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THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case No: J 1862/17

In the matter between:

BRENDA SEKHUTE **First Applicant**

KGABO SEBOLA **Second Applicant**

TEBOHO MOFOKENG **Third Applicant**

MOLOKO BAHOLO **Fourth Applicant**

MACSEAN FAVER **Fifth Applicant**

PORTIA MOKHELE **Sixth Applicant**

RAPAPA MAMOEPI **Seventh Applicant**

and

EKHURULENI HOUSING COMPANY SOC **Respondent**

Heard: 22 August 2017

Delivered: 05 September 2017

Summary: (Urgent – interdict to prevent salary deductions to repay disputed overpayment of remuneration – deductions to be made for equivalent number of months that alleged overpayment took place – employee's refusing to consent to deductions – whether employer's remuneration policy prevented such deductions – s 34(5) of the BCEA – failure to establish prima facie right to prevent repayments in the absence of written authorisation – no irreparable

harm - overpayment due to alleged fraud not recoverable as overpayment in error)

JUDGMENT

LAGRANGE J

Background

[1] This is an urgent application launched on 8 August 2017 requiring the respondent to file an answering affidavit by 15 August and committing the applicants to filing any replying affidavit by 18 August. The applicants are employees of the respondent ("EHC"). Pending final relief declaring the respondent's decision to deduct monies from the applicants' salaries for alleged overpayments made in error to be unlawful, the applicants want interim relief preventing future deductions and reversing deductions already made. Although another Court might disagree, I accept that the application was urgent.

[2] Following a regrading of the applicants' posts in 2016, EHC's board resolved that the applicants' remuneration should be improved in line with the regrading of their posts. The second to seventh applicants received letters from the CEO confirming that the board of directors had approved the new job evaluations and pay scales on the 10 November 2016 and that they would receive payment on the new salary scales with effect from February 2017 but backdated to 1 December 2016. Although the first applicant, the HR Officer, did not receive a similar letter, her name appeared on a list of names of the persons whose salaries were to be adjusted with a new salary scale. She claims this list was drawn by her supervisor, the Acting Manager: Corporate Support, Mr Bopape Salaries of the applicants were duly increased in February 2017 and between then and the end of June, the applicants effectively received increased remuneration backdated to December 2016.

[3] On 1 July 2017, the applicants received letters indicating that an overpayment had occurred in February 2017 due to an error in the payroll

processing. The amount of the alleged errors appear to have been substantial and the applicants were requested to complete a salary deduction form in terms of which they agreed to repay the amount over a period of seven months. The applicants refused to sign these. They contend that there was no error in the February payments and argued that the payments received were a result of giving effect to the new salary scale implemented on their revised job grading. As a result of the deductions been implemented, the applicants claim that they now receive less than what they did before their salaries were improved.

[4] The applicant's claim that the deductions were unlawful because they were contrary to clause 13.2 of the respondent's HR policy which states that "no deductions unless in the form of a legal instruction such as a collective agreement, Court order or arbitration award will be made from an employee's salary without the authority of the employee." There is no dispute that the applicants did not consent to the overpayments, though a few other employees appear to have signed the consent forms.

[5] Notwithstanding their failure to sign the forms, EHC proceeded to commence deductions when it paid salaries on 26 July 2017. On 28 July, the applicants' attorney wrote to EHC demanding the reversal of the deduction and a cessation of future deductions on the basis that no salary calculation error had been made.

[6] In response, EHC requested the applicants to give it until 14 August 2017 when a meeting would be held with the chairperson of the board, but the applicants felt that would be too late given that the August pay date would be approaching soon thereafter. Consequently, they proceeded to launch this application on 8 August 2017.

[7] The respondent denies that the application is one for interim relief as no other processes has been initiated by the applicants to resolve the dispute by the time the matter was argued. The respondent also claims that overpayments had resulted because Medical Aid and Provident Fund contributions had been added to the new remuneration scales and paid out as part of the applicants' gross remuneration instead of being

deducted therefrom. Thus for example, the salary adjustment schedule detailed the salary adjustment for the fifth respondent thus:

Basic salary	R 25 462, 70
Provident fund (Co Portion)	R 2 259, 22
Medical aid (Co Portion)	R 2 401,00
TCTC	R 30 122,92

Evaluation

[8] According to EHC, the fifth respondent's initial salary before the improvement was R 21,574.41 and that the new basic salary of R 25,462.70 represented the salary after the re-grading adjustment. The two amounts reflecting the company's new contributions to the Provident fund and medical aid were part of the total cost company of her remuneration package, but were erroneously added to the fifth respondent's basic salary as if they were part of her direct remuneration. The basic salary adjustment ought to have been an increase of R 3,888.29, but instead she received an amount equivalent to the new medical aid and Provident fund contributions over and above that of R4, 660.22. Although there may be some calculation errors in the table appearing in Annexure "MP 2", which was attached to the respondent's answering affidavit, it is sufficiently clear that the applicants were erroneously paid out Provident and medical aid fund contributions due by the employer as part of their remuneration. Those amounts should only have appeared in the fringe benefit column of their pay slips. In effect, the applicants were given double recognition of the employer's contribution to fringe benefits: once, as part of their gross remuneration, and again as a fringe benefit. As a result, instead of a salary adjustment of 18% in the case of the fifth respondent, her salary increased by just under 40%.

[9] I am satisfied on the evidence, *albeit* that, it could have been better presented, that the applicants have not established that they were entitled

to the full amounts paid to them as part of their salary since February 2017. On the papers, I am satisfied that a genuine overpayment error was made and that it is disingenuous of the applicants to effectively insist that they ought to have received the corresponding employer contributions to their Provident fund and Medical aid as part of their salary and not simply as fringe benefits. Accordingly, whatever the position is regarding recovery of overpayments made, the respondent is not obliged to perpetuate the overpayment error going forward and is only obliged to pay the agreed revision of remuneration in line with the upgrading of posts: it is not obliged to continue paying the applicants amounts equivalent to the employer's contribution to their Medical aid and Provident fund as part of their direct salary.

[10] What still remains to be determined is whether the respondent is entitled to recover those overpayments, which have already been made, in equal amounts over a period equivalent to the seven months period for which they were overpaid, even if though the applicants have not consented to such repayments. The applicants maintain that clause 13.2 of the remuneration policy prevents the employer from doing so without their consent. It provides:

> "13.2 General deductions
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> No deduction, unless in the form of a legal instruction such as a collective agreement, court order or arbitration award, will be made from an employee's salary without the authority of the employee. The HR department will ensure that employees complete a "deduction from salary" form which must be signed by the employee or any deduction, other than those specified above, can be made."

[11] Both parties place much store on their respective interpretations of the phrase 'legal instruction' in the provision above. The applicants maintain that the meaning of the phrase must be cleaned from the illustrative examples which follow and those examples do not assist the respondent in this instance. The respondent argues on the other hand that the phrase encompasses an employer's 'requirement' under section 34 (5) (a) of the Basic Conditions of Employment Act, 75 of 1997 ('the BCEA') that any employee should repay overpayments resulting from an error in

calculating an employee's income. On a plain reading of s 34(5) (a) on its own, it appears to authorise an employer to require an employee to repay overpayments made as a result of a calculating error. The question which arises is whether this provision is compatible with section 34(1)(b) of the BCEA. To place that provision and s 34(5)(a) in its proper context, it is useful to cite the full text of s 34:

> "34 Deductions and other acts concerning remuneration
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> (1) An employer may not make any deduction from an employee's remuneration unless-
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> (a) subject to subsection (2), the employee in writing agrees to the deduction in respect of a debt specified in the agreement; or
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> (b) the deduction is required or permitted in terms of a law, collective agreement, court order or arbitration award.
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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-
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> (a) the loss or damage occurred in the course of employment and was due to the fault of the employee;
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> (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;
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> (c) the total amount of the debt does not exceed the actual amount of the loss or damage; and
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> (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.
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> (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.
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> (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 resulting from an error in calculating the employee's remuneration.

(b) acknowledge receipt of an amount greater than the remuneration actually received."

(emphasis added)

[12] The first thing to note is that, all the subsections except for s 34(5) are concerned with deductions made in terms of section 34 (1). Section 34(1) identifies two classes of deductions which may be made. The first (s 34(1) (a)) is a deduction which may be made for an acknowledged debt and which specifically requires the employee to authorise the deduction in writing. The second (s 34(1) (b)) is a deduction which does not require the employee to authorise the deduction personally in writing before it can be made. This second type of deduction may be mandated by other legal instruments such as a law, Court order or collective agreement. It is noteworthy, that this second type of deduction does not presume the existence of an acknowledged debt.

[13] The application of section 34 (5), has been considered in a number of cases. In *Jonker v Wireless Payment Systems CC*[1], Molahlehi J held

"[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).

[1] (2010) 31 ILJ 381 (LC)

> [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.'
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> [23] The e-mail which the applicant addressed to the respondent on 1 June 2009 does not support the version of the applicant that the respondent was not entitled to deduct the overpayment which was made to her erroneously. The administrative error arose when the applicant was granted a company vehicle. At that point the car allowance which was paid to the applicant should have been discontinued…"[2]

[14] In *Padayachee v Interpak Books (Pty) Ltd* [3]Whitcher AJ (as she then was) observed :

> "[27] It is noteworthy that the drafters of s 34 chose to identify and deal separately with a number of different types of deductions. This must mean that the purpose of the provision is to regulate these deductions.
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> [28] It thus follows that any enquiry into s 34 should commence by identifying the nature and purpose of the deduction in dispute and then ascertain whether the section requires employers to regulate such deductions in a particular manner."[4]

Nguckaitobi, AJ in *SA Medical Association on behalf of Boffard v Charlotte Maxeke Johannesburg Academic Hospital & others*[5] also appeared to accept, albeit perhaps *obiter* that, repayment of overpayments made in error could warrant deductions without the requirements of s 34(1) (a) being met. In particular, commenting on *Jonker* and other decisions, he observed:

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[2] At 386

[3] (2014) 35 *ILJ* 1991 (LC)

[4] At 1996.

[5] (2014) 35 *ILJ* 1998 (LC)

> [39] It is apparent from these decisions that the view taken by the Labour Court is that an overpayment as a result of an administrative error does not constitute remuneration as defined in terms of the BCEA. Since it is outside the parameters of the BCEA, an employer is not required to obtain the consent of an employee before effecting the deductions as required by s 34(1) of the BCEA."[6]

[15] I believe the trend discernible from the judgments cited is that repayment of overpaid remuneration is a *sui generis* category of money lawfully recoverable by an employer from an employee and, on the same reasoning as that in the *Boffard*, is a way of recovering undue remuneration. At the very least, I believe s 34(5) was clearly intended to authorise a particular type of deduction for amounts due to an employer not arising from debts of the kind contemplated by s 34(1) and even if s 34(5) must be read as subject to s 34 (1), then s 34(5) is a provision of 'a law' contemplated in s 34(1) (b) which permits recovery without consent. At common law, the obligation of an employee to refund an employer for an overpayment made in error in essence would appear to be an obligation that could found an action based on unjust enrichment in the form of the *condictio indebiti.*[7] It would serve little purpose if s 34(5) was included simply to reaffirm the existence of a common law right to recover payments made in error. The more plausible interpretation of the provision is that the legislature intended it to specifically authorise deductions for overpayments of remuneration.

[16] In this application, the applicants have not challenged the deductions based on non-compliance with s 38 of the Public Service Act (Proclamation 103 of 1994), as was the case in *Boffard*, or more recently as an illegality as was the case in *Public Servants Association v Department of Home Affairs and Another*.[8] While conceding that the first sentence of clause 13.2 of the EHC's remuneration policy closely mimics the wording of s 34(1)(b) of the BCEA, the applicants argue that in this

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[6] At 2008

[7] *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* [1992] 4 All SA 2 (A), 1992 (4) SA 202 (A) and more generally see LTC Harms , Amler's Precedents of Pleadings, (Lexis-Nexis), 2015, (8 ed) at 92-3.

[8] (J189/2012) [2015] ZALCJHB 406 (12 November 2015)

case, the policy stated in clause 13.2 of the remuneration policy is more favourable because the term 'legal instruction' cannot be equated with the phrase 'a law' in s 34(1)(b) and the only exceptions to the rule that employee must specifically authorise a deduction are those specifically stated namely; no deduction, unless in the form of a collective agreement, court order or arbitration award or similar legal instruction. It is odd that the employer did not use the term 'a law' in clause 13.2, but it is even stranger to argue that even though a collective agreement is defined as an example of a 'legal instruction' in terms of that clause, 'a law' such as the BCEA which contains the provision s 34(5) of the BCEA should not be viewed in the same light. In my view, such an interpretation would be a contorted one. On this basis, I am satisfied that the applicants have failed, even on a *prima facie* basis, to establish that clause 13.2 prohibits the respondent from recovering overpayments made to the second and further respondents in equal amounts over the same length of time that they were originally made.

[17] In relation to the first applicant, the respondent had claimed that she was not entitled to any increase at all. The applicants ingeniously argued that if her overpayment was a result of her purported fraud as the respondent claimed, it could not claim that the additional payments she received were overpayments made in error. If she was responsible for engineering an overpayment she was not entitled to then that was not an overpayment caused by an error in calculation but was a consequence of deliberate misconduct. Accordingly they argue that the respondent cannot rely on clause 13.2 to recover the money without obtaining an acknowledgment of debt or a court order. In respect of the first applicant, they are correct as far as the recovery of arrear undue payments is concerned. However, that still does not mean the respondent is obliged to continue to pay her remuneration at the increased scale going forward if in fact she was never entitled to it.

[18] Quite apart from the absence of a *prima facie* case being established, I am not satisfied that the applicants had demonstrated that they would suffer irreparable harm if the repayments were effected in the manner proposed. The second to further applicants will continue to enjoy the substantial

benefit of the re-grading which led to the legitimate rise in their salaries. They simply will no longer benefit from the additional undue 'windfall' of pension and medical aid contributions being erroneously paid to them as part of their remuneration in addition to the respondent paying those amounts to the respective funds.

[19] I am not satisfied that this is a case where the applicants should not bear the costs of this application, notwithstanding the fact that there is an ongoing relationship. They were disingenuous in trying to retain the undue benefit they had received and the terms on which repayments were to be made were not onerous.

Order

[1] The application is dismissed.

[2] The applicants are jointly and severally liable for the respondent's costs, the one paying, the others to be absolved.

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Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANTS:	S T Mosomane of Mosomane Attorneys Inc.
RESPONDENT:	I Gwaunza of Edward Nathan Sonnenbergs Inc.