**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG**

**Reportable**

**Case no: JA17/2022**

In the matter between:

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| **NORTH WEST PROVINCIAL LEGISLATURE** | **First Appellant** |
| **AJ MAPHETLE N.O.** | **Second Appellant** |

And

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| **NATIONAL EDUCATION, HEALTH AND ALLIED WORKERS UNION obo 158 MEMBERS** | **Respondents** |

**Heard:** **18 May 2023**
**Delivered:** **21 June 2023**
**Coram:** **Sutherland and Musi JJA and Savage AJA**

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**JUDGMENT**

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**SAVAGE AJA**

Introduction

[1] This appeal, with the leave of the Labour Court, is against the judgment and orders of the Labour Court (per Moshoana J) in terms of which the appellant, the

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North West Provincial Legislature (NWPL), was interdicted and restrained from deducting any remuneration from members of the respondent, the National Union of Education, Health and Allied Workers Union (NEHAWU) until it had complied with section 34 of the Basic Conditions of Employment Act[1] (BCEA).

[2] From 16 November 2020 until at least 15 December 2020, employees of the appellant engaged in unprotected strike action. On 16 November 2020, the Secretary of the NWPL (Secretary) issued a communique to staff members informing them that, given the unprotected industrial action, the principle of no work no pay would apply to those employees who did not attend work. On 27 November 2020, the Labour Court interdicted the strike, declaring it unlawful. On 14 December 2020, the Secretary issued a further communique to staff that the principle of no work no pay was to be implemented from 15 December 2020.

[3] Despite the communiques issued, remuneration was paid to all striking employees by the NWPL, apparently because the NWPL failed to halt its payroll run to striking workers. Following this, the NWPL advised the respondent employees that it would deduct the remuneration paid to employees who had been on strike from their salaries over a number of months.

[4] This caused a dispute between the parties and on 13 January 2021, the Secretary agreed to suspend deductions until negotiations between the parties had been concluded. After several meetings, on 18 April 2021 the parties appointed a task team to attempt to resolve the issue. The task team was unable to do so. After negotiations failed, on 2 November 2021, the Secretary informed the respondents that the NWPL would proceed to deduct three working days' remuneration each month from employees' remuneration until 15 April 2022. In response, NEHAWU approached the Labour Court on an urgent basis under section 77(3) of the BCEA seeking, in part A of the application, urgent interim relief interdicting and/or restraining the NWPL from effecting and/or causing to effect any deductions from the remuneration of the respondent employees on the basis of their alleged participation in an unlawful strike. This was pending the hearing of part B, in which an order was

[1] Act of 75 of 1997.

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sought *inter alia* that the deductions made were in contravention of the BCEA and unlawful. The Labour Court granted final interdictory relief in the matter and it is that order which is the subject of this appeal.

Judgment of the Labour Court

[5] The Labour Court found that section 34(1) of the BCEA[2] applies to any deduction from an employee's remuneration, unless the legislated exceptions exist, namely that the employee agrees in writing to the deduction, or the deduction is permitted by law, collective agreement, court order or arbitration award.[3] Since no written agreement had been concluded with the employees, and no law permitted a deduction from the salary of any employee, the deduction of remuneration by the NWPL was not permitted. The Labour Court found there to be no conflict between section 67(3)[4] of the Labour Relations Act (LRA),[5] which provides for no work no pay during a protected strike, and section 34 of the BCEA. Consequently, the deductions made, or those intended to be made, were unlawful and the NWPL was interdicted from deducting remuneration from the salaries of NEHAWU's members until it had complied with section 34 of the BCEA.

On appeal

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[2] Act 75 of 1997.

[3] Section 34 provides that:

'(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.'

[4] Section 67 states that:

(1) In this Chapter, "protected *strike*" means a *strike* that complies with the provisions of this Chapter and "protected *lock-out*" means a *lock-out* that complies with the provisions of this Chapter.

(2) A person does not commit a delict or a breach of contract by taking part in—

(a) a protected *strike* or a protected *lock-out*; or

(b) any conduct in contemplation or in furtherance of a protected *strike* or a protected *lock-out*.

(3) Despite subsection (2), an employer is not obliged to remunerate an *employee* for services that the *employee* does not render during a protected *strike* or a protected *lock-out*, however—

*(a)* if the *employee's remuneration* includes payment in kind in respect of accommodation, the provision of food and other basic amenities of life, the employer, at the request of the *employee*, must not discontinue the payment in kind during the *strike* or *lock-out*; and

*(b)* after the end of the *strike* or *lock-out*, the employer may recover the monetary value of the payment in kind made at the request of the employee during the *strike* or *lock-out* from the *employee* by way of civil proceedings instituted in the Labour Court.'

[5] Act 66 of 1995.

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[6] In this appeal, the NWPL contended that section 34 of the BCEA does not apply where the principle of no work no pay finds application; that the no work no pay principle constitutes a law as contemplated in section 34(1)(b), with the result that there has been compliance with the BCEA; that the recovery of unearned salaries does not amount to self-help, with set-off applicable; that the Labour Court's reliance on section 67(3)(b) was misplaced; and that the respondent employees are not entitled to be unlawfully enriched.

[7] The respondents oppose the appeal on the basis that section 34 bars any deduction from an employee's remuneration unless one of four statutory exceptions are met, regardless of whether the no work no pay principle applies. The constitutional rights of workers are protected by section 34, which includes that the recovery of monies the employer contends are owed to it occurs through a judicial process or with consent, which negates self-help. Furthermore, there is no merit in the proposition that the law of set-off applies. Consequently, it was submitted, the appeal must fail.

Discussion

[8] Section 23(1) of the Constitution provides that everyone has the right to fair labour practices. The BCEA gives effect to and regulates this right *inter alia* by establishing and enforcing basic conditions of employment,[6] which include that an employer is to pay remuneration to an employee not later than seven days after the completion of the period for which the remuneration is payable or of termination of the contract of employment.[7] Remuneration is defined in both the BCEA and the LRA as –

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[6] Section 2 reads:

'The purpose of this Act is to advance economic development and social justice by fulfilling the primary objects of this Act which are –

(a) to give effect to and regulate the right to fair labour practices conferred by section 23(1) of the Constitution –
  (i) by establishing and enforcing basic conditions of employment; and
  (ii) by regulating the variation of basic conditions of employment;
(b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation'.

[7] Section 32(3) of the BCEA.

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'…any payment in money or in kind, or both in money and in kind, made or owing to any person in return for that person working for any other person, including the State, and "remunerate" has a corresponding meaning'.[8]

[9] In seeking to advance economic development and social justice, the BCEA also seeks to give effect to obligations incurred by South Africa as a member state of the International Labour Organisation (ILO).[9] This includes the ILO's Protection of Wages Convention, 1949,[10] Article 8 of which states that:

'1. Deductions from wages shall be permitted only under conditions and to the extent prescribed by national laws or regulations or fixed by collective agreement or arbitration award.

2. Workers shall be informed, in the manner deemed most appropriate by the competent authority, of the conditions under which and the extent to which such deductions may be made.'

[10] Section 34 of the BCEA is the national provision which expressly bars deductions from an employee's remuneration, save for in specified circumstances. It provides that:

'(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.

[8] Section 1 of BCEA; section 213 of LRA.
[9] Section 2(b) of the BCEA.
[10] ILO standard C095 – Protection of Wages Convention, 1949 (No. 95).

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(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.'

[11] Remuneration is paid in terms of a contract of employment as a *quid pro quo* for services rendered. Where services are not rendered by an employee, as a general rule, remuneration is not payable. The exercise by employees of their constitutionally protected right to strike occurs in the context of collective bargaining and involves a power play between the parties. Within this context, the withholding of labour by employees and the concomitant withholding of remuneration by employers are powerful tools available to each of the parties. The principle of no work no pay,[11] to which section 67(3) of the LRA gives effect means that "…*an employer is not obliged to remunerate an employee for services that the employee does not render during a protected strike or a protected lock-out*".[12] The same applies to an unprotected strike.

[12] In spite of the fact that the NWPL was not obliged to remunerate the respondent employees for services that they did not render during their

[11] *Ekurhuleni Metropolitan Municipality v South African Municipal Workers Union obo members* (JA12/13) [2014] ZALAC 61; [2015] BLLR 34 (LAC); (2015) 36 ILJ 624 (LAC).
[12] Save for an exception only in relation to payments in kind in the context of protected strikes. See note 4.

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unprotected strike, it did so and thereafter sought to deduct such remuneration paid from their salaries unilaterally, without agreement or order obtained through an adjudicative or judicial process.

[13] The appellants contend that the NWPL is entitled to effect deductions in this manner since section 34 does not apply to deductions made on the basis of the no work no pay principle when it is the LRA that deals with collective bargaining and not the BCEA; and that it would be artificial and non-sensical for an employer to be entitled to withhold remuneration from a striking employee without a court order but require a court order to recover remuneration paid "*through mere coincidence of timing*". It is further contended for the appellants that to the extent that there is a conflict between the BCEA and the LRA insofar as the principle of no work no pay or its application is concerned, in terms of section 210 of the LRA, it is the LRA which must prevail.[13]

[14] There is no merit in this argument. The principle of no work no pay permitted the NWPL to withhold remuneration from striking employees. It did not do so. The appellants' submission that the payment made did not constitute the payment of remuneration in that it was not a payment made or owing "*in return for that person working for another person*" is similarly unmeritorious. The respondent employees were paid precisely because they are employed by and work for the NWPL. It would be an unduly narrow interpretation of the definition of remuneration were it to be found to exclude circumstances in which no work had physically been done by an employee, which would then necessarily include when an employee is on leave or ill. The payment made by the NWPL to striking employees consequently falls squarely within the definition of remuneration, as set out in both the LRA and the BCEA.

[15] Having paid such remuneration, it mattered not that payment was made during the course of a strike. It remained remuneration paid to employees and the right to fair labour practices, to which the BCEA gives effect, requires that deductions from remuneration are governed by section 34. In doing so, effect is given not only to

[13] Section 210 of the LRA states: "*If any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law save the Constitution or any act expressly amending this Act, the provisions of this Act will prevail*."

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the constitutional fair labour practice right but also the country's international obligation to adhere to the ILO's Protection of Wages Convention and notions of fairness and justice that inform public policy and ensure that account is taken of the necessity to do simple justice between individuals.[14] No conflict exists between the provisions of the LRA and BCEA, when regard is had to the language used in each statute, the context in which it is used, and the purposes of the provisions.15 To find differently, would be to permit self-help in a manner expressly rejected by the Constitutional Court in *Public Servants Association on behalf of Ubogu v Head of the Department of Health, Gauteng and others*16 (*Ubogu*) and in *Chief Lesapo v North West Agricultural Bank and another,*17 it was made clear that taking the law into one's own hands is inconsistent with the fundamental principles of our law.18

[16] The appellants' contention that the recovery of unearned salary cannot be equated to self-help on the basis that it concerns the deprivation of the property in the form of the salary paid to employees is without merit. Similarly, the reliance placed on *Solidarity obo Scholtz v Gijima Holding (Pty) Ltd*[19] does not come to the aid of the appellants when, on the facts of that matter, it was found that an agreement as contemplated by section 34 existed between the parties as to the terms of an employee loyalty incentive scheme.

[17] Since it is not common cause on what days or over what period all employees were on strike, to allow deductions to be made unilaterally by the NWPL, without any agreement or impartial adjudication of the issue, would be patently unfair, unjust and in violation of the express requirements of section 34. As has been made clear by our courts, the rule against self-help is necessary for the protection of the individual against arbitrary and subjective decisions and conduct of an adversary. It serves as a guarantee against partiality and the consequent injustice that may arise.[20]

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[14] See *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 73.
[15] *Capitec Bank Holdings Ltd and another v Coral Lagoon Investments 194 (Pty) Ltd and others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA) at para 25.
[16] [2017] ZACC 45 (CC); (2018) 39 ILJ 337 (CC); 2018 (2) BCLR 184 (CC) at para 70.
[17] [1999] ZACC 16; 2000 (1) SA 409; 1999 (12) BCLR 1420 (*Lesapo*).
[18] *Lesapo* id at para 11 quoting *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 (1) SA 508 (A) at 511H-512A and *Nino Bonino v De Lange* 1906 TS 120 at 122.
[19] [2019] ZALAC 29; (2019) 40 ILJ 1216 (LAC); [2019] 8 BLLR 774 (LAC) at para 20.
[20] *Lesapo* id at para 18.

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*No compliance with section 34*

[18] It was contended in the alternative for the appellants that there had been compliance with section 34. In the first instance, accepting that in *Mpanza and another v Minister of Justice and Constitutional Development and Correctional Services and others*[21] it was held that section 34(2)(b) obliges an employer to follow a fair procedure before making any deduction to an employee's remuneration, the appellants contended that a fair procedure had been followed in that a reasonable opportunity over more than 10 months had been given to employees to make representations before implementing the recovery of the unearned salaries. There is however no dispute that, despite that extended process, the deductions have not been agreed with employees. It follows that, in the absence of such agreement, and with the matter not having been adjudicated, the provisions of section 34 have not been complied with.

[19] The appellants also contended that compliance with section 34 was to be found in the fact that the principle of no work no pay is a law contemplated by section 34(1)(b), section 67(3) or the common law and that, if an employer is permitted to withhold the payment of salary on the basis of such law in its application of the no work no pay principle, there is no reason why unearned salary cannot be treated similarly and recovered on the same basis. This submission has no merit. It fails to appreciate the clear distinction between an entitlement not to make payment of remuneration under certain circumstances, such as those that prevail in a strike, and the entitlement to deduct under circumstances such as those specified in section 34.

*Set-off finds no application*

[20] The appellants also submitted further that the NWPL was entitled to rely on set-off as a principle of our common law. Set-off operates only where two persons

[21] [2017] ZALCJHB 48; (2017) 38 ILJ 1675 (LC); [2017] 10 BLLR 1062 (LC).

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reciprocally owe each other something in their own right.22 It applies, as was stated in *Schierhout v Union Government (Minister of Justice):*[23]

> '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.'

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[21] In *Ubogu,*[24] the Constitutional Court made it clear that the doctrine of set-off does not operate *ex lege* (as a matter of law) and that where there are no mutual debts, but rather an unresolved dispute about deductions made from an employee's salary, it cannot be applied. In the current matter, there remains a dispute about the deductions which the NWPL has made or intends to make from the respondent employees' salaries. The appellants' submission, that the essential elements of set-off are present, consequently cannot be sustained. The extent of indebtedness of the respondent employees to the NWPL has not been determined and, in such circumstances, it cannot be said that there exists a debt which is due and payable. It follows that the doctrine of set-off cannot find application in this matter.

[22] For all of these reasons, the respondents held a clear right to obtain final interdictory relief to prevent the appellants from effecting and/or causing to be effected any deductions from the remuneration of the respondent employees until the NWPL had complied with the provisions of section 34. In such circumstances, with an injury actually committed or reasonably apprehended and no other satisfactory remedy available to the respondents existed, the decision of the Labour Court to grant such final relief cannot be faulted.

[23] It follows that the appeal cannot succeed. Despite submissions to the contrary, having regard to considerations of law and fairness a costs order is inapposite in this matter and no such order is made.

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[22] F du Bois (ed), 'Wille's Principles of South African Law',9 ed (2007) at p 1834.
[23] 1926 AD 286 at 289. See also, *Capricorn Beach Home Owners Association v Potgieter t/a Nilands and another* [2013] ZASCA 116; 2014 (1) SA 46 (SCA).
[24] *Ubogu supra* at para 70.

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[24] In the result, the following order is made:

Order

1. The appeal is dismissed with no order of costs.

**SAVAGE AJA**

**Sutherland and Musi JJA agree.**

APPEARANCES:

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| FOR THE APPELLANTS: | F J Nalane SC with P J Kok and N Seme |
| Instructed by | M E Tlou Attorneys |
| FOR THE RESPONDENTS: | F A Boda SC |
| Instructed by | Schöltz Attorneys |

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