



IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE LOCAL DIVISION, MTHATHA]

[Not reportable]

CASE NO: 1343/2021

Heard on: 19/05/2022

Delivered on: 16/08/2022

In the matter between:

GCINIKHAYA NGCANGULA	Applicant
and	
MHLONTLO LOCAL MUNICIPALITY	First Respondent
THE SPEAKER: MHLONLTO LOCAL MUNICIPALITY	Second Respondent
THE MUNICIPAL MANAGER	Third Respondent

WITH WHICH IS CONSOLIDATED:

CASE NO: 1466/2021

In the matter between:

MALIBONGWE NQEKEHO	Applicant
and	
MHLONTLO LOCAL MUNICIPALITY	First Respondent
THE SPEAKER: MHLONTLO LOCAL MUNICIPALITY	Second Respondent
THE MUNICIPAL MANAGER	Third Respondent

JUDGMENT

NHLANGULELA DJP

[1] In these consolidated proceedings brought by Mr Ngcangule and Mr Nqeketho, the applicants, a relief is sought declaring as unlawful the decision made by Mhlontlo Local Municipality, the respondent, reducing the basic salaries and essential use allowances of the applicants. The applicants seek a further relief that, in the event that the declarator is granted, their remuneration be re-instated.

[2] The common cause facts are the following: Both applicants are the employees of the Municipality, Mr Ngcangula holding the position of the Chief Traffic Officer and Mr Nqeketho holding the position of Deputy Director: Local Economic Development. They have been so employed since 01 November 2013 and 01 April 2014 respectively. Their employment is contractual in nature, which contracts were concluded in writing and on the dates as aforementioned. The applicants were paid a basic salary and essential use allowance (car allowance) at R65 068,62 and R22 774,02 per month respectively. On 25 January 2020 the applicants' remuneration was reduced to R61 453,70 (basic salary) and R21 508,80 (car allowance) respectively and has remained at that amount since then. The decision of the Municipality to reduce the remuneration of the applicants was communicated by means of letters dated 24 November 2020.

[3] It is apparent from the letters as aforementioned that the communication was made pursuant to the Municipal Council Resolution Number 01-18/19 dated 25 March 2019. In terms of those letters the reduction of applicants' remuneration is described as overpayment which is calculated at the rate of 2.5% increment on the salary notch and the back-pay made by the Municipality to the applicants from March 2019 to December 2020. During the interaction between the parties that was triggered by a letter of demand for a refund of overpayment, the Municipality stated that the decision to recover monies with which the applicants were overpaid was lawful. The applicants deny those allegations. In amplification of this claim the Municipality stated on affidavit that the applicants were not entitled to the 2,5% notch increment because they had not been put

to a salary scale and they had not reached a top salary scale. The Municipality stated further that to qualify for the notch increment the applicants had to undergo job evaluation in terms of the TASK JOB EVALUATION program applicable to the Municipality which, though it has commenced to be applied over the entire workforce, it is not yet complete. As an alternative to this program, the Municipality stated that the applicants may be entitled to the notch increment upon the conclusion of the wage curve collective agreement between the SALGBC (the Bargaining Council) and the SALGA.

[4] The nub of the applicant's case as stated on affidavit is that they were not given a hearing at any time before the deduction began, there was no legal basis for the reduction of their remuneration and that any loss allegedly suffered by the Municipality was through no fault on their part. On these bases they contended that they have no legal obligation to refund any portion of their remuneration because the reduction of their remuneration was a breach of their contractual rights that are protected in terms of the provisions of ss 34 (1) and 34 (2) of the Basic Conditions of Employment Act 75 of 1997 (the BCEA), which read as follows:

- “(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 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.

[5] On a closer examination of the facts, it seems to me that there is no real dispute of fact in this matter. Nevertheless, the common cause facts need not be dispositive of the relief sought as the applicants have asked the court to make a declaration of contractual rights. In substance, the case advanced on behalf of the Municipality is that although it granted the 2.5% notch increases since 20 February 2019, the current salaries and car allowances of the applicants should not have been increased by reason that they did not meet the conditions prescribed under the grant. For these reasons the Municipality asserts that the reduction of the remuneration of the applicants does not constitute a deduction as contemplated in ss 34 (1) and 34 (2) of the BCEA. But the Municipality does not place reliance on any provision of law, agreement or a court order.

[6] *Ms Haskins*, counsel for the respondents raised numerous special defences to the applicant's claims, which are the following:

- (i) The High Court lacks jurisdiction;
- (ii) Contractual entitlement has not been pleaded by the applicants;
- (iii) The applicant's claim for a declaratory is not competent in that they must have sought a remedy of review against the decision of the Municipality reducing the remuneration;
- (iv) The applicant's claim for re-instatement of their remuneration should have been brought under the remedy of an interdict, the requisites of which have not been pleaded.

[7] I first deal with the objection that this Court lacks jurisdiction to hear the application. This objection implicates the provisions of ss 77 (1) and (3) of the BCEA, which read:

- “(1) Subject to the Constitution and the jurisdiction of the Labour Appeal Court and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters of this Act,
- (2) ...
- (3) The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a terms of this Act.”

[8] *Ms Haskins* submitted that the Labour Court has exclusive jurisdiction as envisaged in s 77 (1) of the BCEA for the reason that the applicants’ pleadings do not invoke the jurisdiction of the High Court. Reliance was made on the cases of *The National Prosecuting Authority v Public Servants Association* on behalf of *Meintjies And Others*; *Minister of Justice & Correctional Services & Another v Public Servants Association* on behalf of *Meintjies & Others* 2022 (1) SA 409 (SCA) (17 November 2021) at para 58, and *Gcaba v Minister of Safety & Security And Others* 2010 (1) SA 238 (CC) at para 75. The legal principle that is enunciated in these cases, which is trite, is that the High Court will be seized with jurisdiction to determine a labour dispute if it concerns a breach of contractual right(s) that has been specifically pleaded on affidavit. It will help to quote the statements made in *The National Prosecuting Authority v Public Servants Association obo Meintjies and Others*; *The Minister of Justice and Correctional Services and Director-General: Department of Justice and Constitutional Development v Public Servants Association obo Meintjies and Others*, which read as follows at para 58:

“In *Gcaba v Minister of Safety and Security* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC), the Constitutional Court made it clear that an assessment of jurisdiction must be based on an applicant’s pleadings. At para 75, the following was said:

‘... In the event of the Court’s jurisdiction being challenged ... the applicant’s pleadings are the determining factor. They contain the legal basis of the claim under which the applicant seeks to invoke the court’s competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant’s claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognisable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim

under the LRA, one that is to be determined exclusively by the Labour Court, the High Court would lack jurisdiction. . .”

[9] On the other hand it was submitted by *Mr Grogan*, for the applicants, relying on s 77 (3) of the BCEA, that the applicants’ contracts of employment, as well as the breach thereof, are set out on the founding affidavit. Further, it was submitted that disputes concerning deductions from employees’ remuneration have already been entertained by the High Courts, such as in *Cagwe And Others v MEC for the Department of Social Development – Eastern Cape*, Case No. 436/2020 dated 08/09/2020 (per Lowe J). *Gqithekhaya v Amatole District Municipality*, Case No. EL 601/2021 dated 27/05/2021 (per Hartle J); and *Ngalwana v MEC for the Department of Rural Development And Agrarian Reform*, Case No. 822/2018 dated 19/11/2021 (per Smith J). I am in agreement with these submissions.

[10] In these proceedings the founding affidavits deposed to by the applicants show that there were contracts of employment concluded between the applicants and the Municipality respectively, the material terms of which were that a basic salary and allowances would be paid by the Municipality for services rendered by the applicants. In February 2019 the Municipality effected the 2.5% notch increment on salaries and allowances by monthly payments until on 25 January 2020 when the notch increment was taken away retrospectively to February 2019. As stated in a plethora of cases dealing with contractual breaches involving the employer and its employees it often happens that various causes of action emerge out of a single breach regardless of the fact that the same breach attracts the jurisdiction of the Labour Court. One of those cases is *Lewarne v Fochem International (Pty) Ltd* [2019] ZASCA 114 where the following was said at para 8:

“Generally in instances where the dispute relates to, is linked to, or is connected with an employment contract, s 77(3) of the BCEA which confers concurrent jurisdiction on the civil courts and the Labour Courts applies. In the present matter, the appellant’s action arose out of and related to the contract of employment between her and the respondent. It was for payment of money due to her in terms of her employment contract. It was this action that was before the court and on which it had to decide whether it had the necessary jurisdiction. It was thus not necessary for the court to place any reliance on the appellant’s reference, in her founding affidavit, to the respondent’s professed reasons for withholding her remuneration, and the fact that that was in contravention of s 34 of the BCEA. These allegations were simply a summary of relevant facts but they did not alter the essential nature of the appellant’s action. They amounted to what

this court termed, in *Fedlife Assurance Ltd v Wolfaardt* [2002 (1) SA 49 (SCA) para 21] as ‘mere surplusage.’”

[11] Further, in the case of *Cagwe, supra*, where the employees’ salaries in lieu of an alleged absenteeism were reduced, the High Court entertained an application for interdict brought by the employees to stop the deductions on the basis that they offended the provisions of s 34 (1) of the BCEA. I see no reason why the approach in *Cagwe* should not apply in these proceedings.

[12] The submission that contractual entitlement to the 2.5% notch increment and the breach thereof, were not pleaded by the applicants is not correct. The contractual breaches pleaded by the applicants read together with the evidence show that 2.5% increment was applied to all the employees of the Municipality and actually paid the increased remuneration over a considerable period of time, which in my view amounts to the acceptance by conduct on the part of the Municipality that payments were lawful. I also find comfort in regarding the payments as lawful because there was no legislation against the contractual agreement between parties that prevented the benefits of the notch increment. The unilateral change of mind to stop the payment and recover same as overpayments retrospectively does not justify the description of those payments as illegal. Further, the allegation that the applicants did not qualify for payments received is not proved if regard is had to the admission by the Municipality that it has not been able to complete the TASK grading system which commenced in 2012, with the result that it is not for the fault of the applicants that they were not placed on a grade. In the final analysis, the fact of the matter is that the deductions were effected without regard to the applicants’ right to be heard as envisaged in s 34 (2)(b) of BCEA.

[13] The submission that a declaratory order should have been pursued under review proceedings incorporating an interdict cannot be sustained because the present application for a declaratory relief, as a cause of action, is in and of itself a competent remedy. It might well be good to re-iterate the point that the declaratory relief has

been properly pleaded, namely that the applicants have a right to be paid an agreed salary and car allowance; and the Municipality had no right to unilaterally reduce the remuneration of the applicants.

[14] In summary, this Court is seized with jurisdiction to determine the dispute between the parties for the reason that the essential nature of the applicants' claims is an unlawful breach of employment contracts. The fact that the Labour Court has concurrent jurisdiction together with this Court does not deprive this Court of competence to determine the relief sought. The residual legal objections advanced on behalf of the respondents; which have been discussed above, do not have a basis. Finally, all the legal objections raised to thwart the validity of the applicants' claims fall to be dismissed.

[15] It remains for the Court to determine the merits of the applicants' claims. In so far as the evidence, already evaluated, proves that there are subsisting contracts of employment between the applicants and the Municipality entitling them to payment of salary and car allowance; the Municipality effected unilateral reduction of the applicants' remuneration. The defence that the continued payment of remuneration is against the law cannot be sustained. The Municipality is not authorised by any law to reduce applicants' remuneration without due process of law having been followed. The fact that it was through no fault on the part of the applicants that the TASK grading system has not been implemented by the Municipality the applicants does not disentitle the applicants from enjoying the benefits of the 2.5% notch increment. *Mr Grogan* referred, correctly so, to the case of *Public Servants Association obo Ubogu v Head of the Department of Health, Gauteng And Others* (2018) 39 ILJ 337 (CC) in which the Constitutional Court dealt with circumstances that are similar to those obtaining in the present proceedings. In that case the following was stated appositely at para 66:

“The deductions in terms of that provision constitute unfettered self-help – the taking of the law by the state into its own hands and enabling it to be the judge in its own cause in violation of section 1 (c) of the Constitution.”

[16] The applicants have succeeded to make a case for the grant of a declaratory order and, as a consequence, the re-instatement of the terms and conditions of the employment contract in the terms that are not different from those that obtained prior to the deductions of the applicants' remuneration. The costs must follow the result. But more must be said about the issue of costs. There was no legal reason for the Municipality to reduce the remuneration of the applicants. For that reason, the inevitable conclusion to be drawn from such conduct is that the respondents resorted to taking the law into their own hands. In the meantime, the applicants were put into the position of having to find resources, *albeit* at the time when they were being financially drained by the unlawful reduction of their remuneration, to seek protection of the courts. Having been put out of pocket unnecessarily so, an ordinary costs order cannot meaningfully mitigate the litigation costs that they have incurred. Since the applicants have at the outset of these proceedings asked for an order of costs on attorney and client scale, the respondents would hardly be heard to complain that they are ambushed by a costs order of a higher scale than the ordinary party and party scale costs.

[17] In the result the following order shall issue:

- 1. The decision of the Respondents that the applicants were over-paid is unlawfully and of no force and effect;**
- 2. The Respondents' decision to reduce the Applicants' basic salaries and essential use allowances from R65 068,62 to R61 453,70; and R22 774,02 to R21 508,80 respectively per month is unlawful;**
- 3. The Respondents are directed to re-instate the applicants' basic salary and essential use allowance to R65 068,62 and R22 774,02 respectively immediately, and with retrospective effect to the date the reduction was effected;**

4. The Respondents to pay the costs of this application jointly and severally on the attorney-client scale, the one paying, and the others being absolved from liability.

Z M NHLANGULELA

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT, MTHATHA

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