48]

In *Mpanza,* the two applicant employees were employed as in-house counsel for the Department of Justice. In October 2010, their unit was disbanded, and the employees were reassigned to work under different units, which they refused or did not tender their services under those new units. The employer wrote them letters inviting them to justify why their salaries should not be docked for the period they did not report for duty. The evidence before the court suggested that they chose not to respond to these letters.[49] Subsequently, the employer effected the deductions, and they approached the court for relief on the ground that there was a breach of contract by the employer and asked the court to declare the deductions made on their salaries in contravention of section 34 of the BCEA and section 38 of the PSA. Based on the evidence given, the court found that their unlawful refusal to report for duty at their new assigned units meant that they were in breach of their employment contracts and that the employer

44 *Siwela supra* par 23.
45 *Siwela supra* par 27.
46 *Siwela supra* par 29–31.
47 *Siwela supra* par 32–33.
48 *Mpanza v Minister of Justice and Constitutional Development* (2017) 38 *ILJ* 1675 (LC) (*Mpanza*).
49 *Mpanza supra* par 35.

was entitled to apply the "no work, no pay" principle.[50] They had breached their reciprocal obligation to tender their services, and the employer was therefore entitled to refuse to pay them.

With regard to the challenge based on section 34 of the BCEA, the court found that the employer complied with section 34(2)(*b*) in that a fair procedure was followed and the affected employees were given a chance to motivate why deductions from their salaries should not be effected.[51]

It is argued that Cele J erred on this score. Section 34(2) is concerned with deductions made to reimburse the employer for loss or damages occurring in the course of employment and owing to the fault of the employee. It refers to section 34(1)(*a*) because the employees must agree in writing to the deductions, and a fair procedure must be followed in terms of section 34(2)(*b*). The court also did not test the lawfulness of the deductions against section 38 of the PSA. Prior to the judgment in *Ubogu,* this enquiry was required and might have resolved the dispute, even though the results were likely to be the same. The finding that "no work, no pay" applied is welcomed and should have resolved the dispute.

3 7 *NEHAWU obo Mamogale v North West Department of Community Safety and Transport Management*[52]

In *Mamogale,* the Department of Community Safety and Transport Management in the North West (the employer) had introduced a three-shift system that required traffic officers to report for duty from 06h00 to 14h30; 14h00 to 22h30 and 22h00 to 06h30. The new shift system was met with intransigence. Some members of NEHAWU were opposed to the new system and were reporting for duty in accordance with an old arrangement that required them to report for duty from 07h00 to 15h30, etc., citing a lack of agreement between the employer and union. The employer responded by withholding the keys to the cars that the officers were supposed to use, and as a result, they remained idle at the station for their entire shift, unable to perform their work. In April 2022, the employer addressed a memorandum to employees informing them that the "no work, no pay" principle would be implemented in respect of the employees who still used the old shift system until they complied with the instruction. These employees received their full remuneration in April and May; however, a deduction of about R2 500 was levied against their June remuneration, and they were informed of an outstanding balance of R15 200 calculated as an overpayment for days "not worked" in April.[53] NEHAWU approached the Labour Court on an urgent basis to have the deductions declared unlawful in terms of section 34(1) of the BCEA, and it sought to interdict the employer from making further deductions in pursuit of the alleged overpayment balance. The union also

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50 *Mpanza supra* par 32.

51 *Mpanza supra* par 35.

52 *National Education, Health and Allied Workers Union [NEHAWU] obo Mamogale v North West Department of Community Safety and Transport Management* [2022] ZALCJHB 182 (*Mamogale*).

53 *Mamogale supra* par 3–10.

sought an order declaring the withholding of the tools of trade to be an unlawful lockout. Regarding urgency, the court considered the fact that the employer intended to make further deductions from their salaries and said that made this matter sufficiently urgent for the court to hear.

The next question was whether the employer's conduct constituted an unlawful lockout. The court considered the union's argument that the employees continued to avail themselves for work according to the old shift system but that they were prevented from executing their jobs by the employer, and that such conduct constituted an unlawful lockout. It is unfortunate that the union did not present evidence to pursue this point sufficiently, and the court held that the employer was entitled to refuse the employees' incomplete tender or performance and that this did not constitute an unlawful lockout. It is submitted that this issue was important because the consequences of a ruling that there was an unlawful lockout would have rendered the deductions unlawful.

The court turned to consider the employer's argument that the deductions made in June were in line with the exemption in section 34(1)(*b*) of the BCEA. The court noted that the employer pointed to no law, collective agreement, nor arbitration award as envisaged in that provision, save for the decision of the court in *Mpanza,* where the court reiterated the reciprocal obligations of employees and employer in an employment relationship, to work and pay, respectively. Lagrange J found that the *Mpanza* judgment was not applicable in this case because the employees in *Mpanza* had been given an opportunity to make representations before deductions were made, and that nothing from that case suggested that deductions could be made months after employees were paid their full remuneration for periods allegedly not worked. The court therefore held that nothing in law justified the deductions, and it declared them unlawful.

The court rejected the submission that the employer could invoke the "no work, no pay" principle months after it had paid salaries to the affected employees. After this stage, according to the court's reasoning, the employer can only do this through either section 34(1)(*a*) by consent to the deduction or (*b*) in terms of a law, award or collective agreement. It is submitted that such a result incapacitates the employer and cannot be what the framers of this provision intended. Moreover, the issue of representations in *Mpanza* was misconstrued; section 34(2)(*b*) should never have been entertained. Also, although the facts in *Mpanza* do not reveal the exact period of absence from work, it is axiomatic that it was months, and the deductions were effected months after the actual periods of absence; it is thus submitted that it was incorrect for the court to exclude *Mpanza.* It is worth highlighting that the court also made a finding that the employer was entitled to repudiate incomplete performance or work that was not in accordance with the employment contract, which, as in this case, discharged it from the duty to remunerate.[54] It is submitted that this finding should have allowed the trigger of the "no work, no pay" application, as invoked in vain by the employer.

[54] *Mamogale supra* par 23.

Moreover, *Mamogale* marked a stark deviation from *Stein v Minister of Education*[55] a year earlier, where Mangena J held that remuneration, as defined in the BCEA, means payment in money or in kind or both, made or owing to any person in return for that person performing work. It follows then that payment for days not worked is not remuneration and that alleged deductions in these circumstances in fact constitute recoupment or repayment of remuneration that wasn't supposed to have been made in the first place.[56] This is permissible under section 34(5). The court held that in cases where the employer has already made the payment, it should be allowed to recover it without the consent of the employee. The employee must, of course, be given an opportunity to correct the situation or present their case.[57] This is also in line with the sentiments of Ngcukaitobi AJ in *SA Medical Association* that overpayments are not remuneration and deductions to recover these must be allowed. Save for the above remarks on the decision, the employer's reliance on the exceptions in section 34(1)(*b*) was correctly dismissed by the court. This is particularly so because the application of "no work, no pay" was not sufficiently pleaded.

3 8 *NEHAWU obo members employed by the UNISA v UNISA*[58]

In *Nehawu v UNISA,* members of the union embarked on an unprotected, protracted strike that spanned March to July 2022.[59] The employer issued a communiqué to the effect that it would implement a "no work, no pay" policy against the striking workers. The employer based this on clause 17.1.10 of the collective agreement it had with the union. True to its word, from June 2022, the employer effected deductions from the salaries of employees involved in the unprotected strike.[60] The union approached the court for an interdict preventing the employer from making deductions in subsequent months. The union argued that because the employer had paid full salaries in the months where the affected employees were on strike, it could not make deductions at a later stage, as it was prohibited in terms of section 34(1)(*b*) or section 34(5) of the BCEA. According to this argument, there was no law, collective agreement, court order or arbitration award authorising the deduction, and the employer could not require repayment of remuneration unless it constituted overpayments previously made as a result of a calculation error.

Surprisingly, the union mounted this argument after making concessions as to the existence of a collective agreement and a specific clause to this

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55 In *Stein v Minister of Education* (*supra*), the affected employee was invited to submit leave forms to apply for leave for the days he was absent. The employee refused, and the employer informed him that those days would be treated as unpaid leave in accordance with the leave policy and that deductions would be made.

56 *Stein v Minister of Education supra* par 10.

57 This may be inferred from s 34(5)(*b*), which provides for acknowledgement of receipt of the overpaid amount by an employee.

58 *NEHAWU obo members employed by the UNISA v UNISA* J1005/22 (*Nehawu v UNISA)*.

59 *Nehawu v UNISA supra* par 5.

60 *Nehawu v UNISA supra* par 8.

effect.[61] Moreover, the union incorrectly averred that section 34(5) was also applicable as there was an overpayment of remuneration and the employer had to institute *condictio indebiti* against each employee or conclude agreements regarding the repayment with each employee. This was obviously incorrect because the employer had never averred any overpayment of salaries as a result of a calculation error as stipulated in section 34(5). The employer simply sought to activate its recourse in terms of the collective agreement, albeit belatedly.

The court distilled the real dispute to be the manner in which the employer effected "no work, no pay" retrospectively, and whether this was in line with section 34(1)*(b)*. This meant that the court had to interpret the application of the collective agreement between the parties.[62] Section 24 of the LRA vests the jurisdiction to interpret collective agreements with the Commission for Conciliation, Mediation and Arbitration (CCMA) and not the Labour Court.[63] Reliance on the alternative to section 77(3) of the LRA could not be sustained as the court found direction in *Ekurhuleni Metro v SAMWU*.[64] This section cannot give the Labour Court powers that it does not have in terms of the LRA. Section 77(3) gives the Labour Court concurrent jurisdiction with civil courts regarding matters concerning employment contracts, irrespective of whether any basic condition of employment constitutes a term of that contract. The deduction or non-payment of salaries can only be in contravention of the BCEA if it is in breach of the main agreement (collective agreement), but the Labour Court is not empowered to interpret the main agreement.

The court emphasised the primacy of the collective agreement using the Labour Appeal Court's decision in *Ekurhuleni* and noted that one of the primary objects of the LRA is to promote collective agreements over individual employment contracts.[65] The court also relied on *SANAS v NEHAWU*[66] to properly categorise the dispute as one that required the interpretation and application of the collective agreement between the parties, over which the court lacked jurisdiction. The matter was struck off the roll, and the parties were encouraged to exhaust existing internal measures.

The court was correct to refer the interpretation of the collective agreement to the CCMA to determine whether the deductions were made in line with that agreement. The court's abstention from making a finding on the lawfulness of the deductions, even in the face of section 34(1)(*b*), which seemed applicable on the surface level, was prudent. This is so because the CCMA may, upon interpretation of the agreement, still find that the employer infringed the tenets of the collective agreement, rendering the deductions legally untenable.

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61 *Nehawu v UNISA supra* par 10.
62 *Nehawu v UNISA supra* par 20.
63 *Nehawu v UNISA supra* par 23.
64 *Ekurhuleni Metro v SAMWU obo members* (2015) 36 *ILJ* 624 (LAC) (*Ekurhuleni*).
65 *Nehawu v UNISA supra* par 27–28.
66 [2021] ZALCJHB 5.

4 THE *AUDI ALTERAM PARTEM* RULE AS A SAFEGUARD IN DEDUCTIONS DISPUTES

In terms of the *audi alteram partem* rule, an affected person must be afforded a reasonable chance or opportunity to answer to the charges or allegations against them and to put forward their case.[67] In other words, a party who is adversely affected by the outcomes of an administrative decision should be heard or afforded an opportunity to state their version before the decision is taken. The decision in *Ubogu* is important because it illustrates the importance of complying with the principle of natural justice and the *audi alteram partem* rule. *Ubogu* affords protection to state employees even in cases where monies were erroneously paid to them; they still must be afforded a reasonable opportunity to state their case.[68] The requirement of consent in section 34(1) also presupposes the application of the *audi alteram partem* rule, since how else can consent be obtained if not by affording the other party a chance to put forward their case?

5 IS *SET-OFF* APPLICABLE?

The Appellate Division in *Schierhout v Union Government (Minister of Justice)*[69] held that "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". This gave recognition to the common-law doctrine of set-off. Rosenow J remarked in *Harris v Tancred*[70] that the origin of this doctrine must have been a common-sense method of self-help. For this doctrine to be applicable, mutual debts must exist between the employer and employee. It is therefore not applicable where the employer seeks to recoup or deduct remuneration owing to overpayment or in application of the "no work, no pay" principle. The Labour Court and the CCMA have considered the application of set-off in appropriate cases.[71] For instance, where an employee had taken a loan from the employer and there was a balance due to the employer, the employer could invoke set-off to deduct the balance from an arbitration award in favour of the employee.

6 CONCLUSION

Section 34 is an important feature of the BCEA and prevents arbitrary self-help measures by unscrupulous employers. It also empowers employers to recoup erroneous overpayments without hassle. As already demonstrated, the provision does not abolish the common-law "no work, no pay" principle;

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67 Choma and Kgarabjang 2018 *Risk Governance and Control: Financial Markets & Institutions* 66. See also Ncamane 2022 *Obiter* 831, where the author highlights the *audi alteram partem* rule as one of the two aspects of procedural fairness in administrative law.

68 See *SA Medical Association supra*.

69 *Schierhout v Union Government (Minister of Justice)* 1926 AD 286 289.

70 1960 (1) SA 839 (C) 843H.

71 See *Penny v 600 SA Holdings (Pty) Ltd* (2003) 24 *ILJ* 967 (LC); see also *Barry and African Defence Systems (Pty) Ltd* (2004) 25 *ILJ* 11202 (CCMA).

instead, it embraces it as part of the law. The discussion of cases dealing with deductions has highlighted a number of shortcomings in how the different role players have interpreted and sought to apply the law relating to deductions.

It may be concluded that the “no work, no pay” principle is still very much part of our law, and employers are justified in invoking it in appropriate circumstances. It is submitted that the *Mamogale* judgment was incorrect to hold that this principle may not be invoked after salaries have been paid. Pragmatism informs us that employers are only able to effect deductions after the fact, especially in the context of strikes and in large workplaces, where the employer cannot be expected to monitor absence daily. Overpayments owing to administrative error on the employer’s payroll do not constitute remuneration as defined in the BCEA, and an employer does not require permission before effecting deductions to recoup such overpayments. *Cenge* encourages employers to consider offers made by employees to repay overpayments, albeit on different terms than they may have wanted. As noted above, section 34(5) does not require this. Moreover, the fact that these deductions may plunge the employees into financial hardship does not, on its own, warrant courts’ intervention. In circumstances where “no work, no pay” is regulated in terms of a collective agreement between the employer and the union, the collective agreement must be given precedence. Disputes regarding the interpretation and application of these agreements must be referred to the CCMA in line with section 24(2) of the LRA.