

# Do salary reductions arising from erroneous overpayments constitute a salary deduction under section 34(1) of the Basic Conditions of Employment Act 75 of 1997? An appraisal of *Mhlontlo Local Municipality & 2 others v Ngcangula and Another* (Case no 1154/2022) [2024] ZASCA 5

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## 1 Introduction

The employment relationship is reciprocal, meaning that both parties have responsibilities: employees must work, while employers must pay the negotiated salary (*Coin Security (Cape) (Pty) Limited v Vukani Guards and Allied Workers Union and others* (1989) 10 ILJ 244J; Garbers, Le Roux & Strydom (eds) *The New Essential Labour Law Handbook* 8th ed (MACE 2024) 56-62; Manamela et al *Labour Law Rules!* 5th ed (Juta 2025) 24-27; Sibiyi; Calvino; Iyer 'Judicial scrutiny of derivative misconduct in South African employment law: a careful approach to the duty to speak' 2023 44(1) *Obiter* 106-121, which discusses this reciprocity with specific reference to good faith. See also Van Jaarsveld 'An employee's contractual obligation to promote harmonious relationships in the workplace – When are the stakes too high? Some pointers from the judiciary' 2007 (19) *South African Mercantile Law Journal* 204. If an employee fails to perform their contractual duties for any reason, the employer is entitled to withhold their pay (see *Mpanza and another v Minister of Justice and Constitutional Development and others* (2017) 38 ILJ 1675 (LC) (*Mpanza*) par 32). Similarly, if an employer has overpaid an employee, they should have the right to recover those overpayments (*Sekhute and Others v Ekurhuleni Housing Company SOC* [2017] ZALCJHB 318 par 14 (*Sekhute*). This is supported by section 34(5) of the Basic Conditions of Employment Act 77 of 1997 (BCEA) which provides that an employer may not require or permit an employee to repay any

remuneration except for overpayments resulting from an error in calculating remuneration. The subsection reflects a legislative recognition that employers must be able to correct genuine payroll errors while still protecting employees from arbitrary deductions.

There are several situations where an employer may overpay an employee beyond their contractual entitlement, such as payroll errors or payment for hours not worked. This often occurs when employees are mistakenly believed to be on authorised leave or are paid despite being absent due to strike action (Hlwatika 'Salary deductions: Can employers resort to "self-help"? 2024 45(2) *Obiter* 506; see also Khumalo 'Sidonselwa iholo ngokungemthetho. "No work, no pay": Lawful deductions or employer's self-help? In search of practical guidelines' 2025 46(4) *Obiter* 815-816). The employer may want to deduct the overpaid salaries or reduce them to the contractual rate. This issue has come to the forefront in several recent cases (see, for instance, *Stein v Minister of Education and Training and Others* (J415/20) [2021] ZALCJHB 420 (15 November 2021); *Sekhute*; and *National Education, Health and Allied Workers Union [NEHAWU] obo Mamogale and 14 Others v North West Department of Community Safety and Transport Management and Another* (J711/2022) [2022] ZALCJHB 182). Employers face a serious challenge in lawfully correcting their administrative errors. Part of this challenge stems from uncertainty regarding whether correction of an erroneous payment constitutes a deduction for purposes of section 34 of the BCEA. However, an important distinction must be drawn between a deduction from remuneration that is lawfully due to an employee and the correction of an erroneous salary overpayment. Employers should therefore be able to correct genuine payroll errors by restoring remuneration to the level contractually due (See Ncube 'Unilateral reduction of employees' salaries in the context of COVID-19 pandemic: *Macsteel Service Centres SA (Pty) Ltd v National Union of Metalworkers of South Africa (NUMSA)* 2020 8 BLLR 772 (LC) 2026(29) *PER / PELJ* 9-10).

The distinction between salary deductions and the recovery of overpayments has received limited direct attention in South African labour law scholarship (Hlwatika at 505; Ncube at 1; see also Cato *Deductions from employees' remuneration: Seeking clarity in the law* (MPhil dissertation 2009 submitted at the University of the Western Cape). Most commentary generally focuses on deductions from remuneration rather than on situations where the employer seeks to correct payments made in error. This creates uncertainty about whether withdrawing an erroneous payment constitutes a statutory deduction governed by section 34 or is merely a correction of remuneration to the contractual rate.

This note examines the Supreme Court of Appeal's (SCA) judgment in *Mhlontlo Local Municipality & 2 Others v Ngcangula and Another* (case no 1154/2022) [2024] ZASCA 5 (January 2024) (*Mhlontlo*), where an employer sought to rectify an incorrect notch increment by reducing the salaries of two of its employees by the same percentage as that by which

their salaries were incorrectly increased. The employees contested this action, labelling it as a prohibited deduction under section 34 of the BCEA.

This case note uses the reasoning in *Mhlontlo* to illustrate the distinction between what constitutes a correction of erroneous salary overpayments, and statutory deductions in terms of section 34 of the BCEA. The following section summarises the facts of the case, followed by an overview of the HC and SCA judgments. Thereafter, an evaluative commentary is provided.

## 2 Facts of the case

Mr Gcinikhaya Ngcangula and Mr Malibongwe Ngekeho (the employees) were employed by the Mhlontlo Local Municipality in the Eastern Cape as Chief Traffic Officer and Deputy Director: Economic Development, earning an inclusive monthly salary of R65,068 and R22,774 respectively (*Ngcangula v Mhlontlo Local Municipality and Others; Ngekeho v Mhlontlo Local Municipality and Others* (1343/2021;1466/2021) [2022] ZAECMHC 24 par 2) (*Ngcangula v Mhlontlo* HC). Both employees had been employed in these capacities since 2013 and 2014, respectively (*ibid*). In Feb 2019, the Municipality gave a 2.5% increment to employees who had undergone a Task Job Evaluation Programme (*Mhlontlo* par 3). The Municipality mistakenly extended this notch increment to all employees, including those who did not qualify (par 29).

Upon this realisation, the Municipality took a resolution in the following month to correct the situation and to reduce the salaries of the unqualifying category by 2.5% (par 5). Pursuant to this resolution, the Municipality addressed letters to these employees in November 2019 informing them of the overpayment and that, to correct the mistake, there would be 2.5% salary reductions effective from January 2020 (par 3).

The employees perceived this as a salary deduction as opposed to a reduction to correct the overpayments previously made. The employees approached the High Court for a declarator arguing that this was an unlawful deduction in terms of section 34 of the BCEA. They asked for the reinstatement of their remuneration to what it was before the deduction (*Ngcangula v Mhlontlo* HC pars 4-5). The employees argued that they were not afforded an opportunity to be heard before the deductions were effected and that a salary reduction was a breach of their employment contracts and against the tenets of section 34 of the BCEA (*ibid*).

The Municipality submitted that because the two employees were not legally entitled to the 2.5% notch increment in the first place, the reduction did not constitute a deduction as envisaged in section 34 of the BCEA (*Mhlontlo* par 26). The court was then invited to determine whether the withdrawal of this 2.5% notch increment constituted a deduction,

thereby triggering the application of section 34, and whether this was a breach of their employment contracts. The following section summarises the two judgments from the High Court and SCA respectively.

### 3 Judgments

#### 3 1 High Court (*Ngcangula v Mhlontlo* HC)

Before addressing the merits, the High Court considered and rejected the Municipality's jurisdictional challenge (pars 7-14). The court held that it had concurrent jurisdiction to hear the matter in line with section 77(3) of the BCEA because the dispute concerned an alleged breach of the employment contract (par 14).

Turning to the merits, the court held that the 2.5% increment paid by the municipality to the employees was lawful and could not be withdrawn, as it had been applied across the board and was paid to the employees for a significant period (par 12). The court further held that the entitlement -or lack thereof- to the 2.5% notch increment by the two employees was immaterial, because it was not their fault (par 15). Accordingly, the court held that the reduction constituted a salary deduction prohibited in terms of section 34 of the BCEA.

To support this finding, the court cited the Constitutional Court's judgment in *Public Servants Association obo Ubogu v Head of the Department of Health, Gauteng and Others* (2018) 39 ILJ 337 (CC) (*Ubogu*), which emphasised that a deduction under these circumstances constitutes unfettered self-help, whereby the employer took the law into its own hands (par 15).

The court ordered the reinstatement of the 2.5% notch increment and backpay in respect of the months for which the reductions were effected (par 17). The Municipality subsequently took the matter on appeal.

#### 3 2 Supreme Court of Appeal (*Mhlontlo*)

During the appeal, the employees raised two special pleas *viz*, the doctrine of peremption as well as mootness (pars 12-18). Both special pleas were dismissed by the SCA (para's 16-17)

The court then turned its attention to the pivotal issue of whether the employees had established that the reduction of their salary by 2.5% constituted a breach of their employment contracts (par 19). The employer submitted evidence to show that the High Court judgment was incorrect (par 29). This was based on the fact that the employees could not establish their contractual entitlement to the increment (par 27). One of them even attached a copy of their employment contract, but could not point out any clause that created such an entitlement (*ibid*). Attached to Mr Ngcangula's affidavit was a letter from the South African Local Government Bargaining Council (SALGBC) which stated that the 2.5%

notch increment would be applied only to employees who had not reached the top of their salary scales. This also confirmed that the notch increase was not intended to apply to all employees (par 28).

The SCA disagreed with the findings of the High Court. The fact that the increments were paid over a considerable period of time did not make them lawful (par 30). The court explained that an erroneous payment from one's employer, even over an extended period, could not create a contractual entitlement, instead, it would entrench illegality (*ibid*).

This finding distinguished between remuneration to which employees are legally entitled and payments mistakenly made by an employer. Since the employees could not demonstrate any contractual basis for the 2.5% increment, the Municipality's decision merely restored remuneration to its correct contractual level. The court therefore rejected the High Court's characterisation of the adjustment as a deduction under section 34. The appeal was thus upheld (par 35).

This judgment effectively authorised the employer to reduce the employees' salaries by the 2.5% that was erroneously given. Moreover, this did not amount to a prohibited deduction in terms of section 34 of the BCEA.

## 4 Commentary

### 4 1 Alignment with the Basic Conditions of Employment Act

Section 34(1) of the BCEA prohibits deductions from employees' remuneration unless the conditions listed therein are met, namely, the employee consents in writing or the deduction is required or permitted in terms of a law, collective agreement, court order, or arbitration award (See *Malumane v Member of the Executive Council, Mpumalanga Department of Health and Others* (2026-095555) [2026] ZAMPMBHC 47 (11 June 2026) (*Malumane*) par 33).

The purpose of section 34(1) is to protect employees against arbitrary and unilateral conduct by employers and to prevent employers from engaging in self-help in relation to remuneration that is due and payable to employees (*Malumane* par 35; Hlwatika at 514). In this regard, the section creates an important statutory safeguard by ensuring that deductions occur only within the limits expressly recognised by law. The protection afforded by section 34(1) is significant because remuneration occupies a central place in the employment relationship. Employees depend on remuneration for their livelihood and are therefore vulnerable to arbitrary reductions or deductions by employers. It follows that an employer who wishes to deduct monies from an employee's remuneration must demonstrate compliance with one of the statutory grounds listed in section 34(1) (*Malumane* par 17).

In terms of section 1 of the BCEA, a salary, also known as remuneration, is generally an agreed payment of money payable to an employee by the employer for work performed. It is defined as any payment in money or in kind, or both in money and 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. Remuneration becomes due and an entitlement to an employee once the work has been performed. If for whatever reason it is not paid, or part thereof has not been paid, it must generally be paid within the time periods contemplated by the BCEA (*Malumane* par 32; see also *North West Provincial Legislature and Another v National Education Health and Allied Workers Union obo 158 Members* [JA17/22] [2023] ZALAC 12 (*North West Provincial Legislature*) par 8).

The protection created by section 34(1) therefore presupposes the existence of remuneration to which the employee is legally entitled. It is only logical that the consent requirement contained in section 34(1) was developed with the understanding that consent can be obtained only from a person who possesses a legitimate entitlement to the payment concerned (Ncube at 7; See also *Mpanza* pars 30-32). If no entitlement exists, the conceptual foundation for invoking section 34(1) becomes considerably weaker (*ibid*).

The BCEA itself recognises that erroneous overpayments may occur (*Jonker v Wireless Payment Systems CC* (J1137/09) [2009] ZALC 150 (*Jonker*) par 21). Section 34(5) specifically contemplates the repayment of remuneration where an employer has overpaid an employee as a result of an error in calculating remuneration (*Jonker* pars 21-22). The subsection serves an important practical purpose. Employers who make genuine payroll or administrative mistakes must be able to correct those errors without being forced to tolerate ongoing losses or resort immediately to expensive litigation. Section 34(5) therefore operates alongside section 34(1). Whereas section 34(1) protects employees against unlawful deductions from remuneration to which they are entitled, section 34(5) acknowledges that there may be instances where an employee receives remuneration to which they were never entitled and which would need to be recovered. The legislature thus recognised that the protection of employees and the correction of payroll errors must be balanced.

It is at this point that the distinction central to *Mhlontlo* emerges. In *Mhlontlo*, the employer never attempted to deduct the overpayments from the employees' salaries as a debt owed to it, which would have triggered the application of section 34(5). Instead, the employer simply sought to reduce the salaries to correct the anomaly and restore them to the level that should always have applied. The concepts of salary deduction and salary reduction are not defined in the BCEA. Grammatically, to reduce is to lessen or to make something smaller, while to deduct is to subtract or remove an amount from an existing total (*Oxford English Dictionary* (Oxford University Press 2026). Although the

two concepts may appear similar in their practical effect, they are not necessarily identical in law (See *Jonker* par 22).

A deduction involves taking away remuneration that is due to an employee, whereas a reduction which serves to correct an erroneous overpayment involves removing an amount that should never have formed part of the employee's remuneration in the first place. The employer's action in *Mhlontlo* therefore constituted a correction of remuneration rather than a deduction as envisaged by section 34(1). The judgment highlights the subtle yet crucial distinction between these concepts and demonstrates that not every reduction in the amount reflected on a payslip amounts to a statutory deduction.

A salary reduction is generally a contractual issue (*Hartley v SMD Trading Group CC* (D138/21) [2024] ZALCD 16 pars 45-46 & 51 (*Hartley*); see also *Solidarity obo Members v Sahara African Living (Pty) Ltd* (JS829/21) [2024] ZALCJHB 166 (17 April 2024) pars 32-37 (*Sahara African Living*) albeit in the context of an employer who breached the contract of employment by unilateral salary reductions during COVID-19 to protect the company's finances), and the SCA was therefore correct to approach *Mhlontlo* from a contractual perspective. The court accordingly required the employees to demonstrate which clause of their contracts of employment had been breached, which they were unable to do (*Schloemann v Goldstone Resources Ltd* (C 658/16) [2018] ZALCCT 40 (13 December 2018) par 49). The distinction between a lawful correction of remuneration and a unilateral variation of contractual remuneration is important. Where an employer seeks to alter an employee's contract by reducing remuneration that is contractually due, the matter concerns a contractual breach. By contrast, where the employer merely restores remuneration to the level contractually agreed upon after an error has occurred, is one of correction rather than variation.

The SCA's interpretation is consistent with both the structure and purpose of section 34. Section 34(1) protects employees against unauthorised deductions from remuneration to which they are entitled, while section 34(5) recognises that erroneous overpayments may require correction. The approach adopted in *Mhlontlo* gives effect to both objectives. It protects employees against arbitrary employer conduct without preventing employers from correcting genuine administrative mistakes. For this reason, the court was correct to reject the employees' characterisation of the adjustment as a deduction falling within section 34(1).

## 4 2 Alignment with judicial authority

### 4 2 1 *Judicial authority supporting recovery of erroneous overpayments*

In *Jonker*, the applicant sought to prevent the employer from deducting amounts that had been overpaid in error, arguing that section 34 of the

BCEA prohibited such conduct. In gainsaying this argument, the Labour Court relied on *Sibeko v CCMA* (2001) JOL 8001 (LC), where a distinction was drawn between remuneration and an error in payment (*Jonker* pars 22-23). The former falls within the protection afforded by section 34, and the latter does not.

In this regard, the court had the following to say:

'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.' (*Jonker* par 22).

This reasoning strongly supports the approach later adopted by the SCA in *Mhlontlo*.

In *Sekhute*, employees received salary adjustments following a grading exercise. The employer later discovered that certain payments had been made in error and sought to recover them. The employer relied on section 34(5) of the BCEA and proceeded with recovery notwithstanding the employees' refusal to consent.

The court held that the employer was entitled to recover the overpayments and regarded the amounts improperly retained by employees as recoverable under section 34(5). The decision therefore illustrates the operation of the subsection in circumstances involving genuine payroll errors and supports the proposition that employees are not entitled to retain remuneration paid in error. The court aligned itself with the judgment in *Jonker* (*Sekhute* pars 13-14).

The same general distinction was recognised in *SA Medical Association on behalf of Boffard v Charlotte Maxeke Johannesburg Academic Hospital & others* (J2469/13) [2014] ZALCJHB 78 (*Boffard*) pars 37-40). The court accepted that overpayments may be recovered but found fault with the manner in which the employer acted (*Boffard* pars 33, 34 & 48). The decision therefore demonstrates that while employers may correct overpayments, they may not do so through arbitrary or procedurally unfair conduct.

#### ***4 2 2 Judicial authority dealing with contractual salary reductions***

In *Hartley*, the employer reduced the employee's salary on the basis of an alleged agreement between the parties (*Hartley* pars 9-10). The employee disputed the existence of such an agreement and claimed that the reduction constituted a breach of contract (*Hartley* par 2). The court found in favour of the employee and awarded damages equivalent to the amount by which the salary had been reduced (*Hartley* pars 46 & 51).

Similarly, in *Sahara African Living*, the employer implemented a 20 %-30 % salary reduction during the COVID-19 period (*Sahara African Living* pars 8; 10 & 13). The court held that salary constitutes a core term of employment and that unilateral changes to remuneration amount to changes in terms and conditions of employment which cannot be effected unilaterally (*Sahara African Living* par 37). The court held that the salary reduction amounted to a breach of the employment contract and awarded compensation (*Sahara African Living* pars 48 & 56).

The distinction between *Mhlontlo* and the above cases is not merely factual but involves established principles. *Hartley* and *Sahara African Living* concerned contractual remuneration to which employees were entitled and which employers sought to reduce unilaterally. Those cases therefore involved breaches of contract. By contrast, *Mhlontlo* concerned remuneration that was never contractually due. The Municipality sought only to correct an administrative error and to restore remuneration to the level contemplated by the employment contract. The distinction is therefore between contractual remuneration and erroneous remuneration, and between a contractual breach and the correction of an error.

Considered holistically, the authorities support the SCA's reasoning in *Mhlontlo*. *Jonker*, *Sekhute* and *Boffard* recognise that an employer may correct or recover erroneous overpayments. *Hartley* and *Sahara African Living* on the other hand demonstrate the limits of unilateral changes to remuneration that is contractually due. *Mhlontlo* therefore represents a logical continuation of existing labour-law jurisprudence rather than a departure from the established principles.

#### **4 3 A contrast with *Ubogu***

A separate discussion of *Ubogu* is necessary because the High Court relied heavily on the Constitutional Court's reasoning in that matter when finding in favour of the employees. The SCA, however, reached the opposite conclusion and did not place any reliance on *Ubogu*. It is therefore important to consider whether the SCA's lack of reliance on *Ubogu* was justified.

In *Ubogu*, the Constitutional Court declared section 38(2)(b)(i) of the Public Service Act unconstitutional (par 80). The employee had been incorrectly placed on a higher salary scale and the State later sought to recover more than R794 000 through deductions from her salary (pars 5-7). The Constitutional Court's concern was not merely that deductions were made. Rather, the impugned provision authorised the State to determine the existence and amount of a debt and to recover it unilaterally without first obtaining judicial sanction (par 64). The provision therefore sanctioned self-help and unjustifiably limited the right guaranteed by section 34 of the Constitution to have disputes determined by a court or independent tribunal (pars 65 & 67).

The crucial distinction lies in the nature of the employer's conduct. In *Ubogu*, the State sought to recover historic overpayments by making deductions from the employee's ongoing remuneration. In *Mhlontlo*, however, the Municipality did not seek to recover past overpayments through deductions. Rather, it corrected the employees' remuneration prospectively by removing an increment to which they had never been entitled. Accordingly, *Mhlontlo* did not involve the type of deduction that triggered the constitutional concerns identified in *Ubogu*, which explains why the SCA did not find it necessary to engage with *Ubogu*.

While both section 38 of the Public Service Act and section 34 of the BCEA may arise in circumstances involving erroneous overpayments, they operate differently. Section 34(5) represents a legislative mechanism specifically designed to address payroll errors within the employment context. By contrast, the constitutional difficulty in *Ubogu* stemmed from a statutory authorisation of unilateral self-help by the State (Garbers et al *'The Essential Labour Law Handbook'* (8ed Mace LLP, 2024) (141); *Boffard* pars 27 & 40). For this reason, *Ubogu* cannot be read as undermining section 34(5) of the BCEA. The two provisions address different concerns and operate within different legal frameworks. The SCA's non-reliance of *Ubogu* in *Mhlontlo* is therefore convincing and sound. *Mhlontlo* concerned the correction of remuneration to the contractual level, whereas *Ubogu* involved the unilateral recovery of alleged debts through deductions from remuneration. Properly understood, the two decisions are complementary rather than contradictory.

## 5 Conclusion

*Mhlontlo* is an important development for employers who have struggled to navigate the issue of correcting erroneous payments in the recent past. It highlights the importance of section 34(1) of the BCEA, particularly its role in preventing arbitrary self-help measures by unscrupulous employers. At the same time, it empowers employers to recoup erroneous overpayments without unnecessary hassle through section 34(5).

This judgment also draws the fine but important distinction between two concepts: the statutory concept of a 'deduction' and the contractual issue of a 'reduction' and the nuances attendant to both. Furthermore, it affirms that when an employee raises a breach of contract claim, they must be able to pinpoint the specific clause in the employment contract that has allegedly been breached.

This case clearly illustrates that the rights and protections enjoyed by employees come with corresponding responsibilities and are subject to certain limitations. Likewise, the rights of employers must also be recognised in order to sustain the business enterprises that create the very employment over which these rights converge.

