

# AANTEKENINGE

## CLAIMS AGAINST EMPLOYEES: INTERPRETATION AND APPLICATION OF SECTION 34 OF THE BASIC CONDITIONS OF EMPLOYMENT ACT 75 OF 1997

### OPSOMMING

#### **Eise teen werknemers: Vertolking en toepassing van artikel 34 van die Wet op Basiese Diensvoorwaardes 75 van 1997**

Arbeidsreg het ten doel om 'n meer gelyke balans tussen werkgewers en werknemers te skep. Die Wet op Arbeidsverhoudinge 66 van 1995 bied byvoorbeeld beskerming aan werknemers, synde die swakker belangegroep, teen onbillike ontslag en dit maak ook vir omvangryke vakbondregte voorsiening. Die Wet op Basiese Diensvoorwaardes 75 van 1997 skryf insgelyks beskermingsmaatreëls ten opsigte van diensvoorwaardes voor.

Die vraag kan met reg gestel word of werkgewers teen hierdie agtergrond enigszins geregtig is om aftrekkings van werknemers se vergoeding te maak. Artikel 34 van die Wet op Basiese Diensvoorwaardes reguleer werkgewers se reg om aftrekkings van 'n werknemer se vergoeding te maak ten einde gelede skade te verhaal. Artikel 34 verskaf enerzijds aan werkgewers 'n spoedige meganisme om vergoed te word sonder om te litigeer, maar dit bied andersyds beskerming aan werknemers deur formaliteite, prosedures en kwantum voor te skryf.

In hierdie bydrae word artikel 34 ontleed en probleemgebiede rakende aftrekkings word uitgewys. Aanbevelings word voorts gemaak oor hoe die houe die bepaling behoort te vertolk tot tyd-en-wyl voorgestelde wysiging aan die artikel aangebring word.

### **1 Introduction**

Labour law protects employees in a number of ways. So, for example, the Labour Relations Act 66 of 1995 (the “LRA”) protects employees against unfair dismissal and unfair labour practices and grants extensive collective bargaining rights to trade unions and their members (see Ch II and VIII of the LRA). Furthermore, the Basic Conditions of Employment Act 75 of 1997 (the “BCEA”) shields employees against exploitation by establishing “basic conditions of employment” (s 1 of the BCEA). Workers may, for instance, not work longer than 45 hours per week and they are entitled to at least 21 consecutive days’ annual leave (see ss 9 and 20 of the BCEA; Van Niekerk, Christianson, McGregor, Smit and Van Eck *Law@work* (2015) 102–104). These established basic conditions of employment take precedence over conditions of service which may have been agreed on in terms of the common-law contract of employment (see s 5 of the BCEA; Grogan *Workplace law* (2014) 63–64).

This protection provided by labour law is acceptable in the legal tradition on the understanding that it is essential to establish a more equal balance between the comparatively weaker bargaining positions of employees relative to their employers (Davies and Freedland *Kahn-Freund’s Labour and the law* (1983) 14;

Benjamin “Labour law beyond employment” in Le Roux and Rycroft (eds) *Re-inventing labour law: Reflecting on the first 15 years of the Labour Relations Act and future challenges* (2012) 22). In the modern era, employees’ rights are also recognised as fundamental human rights. Amongst the rights to human dignity and equality, the South African Constitution also expressly protects everyone’s right to “fair labour practices” (s 23(1); Van Eck “Constitutionalisation of South African labour law: An experiment in the making” in Fenwick and Novitz (eds) *Legal protection of worker’s human rights: Regulatory changes and challenges* (2010) 259).

Against this background, it may come as no surprise that the LRA makes no provision for employers to lodge claims against their employees in respect of their potential unfair or unlawful conduct in the employer-employee relationship. (See the definitions of “dismissal” and “unfair labour practice” in s 186 of the LRA, which only refer to unfair actions by employers.) However, employers can still rely on their common-law remedies by, for example, lodging a claim based on breach of contract. The courts have also on occasion held that the constitutional right to fair labour practices focuses on ensuring the continuation of the employment relationship on terms that are fair to both employers and employees. (See *NEHAWU v University of Cape Town & others* (2003) 24 ILJ 95 (CC) and *Kylie v CCMA & others* (2010) 31 ILJ 1600 (LAC).)

Subject to certain conditions being met, section 34(2) of the BCEA allows employers to make deductions from an employee’s remuneration to reimburse them for loss or damage. The section seeks to strike a balance. On the one hand, it provides employers with an expeditious mechanism to be reimbursed without having to resort to costly litigation. On the other hand, however, the section protects employees by prescribing formalities, processes and quantum regarding deductions from remuneration. However, section 34 has, in recent times, proved to be troublesome in respect of its interpretation and application and it is currently by no means clear under which circumstances employers may withhold an employee’s remuneration in consideration of losses incurred. (See below for the discussion of *Botha and British American Tobacco SA (Pty) Ltd* 2008 29 ILJ 1301 (CCMA); *Padayachee v Interpak Books* 2014 35 ILJ 1991 (LC); and *Naidoo v Careways Group (Pty) Ltd* 2014 35 ILJ 181 (LC).)

This contribution sets out to analyse the extent of an employer’s right to make deductions from an employee’s remuneration, to pinpoint the problematic phrases contained in the section and to recommend how the courts should interpret the section pending the suggested future amendment thereof.

## 2 Analysis of section 34 of the BCEA

Section 34 stipulates under which circumstances an employer may make deductions from an employee’s remuneration. The provision reads 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 required or permitted in terms of a law, collective agreement, court order or arbitration award.
- (2) A deduction in terms of subsection (1)(a) may be made to reimburse an employer for loss or damage only if –
- (a) the loss or damage occurred in the course of employment and was due to the fault of the employee;

- (b) the employer has followed a fair procedure and has given the employee a reasonable opportunity to show why the deductions should not be made;
  - (c) the total amount of the debt does not exceed the actual amount of the loss or damage; and
  - (d) the total deductions from the employee's remuneration in terms of this subsection do not exceed one-quarter of the employee's remuneration in money.
- (3) A deduction in terms of subsection (1)(a) in respect of any goods purchased by the employee must specify the nature and quantity of the goods.
  - (4) An employer who deducts an amount from an employee's remuneration in terms of subsection (1) for payment to another person must pay the amount to the person in accordance with the time period and other requirements specified in the agreement, law, court order or arbitration award.
  - (5) An employer may not require or permit an employee to –
    - (a) repay any remuneration except for overpayments previously made by the employer resulting from an error in calculating the employee's remuneration; or
    - (b) acknowledge receipt of an amount greater than the remuneration actually received.”

Different scenarios could arise from the employer-employee relationship where an employer may consider deducting amounts of money from an employee's contractually agreed salary. Firstly, an employer could be compelled to make deductions as required by the authorities. So, for example, an employer has a statutory obligation to deduct income tax, contributions in respect of unemployment insurance, skills levies and insurance premiums for occupational injuries and diseases (see, eg, the Income Tax Act 58 of 1962; the Unemployment Insurance Act 30 of 1966; the Compensation for Occupational Injuries and Diseases Act 130 of 1993; and the Skills Development Act 97 of 1998). Such amounts must be paid over to the state (Item 4.6.3 of the BCEA General Administrative Regulations directs that such deductions and contributions to benefit funds must be paid over in seven days.) Secondly, an employee could buy goods from an employer or the employee could borrow money from the employer. The parties would typically reach consensus on the rights and obligations flowing from such a transaction and the repayment of outstanding debts (s 34(3) of the BCEA). Thirdly, the employee could cause the employer financial harm through his or her actions or omissions. For instance, a worker could damage the property of an employer, such as a motor vehicle, while doing deliveries, or the employee could breach his or her fiduciary duties and make secret profits or defraud the employer. Finally, the employee could cause financial harm to third parties in the course of his or her employment. In such instances, the employer could be ordered to pay third parties based on the doctrine of vicarious liability. The employer will then have a right of recourse against the employee for repayment of the amount of damages. (See Van Jaarsveld and Van Eck *Principles of labour law* (2005) 69). It is our view that an employer will be allowed to deduct such payments from an employee's remuneration as long as it is in accordance with section 34.

The starting point of section 34(1) is that an employer is prohibited from making deductions from an employee's remuneration. However, the section provides for two broad categories where deductions are generally permitted. Firstly, section 34(1)(a) provides for the possibility where “subject to subsection (2), the employee *in writing agrees* to the deduction in respect of a *debt* specified in the agreement” (emphasis added).

This category is further qualified by section 34(2) in so far as it specifically relates to a deduction “made to reimburse an employer for loss of damage”. This instance relates to a deduction which is “required or permitted *in terms of a law*, collective agreement, court order or arbitration award” (s 34(1)(b) of the BCEA; emphasis added).

The two subsections are separated by the word “or”. A number of aspects are clear from the above. The first is that the section refers to two different scenarios. The one relates to instances where deductions are made in consideration of loss or damage caused by an employee. In this instance, an agreement on the deduction is required. Secondly, the following category relates to instances where the employee did not necessarily cause the employers loss or damage and it is not necessary for employers to obtain written consent to the deduction. As mentioned, an employer could, for example, be compelled to deduct taxes or levies from the employee’s remuneration before paying it over to the authorities or an employer is obliged to pay trade union dues or contributions to pension or benefit funds to relevant social schemes. However, there is also room to interpret the second category to refer to instances where an employee caused loss and/or damage, but which is sanctioned by a court order or an arbitration award as this is not expressly excluded by section 34(1)(b). Thirdly, employers and employees do not have an unfettered discretion regarding agreements in terms of which deductions can be made where the employee caused loss or harm. Such agreements are subject to the requirements set out in section 34(2), which are discussed below.

### 3 Written agreement

Section 34(1)(a) entitles an employer to make deductions from an employee’s remuneration if the employee agrees in writing to such deduction in respect “of a debt specified in the agreement”. The BCEA does not mention what is understood under “debt”. Nonetheless, it could perceivably cover the situation where an employer lends money to the employee, or where the employee buys goods from an employer and where they agree that the purchase price will be paid off in the future (see s 34(3)). The BCEA sets requirements regarding employers who compel employees to buy goods from them in section 33A(1), but these provisions fall beyond the scope of this contribution.

It is also clear that it would cover the instance where an employee damages the employer’s property. An agreement which specifies the debt must first be concluded before such deductions can be made. It is predictable that employers would argue that an agreement to make deductions in respect of loss which occurred in the course of employment can be included in a contract of employment. It is uncertain whether such agreements would withstand judicial scrutiny as the requirement states that the debt must be “specified in the agreement” and such agreements will not provide certainty as to the quantity of the debt.

Section 34(2) establishes additional requirements which protect the employee and creates parameters in respect of the substance, form and quantum of such deductions. The section states that where deductions are made to reimburse loss or damage, it may only be done 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 do not exceed 25% of the employee's remuneration in money".

Three of the four requirements do not provide sufficient clarity regarding what exactly policy-makers intended to achieve with the section. Firstly, the BCEA does not make it clear what the term "in the course of employment" means. Does it limit deductions to instances where the employee was actually performing duties in terms of the contract of employment? This seems to be the case and would, in all probability, exclude the instance where an employee is in the unauthorised possession of an employer's vehicle and is involved in an after-hours accident while on a frolic of his own. This requirement seems to be overly restrictive and, in such instances, the employer would have no choice but to institute proceedings in the civil courts. Furthermore, the employer will have to rely on the common-law tests relating to which actions fall within the course of employment. As pointed out by Van Jaarsveld, Fourie and Olivier *Principles and practice of labour law* (2015) 32–33, a number of factors need to be taken into account to determine whether an act or omission occurred in the course of employment. These include the terms of the contract of employment in question, the manner in which the services were performed, the factual circumstances in which the act was committed, work instructions for the relevant day, week, month or otherwise applicable to the employee and any applicable statutory provisions, regulations and collective agreements (*Minister of Safety and Security v Jordaan t/a Andre Jordaan Transport* 2000 21 ILJ 2585 (SCA); *Jordaan v Bloemfontein Transitional Local Authority* 2004 3 SA 371 (SCA); *K v Minister of Safety and Security* [2005] 8 BLLR 749 (CC) and *Chartaprops 16 (Pty) Ltd v Silberman* 2009 30 ILJ 497 (SCA)).

Secondly, the requirement relating to a fair procedure is non-specific. The intention may have been to keep this requirement open and to provide the employer with a discretion regarding the form of the procedure and the opportunity to show why the deductions should not be made. Such opportunity could arguably be one in terms of which the employee can make written representations to the employer (see, eg, the requirements set in *Modise v Steve's Spar Blackheath* 2000 21 ILJ 519 (LAC)). Nonetheless, it could also include a more formal one in terms of which written notification is given and the employee has the opportunity to lead evidence and to cross-examine. Whatever the intention may have been, it is our argument that proceedings in the form of a disciplinary enquiry as envisaged by Item 4(1) of Schedule VIII of the LRA would satisfy this requirement as long as, during the enquiry, the employee has specifically been granted "a reasonable opportunity to show why the deductions should not be made". (See *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation and Arbitration* 2006 27 ILJ 1644 (LC) regarding the *audi alteram partem* principle in the employer-employee context.)

The third requirement, in relation to not claiming anything more than the actual amount of the loss or damage, meets the requirements of being clear and attaining the goal of obtaining an equal balance between employer and employee. This requirement entails that the employer will not be allowed to charge any interest on the amount of damage or be entitled to consequential loss. This subsection is appropriately formulated in so far as it does not leave leeway for employers to claim accrued interest or implement other agreed remedies such as penalty clauses.

The fourth requirement is problematic and open to various interpretations. The sub-section provides that the “total deductions from the employee’s remuneration” may not exceed “one-quarter of the employee’s remuneration in money”. It is unclear whether the words “employee’s remuneration in money” refer to the remuneration paid on the particular pay-roll run (for example, at the end of the month or a two-week period as the case may be) or to the total remuneration over the course of a year or even longer. Furthermore, it is unclear whether the phrase “total deductions” relates to the sum of all the periodic deductions (in other words the total debt), or whether it merely refers to all deductions made from the particular weekly or monthly pay-roll run.

We suggest that the legislature intended that all deductions from a particular monthly or two-weekly remuneration payment should not exceed one-quarter of that particular payment. This would make sense in so far as the employee would still have three-quarters of the remuneration on which to survive for the duration of the month or two weeks. However, it would be absurd to attach the strict meaning of the words to the interpretation of the clause. It would then mean that “the total deductions”, namely, the sum of periodic deductions added together may not exceed one-quarter of a particular periodic remuneration payment.

It is not clear whether the section 34 one-quarter rule limits an employer’s entitlement to recoup the full amount of damage. The authors propose that the legislature should provide more clarity whether the remainder can still be claimed by means of court proceedings after a deduction has been made in terms of section 34. It would have been of great assistance in interpreting the one quarter-rule if there had been authority on how the quantum of a claim under section 34 is determined in a civil court. The discussion below covers permissible deductions in terms of section 34(1)(b) where written consent and a fair procedure is not required.

#### **4 Deductions where consent is not required**

Section 34(1)(b) entitles an employer to make a deduction from an employee’s remuneration if such deduction is “required or permitted in terms of a law, collective agreement, court order or arbitration award”.

Here, deductions can be made without a fair hearing at the workplace. Apart from the phrase “in terms of a law”, to which we return later, the categories are uncontroversial. A deduction in terms of a collective agreement will, for example, include an agreed agency shop fee (s 25(1) of the LRA) which must be paid over to the trade union. Deductions in terms of a court order or arbitration award can include a court order in terms of section 77(3) of the BCEA or a private arbitration award in terms of the Arbitration Act 42 of 1965. For that matter, even though the section does not specify this, it could possibly include orders or awards that confirm an employee’s liability for loss or damage caused in or outside the course of employment. It goes without saying that it would entail a situation where there is still an employer-employee relationship in existence. Had this not been the case, the employer would no longer be paying remuneration to the employee.

#### **5 Deductions “in terms of a law”**

It is clear that deductions in terms of legislation can be brought under the phrase “in terms of a law”. It would be nonsensical to allow a situation, for example, where the Income Tax Act stipulates that an employer must deduct tax, in which

an employee is still required to reach consensus first before such deductions can be made. It is, however, uncertain whether common-law principles ought to be categorised as falling under “in terms of a law”. The facts in *Padayachee v Interpak Books Ltd* 2014 35 ILJ 1991 (LC) illustrate the ambiguity in this regard:

Padayachee (“the employee”) resigned from Interpak Books Ltd (“the employer”) on one month’s notice. Despite this, the employer requested her to leave immediately and conducted a disciplinary hearing which the employee did not attend. The enquiry concluded that the employee’s gross negligence caused the employer R180 000 in damages and the employer notified the employee that this amount had been set off, in terms of section 34(1)(b) of the BCEA, against her last month’s salary.

The employee approached the Labour Court and argued that the employer had no right to make the deduction for a number of reasons. Firstly, she did not consent to it in terms of section 34(1)(a); secondly, the deduction was in excess of the prescribed one-quarter limit in terms of section 34(2); and thirdly, the debt did not constitute a liquidated amount. The argument continued that this was a claim for damages which had not been determined and quantified by a court.

The employer conceded that no agreement had been reached, but argued that section 34(1)(a) and 34(2) were not applicable. Set-off is a rule of the common law and the common law constitutes “a law” and, consequently, in terms of section 34(1)(b) the employer did not need the written consent of the employee as dictated by section 34(1)(a), nor did the one-quarter limitation in terms of section 34(2) apply (paras 15–16).

The court accepted that the phrase “permitted in terms of a law” includes set-off as a rule of the common law (para 25). However, the court rejected the respondent’s argument that deductions can be made in respect of damage or loss in the absence of an agreement in terms of section 34(2) once it is determined that it falls under section 34(1)(b) (para 26).

The court reasoned that the starting point is to recognise that section 34 deals with different types of deductions. The first step of any inquiry into the provision is to identify the nature of the deduction (*ibid*). Section 34(2) deals with deductions in respect of damage and loss, section 34(3) deals with deductions in respect of goods purchased by the employee, section 34(4) regulates deductions for payment to another person and section 34(5) deals with deductions for overpayments. The second step is to establish whether employers are required to regulate these deductions in a particular manner. In *Padayachee*, the employer sought to make a deduction in respect of damage or loss allegedly caused by the employee. Although section 34(2) confers upon employers the right to make deductions for damage or loss, such a right can only validly be exercised if the employer complies with the prescribed formalities. This includes the holding of a fair internal hearing to determine the liability of the employee and written consent by the employee to reimburse the employer in respect of the damage or loss (paras 29–30).

The court held that section 34(2) requires the damages to be liquidated “through a process of a hearing and a written agreement which sets out the specific amount owed and due” (para 32). The employer’s failure to comply with these formalities rendered the deduction in conflict with section 34 and, therefore, the employer was ordered to pay back the employee’s R86 046.59 together with interest (para 49).

Despite *Padaychee*'s understanding of section 34, the wording of the BCEA does not support the particular interpretation and it is not at all clear that the court made the correct decision. On the one hand, section 34(1)(a) covers instances where an agreement has been reached and these cases are subject to the *audi alteram partem* principle and the one-quarter rule. On the other hand, this section is followed by the word "or" and section 34(1)(b), which is silent on written consensus which permits deductions "in terms of a law, collective agreement, court order or arbitration award". The legislature does not specify, for example, that court orders or arbitration awards dealing with loss or damage and which could easily be brought under the wording of section 34(1)(b), must also comply with the requirement of prior consensus and the *audi alteram partem* principle in terms of section 34(2). It would, for example, be superfluous to make the requirements in respect of a written agreement and a fair procedure applicable to instances where a court or arbitrator has already made an award in respect of a claim for loss or damage. This will result in an unnecessary repetition of the process at the workplace.

Although we agree with the outcome in *Padayachee*, namely, that the deduction could not be made, we find justification for the decision on another ground. The answer lies in the meaning given to the phrase "in terms of a law". In the normal grammatical sense one would not refer to the common law as "a law". The "common law" could possibly, still fall under the phrase "the law" in a general sense, but not "a law". The legislature in all probability sought to refer to the concepts "statute" or "legislation" when it referred to "a law". We prefer the interpretation given to "a law" by the Commission for Conciliation, Mediation and Arbitration (the "CCMA") in *Botha and British American Tobacco SA (Pty) Ltd* 2008 29 ILJ 1301 (CCMA) where the commissioner of the CCMA held that:

"I suspect that the term law as herein cited [in s 34(1)(b) of the BCEA] refers to a statute rather than the common law . . . This leads me to conclude that the common-law right of set off is not a 'law' contemplated in s 34(1)(b) which subsection in my opinion has no application to the common-law right of set off of a debt owing to the employer by the employee" (1311A–E).

We find support for our argument that "a law" refers to statutes rather than the common law in general, in the definition of "employment law" in the BCEA and the LRA (s 1 of the BCEA and s 213 of the LRA) which states that

"employment law includes this Act, any other Act the administration of which has been assigned to the Minister, and any of the following Acts:

- (a) The Unemployment Insurance Act, 1966 (Act 30 of 1966);
- (b) the Skills Development Act, 1998 (Act 97 of 1998);
- (c) the Employment Equity Act, 1998 (Act 55 of 1998);
- (d) the Occupational Health and Safety Act, 1993 (Act 85 of 1993);
- (e) the Compensation for Occupational Injuries and Diseases Act, 1993 (Act 130 of 1993)".

The word "includes" in the definition of employment law indicates that the statutes listed do not constitute a closed list. It could include any other legislation dealing with issues of employment, for example, the Income Tax Act. However, it is important to note that the definition of employment law only refers to statutes and says nothing about the common law. The omission of the common law from the definition supports our view that the term "a law" as provided for in section 34 of the BCEA, does not include the common law.

There are cogent reasons behind the legislature's intention not to require the employee's consent and compliance with fair procedures at the workplace, where a deduction is made in terms of a statute, a collective agreement, a court order or arbitration award in terms of section 34(1)(b). Consider the scenario where an employer with many employees has to deduct taxes and levies from the remuneration of an employee in terms of different statutes. It will be impractical for the employer to obtain written consent from each and every employee who is liable for these deductions. It would also be impractical to require the employer to give each of the employees a fair hearing and an opportunity to state why the deduction should not be made, as required in terms of section 34(2). The drafters of section 34 intended to avoid these practical problems, hence they drafted it in such a way as to ensure that where a law authorises a deduction from remuneration, consent and procedural requirements will not apply. The legislator thus attempts to establish a balance between the rights of employers when legislation prescribes that deductions should be made, and to protect employees from being subjected to arbitrary conduct in the absence of prior court or arbitration proceedings, by giving them a right to a fair procedure and to place limits on the quantum in the instance of the recovery of losses from employees.

The facts in *Naidoo v Careways Group (Pty) Ltd* 2014 35 ILJ 181 (LC) illustrate yet another example where section 34 was interpreted in a manner that could have consequences which are not in line with the intention of the legislator. Here, Careways Group (Pty) Ltd (the "employer") barred Naidoo (the "employee"), who was the chief executive officer of the employer, from the employer's premises based on her incompatibility with the owner of the business. The employer failed to pay the employee her salary for a period of two months after she had been refused entry to the workplace.

The employer contended that the employee had instructed a subordinate at the workplace not to deduct taxes from her salary and that the non-payment of two months of her salary was a mere set-off against the taxes that the employer owed to the South African Revenue Services. The court confirmed that an employer has a duty to deduct tax from an employee's salary in terms of the Income Tax Act. However, the court was misdirected when referring to the deduction of outstanding taxes in the following terms:

"There are however limits to the amount which may be deducted [for taxes] from the employee's salary. A deduction from an employee's salary is governed by s 34(1) and (2) of the BCEA. An employer is not permitted to deduct an amount exceeding one-quarter of the total salary of the employee, in terms of s 34(2)(d) of the BCEA" (para 27).

The court misapplied section 34 in this instance. The Income Tax Act is a statute and, therefore, the deduction was made "in terms of a law" in accordance with section 34(1)(b). As mentioned previously, authorisation for a deduction in terms of a law is found in section 34(1)(b) and accordingly section 34(2) is not activated. The one-quarter limit would, therefore, not apply under these circumstances.

## **6 Counter-claims against employees and section 34**

Where employers are unable to secure agreement to deduct amounts of money from employees' remuneration to recover damages or losses in terms of section 34, they still have remedies in terms of the civil law. In *Atlas Organic Fertilizers v Pikkewyn Ghwano* 1981 2 SA 173 (T) the court held that an employer who suffers loss due to the conduct of an employee is, in addition to terminating the contract of employment, entitled to claim common law damages.

In *Rand Water v Stoop* 2013 34 ILJ 576 (LAC) the Labour Appeal Court considered the interaction between an employee's right not to be unfairly dismissed and an employer's right to institute a counter-claim based on a breach of the employee's implied fiduciary duty. The facts that gave rise to this case were as follows: Two employees engaged in fraudulent activities relating to invoicing and billing, which defrauded the employer of more than R8 000 000. A disciplinary enquiry found the employees guilty of misconduct and they were dismissed. They lodged an unfair dismissal claim at the CCMA, but the matter was transferred to the Labour Court.

The employer instituted a counter-claim against the employees in terms of section 77(3) of the BCEA, based on a breach of the "implied term of the contract of employment that the employee will serve the employer honestly and faithfully" (para 16). The court concluded that it did have the power to award contractual damages against employees where the claims based on unfair dismissal and breach of contract related to the same set of facts. The court furthermore rejected the unfair dismissal claims of the employees and ordered the employees to pay back to the employer the amount in question (para 137).

What is the link between section 34 of the BCEA and the institution of counter-claims against employees in respect of unfair dismissal cases? It is argued that an employer would be entitled to deduct an amount of money from an employee's remuneration in terms of section 34(1)(b) without complying with the section 34(2) requirements, as long as a deduction is made from an employee's remuneration.

This raises the question as to what would constitute "remuneration". Does it only refer to an employee's salary or would it include amounts of money for accumulated leave, bonuses or car and cellular phone allowances? The BCEA and LRA define remuneration as "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" (see s 1 of the BCEA and s 213 of the LRA.)

Since the adoption of the LRA in 1996, the courts have drawn a distinction between "remuneration" and "benefits" for the purposes of establishing an unfair labour practice. The LRA and the BCEA have the same definition of "remuneration" and, therefore, the same principles are applied to establish remuneration in terms of the BCEA. Neither the LRA nor the BCEA defines a "benefit". The courts initially adopted the approach that a benefit is not remuneration. The labour courts originally opted to give benefits a narrow meaning and held that a benefit was something other than remuneration, such as medical benefits or pension benefits (*Van Niekerk et al* 189; see also *Schoeman v Samsung Electronics* 1997 18 ILJ 1098 (LC); *Gaylard v Telkom SA Ltd* [1998] 9 BLLR 942 (LC)). This meant that if payments were classified as a benefit, they could not also constitute remuneration. This approach would result in a situation where, for the purposes of section 34, the employer would not be entitled to make deductions from outstanding benefits which the employer still owed the employee.

The Labour Appeal Court in *Apollo Tyres South Africa (Pty) Ltd v CCMA* [2013] 5 BLLR 434 (LAC) overturned the decision in *Schoeman* and held that the distinction drawn between remuneration and benefits was artificial. It was held that the definition of "remuneration" in section 213 of the LRA is wide enough to include wages, salaries and benefits (para 25). In an insightful contribution by Ebrahim, he welcomes the latest interpretation adopted by *Apollo*

(“The interpretation to be accorded to the term ‘benefits’ in section 186(2)(a) of the LRA continues: *Apollo Tyres South Africa (Pty) Limited v CCMA* (DA1/11) [2013] ZALAC 3” 2014 *PELJ* 596). The author argues (604) that the court’s approach is in line with international practice to interpret the term remuneration to include benefits. Article 1(a) of the International Labour Organisation’s Equal Pay Convention 100 of 1951 defines “remuneration” as “the ordinary, basic or minimum wage or salary and *any additional emoluments whatsoever*” (own emphasis). Ebrahim notes (603) that article 141(2) of the European Union’s Equal Pay Treaty has a similar meaning. It is interpreted to include “payments made during and after employment, fringe benefits, severance payments, occupational pensions and redundancy payments”.

In light of the above, an employer will be entitled to make deductions from what would traditionally be classified as an employee’s benefits, for example, unpaid car and housing allowances and bonuses. Even during the era before the current broader approach, the Labour Court in *Gaylard* confirmed that accumulated leave forms part of an employee’s remuneration (para 21).

It is our argument that should an employee cause an employer damage or loss, the employer would be entitled to deduct damages caused from outstanding accrued leave and other unpaid benefits as long as a fair disciplinary enquiry which complies with section 34(2) of the BCEA had taken place and the other requirements of the section had also been met. The employer would also, under the circumstances where an alleged unfair dismissal matter had been considered by an arbitrator or a judge, be entitled to deduct counter-claim losses in terms of the arbitration award or court order, in terms of section 34(1)(b) without being limited by the one-quarter rule.

## 7 Conclusion

In *Padayachee*, the Labour Court has taken a purposive approach to the interpretation of section 34. We support the court’s finding that the purpose of section 34 is not only to protect employees against arbitrary conduct by employers, but also to provide employers with an effective and speedy mechanism to receive reimbursement for damages or losses caused by employees. The civil court processes are lengthy and costly and deductions under the appropriate circumstances are to be welcomed.

We do, however, reject the court’s approach taken in order to give effect to the dual purpose of section 34. The court’s finding that an employer needs to gain the employee’s consent in all circumstances where a deduction is made in consideration of losses or damages caused by an employee, does not give effect to the mentioned dual purpose. What about the instances where an employer has obtained a court order or an arbitration award which also addressed the issue of damages caused by the employee?

We also do not agree with *Padayachee*’s finding that the term “in terms of a law” should be accorded a wide interpretation which would also include the common law. This would also not establish an appropriate balance. Surely the phrase “a law” refers to a statute or particular legislation. If employers had to obtain consent from an employee and if they were compelled to follow a fair procedure at the workplace in every instance where a law obliged a deduction, it would not give effect to the purpose of the provision to provide employers with a speedy mechanism to make deductions. Instead, it would only create a huge

administrative burden on employers and might even delay the procedures, for example, for the deduction of tax in terms of the Income Tax Act.

We propose that, in order to strike a balance between the rights of employees and employers respectively, the legislator should re-draft section 34 in clearer wording. We suggest that “a law” should be deleted from section 34(1)(b) and be replaced with “employment law.” As mentioned above, the definition of “employment law” refers to specific pieces of legislation and not the common law. However, it does not make provision for a closed list. It could, for example, be interpreted to include the Income Tax Act since certain provisions of the statute relate to matters of employment even though they are not listed in the definition.

If it is accepted that the phrase “a law” in section 34 means employment law, the practical problems discussed above will be avoided and this would mean that the dual purpose of section 34 would be given effect to. This, in turn, would give employers the assurance that although the overall purpose of labour law is to protect employees, they (employers) are not left entirely without recourse.

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