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DEDUCTIONS FROM EMPLOYEES' REMUNERATION:

SEEKING CLARITY IN THE LAW



A mini-thesis submitted in partial fulfilment of the requirements for the degree of Masters of Law in the Faculty of Law, University of the Western Cape.

I declare that *Deductions from employees' remuneration : seeking clarity in the law*, is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Signed in Cape Town on this 15th day of November 2009

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KEYWORDS: Labour law; legislation/policy; Basic Conditions of Employment; Sectoral Determination 9; regulated flexibility; deductions from wages; remuneration; losses/damages caused; debt specified; offset



ABSTRACT

Deductions from employees' remuneration: seeking clarity in the law

Sectoral Determination 9,¹ Wholesale and Retail Sector echoes the wording found in the Basic Conditions of Employment Act² when it comes to the section pertaining to deductions from employees' remuneration. It is unclear how an employer may lawfully make a deduction (other than those required by law) from an employee's remuneration in order to recover costs such as till shortages, stock losses and improper notice. Loss and damages are common problems faced not only by retailers but by all employers, yet the two governing bodies, that is, the Department of Labour and the CCMA, fail to offer any assistance to the employer in this regard. The law is unfairly biased against the employer, who may be financially unable to recover from losses caused by an employee and may face closure should it be unable to recover losses suffered.

The two remedies available to the employer are civil action and criminal action against the employee. However, both have proven to be inadequate for recovering losses incurred. Furthermore, the employer will have already incurred losses and therefore can ill afford the money or the time to pursue these options. The Small Claims Court does offer some relief to a smaller employer wanting to claim to a maximum of R7000, but companies are excluded from this mechanism as the rules of the Small Claims Court specifically exclude them from using this forum.

In this study, I will look at the common law principle of offset to see whether it can be applied to employers making deductions against employees for loss or damage. Notice is a quantifiable amount and is a legal debt; therefore, it should be able to be applied as an offset. Two subsections deal with deductions; after looking carefully at the wording of these subsections I will try to determine whether the one is alternate to the other, or whether the narrow interpretation that the Department of Labour gives to the statute is accurate.

A narrow interpretation of the law states that the employee must sign an acknowledgement of debt. However, employees often refuse to sign an acknowledgement of debt, thereby frustrating the law. Could this possibly have been the intentions of the drafters? Surely not, yet the Department of Labour, by having a narrow interpretation of the law, see it as such and as a result the employer is left out of pocket. In this mini-thesis, I will look at the way the law should be interpreted and the way it should be applied in practice.

¹ Sectoral Determination 9: Wholesale and Retail Sector, *Government Gazette* No. 24207

² The Basic Conditions of Employment Act 75 of 1997

What problems does this ambiguity create? Some problems could include a higher case load for the Department of Labour, demotivated employees, increased tension in the workplace and frustrated employers.

I also consider comparative labour law to see if other countries faced with similar situations have made any allowances for such circumstances.

Aims of this mini-thesis:

1. To highlight the problems and ambiguities in the interpretation and application of section 34 of the Basic Conditions of Employment Act (BCEA)³ and section 8 of the Sectoral Determination 9(SD9)⁴
2. To recommend, propose and encourage a practical solution for employers to implement in the workplace
3. To improve the situation for employers under the current structure.
4. To lead the legislature drafters to amend or redraft these sections

November 2009



³ The Basic Conditions of employment Act 75 of 1997

⁴ Sectoral Determination 9: Wholesale and retail sector, *Government Gazette* No. 24207

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CHAPTER 1: INTRODUCTION

Consider the following scenarios:

- Your stock controller is 20 units short at your month-end stock take; you confront her with this and she walks out, refusing to sign an acknowledgement of debt.
- You advance an employee an amount of money for transport and he subsequently does not arrive at his destination.
- On cashing up it is found that a cashier has a shortage in her till.
- A staff member fails to attend a training course you have paid for.
- Staff make personal calls from the office phone and use your photocopier and fax machine to make and send their curriculum vitae.
- An employee gives inadequate notice and walks off the job.

All these events occur in the day-to-day course of business. Can the employer legally deduct for the loss incurred? Can the employer deduct notice? Does the employer have to sue the employee in court? Can the employer force the employee to sign an acknowledgement of debt? What if the employee has no money other than that earned for work done? What is lawful and fair? This mini-thesis will investigate the proper employer's response to these issues, as well as consider the options that are available under such circumstances.

A leading law firm¹ suggests the following solutions for an employer when facing loss or damage that has been caused by an employee.

- If the employer does not have the deduction in writing, that is, signed consent by the employee to make the deduction, the employer is highly unlikely to succeed in the Labour Court after a compliance order has

¹ Edward Nathan Sonnenbergs, leading law firm in Cape Town. This advice was contained in an opinion given to the author by the law firm 19 February 2008.

been issued by the Department of Labour (DOL). The notice must be opposed, answering affidavits must be delivered and there is little chance of success. This would be very costly for an employer. The DOL will be discussed further in chapter 5 of this thesis.

- Pay the compliance order and bring a civil claim against the employee in the Small Claims Court. Neither party is allowed legal representation in this forum, thereby possibly being a cheaper option for the employer. This option will be discussed in chapter 7.
- Threaten the employee with civil and/or criminal proceedings to persuade the employee to drop his or her case with the DOL.
- Should an employee be due a pension payout, one must investigate section 37D of the Pension Fund Act to freeze this amount pending the outcome of the civil and or criminal proceedings. (This only applies as a practical option to employers who offer pension schemes.)

In this mini-thesis I will investigate three of the above-mentioned options and estimate the employer's chances of success in each. With regards to option 4, smaller employers do not offer pension schemes; therefore this would not be an option.

In this mini-thesis I will approach these issues as follows:

In chapter 2 I look at the relevant legal principles, such as the common law and the notion of set-off, and the way these can be applied today. I will discuss South African legislation that governs the law pertaining to deductions, including the Basic Conditions of Employment Act² (BCEA), Sectoral Determination no 9 (SD9)³, the Unemployment Insurance Fund Act⁴ and the South African Constitution.⁵

² The Basic Conditions of Employment Act 75 of 1997

³ Sectoral Determination 9: Wholesale and Retail Sector, *Government Gazette* No. 24207, 2002

⁴ Unemployment Insurance Act 63 of 2001 *Government Gazette* No. 23064 28 January 2002

⁵ The Constitution of the Republic of South Africa Act 108 of 1996

I will also discuss the Wage Act,⁶ which was the predecessor to the current SD9, and I will look at the way employers should interpret and apply this legislation in their businesses.

Chapter 3 looks the problems faced by employers when employees give inadequate notice. How do employers recover the monies for notice not worked?

Chapter 4 looks at comparative labour law by considering three countries and the way they deal with the issues of deductions and inadequate notice.

Chapter 5 looks at the different views on deductions, namely those of some of the bargaining councils in South Africa, the DOL and the Commission for Conciliation, Mediation and Arbitration (CCMA).

Chapter 6 looks at the case law on these issues and chapter 7 considers employer solutions offered by the BCEA and the Labour Relations Act and whether these are viable options for the employer or not. The small claims court and criminal procedures are also discussed.

In the conclusion I look at labour law issues as perceived by South African businesses and what should be done to improve the current situation for employers in South Africa with respect to deductions made by employers for losses or damages caused by employees.

⁶ Wage Determination 478 August 1995 *Government Gazette* no 16627, replaces Wage Act 5 of 1957

CHAPTER 2: THE RELEVANT LEGAL PRINCIPLES AND LEGISLATION

2.1 Common law

Common law refers to law developed by judges through the decisions of courts and similar tribunals (called case law), rather than through legislative systems that rely on statutes or executive action, and to corresponding legal systems that rely on precedential case law. The body of precedent is called “common law” and it binds future decisions.⁷ A brief examination and an understanding of the common law is important because it comprises the founding principles relating to deductions, as evolved through our courts over time, as well as general practice and precedent.⁸ The Basic Conditions of Employment Act⁹ (BCEA) and Sectoral Determination no 9 (SD9)¹⁰, are not simply codifications of some elements of the common law (such as “set-off”), as they include new requirements for employers and employees to follow by law as well as modifications of preceding legislation.

The common law remedy of set-off is the extinction of debts which two parties mutually owe one another by means of the claims which they have against one another. In order for set-off to occur, the debts must be of the same nature, liquidated and fully due. Set-off is a limited remedy as the amount and status of the debts must be known and quantifiable.

Set-off (*compensatio*) means that one debt is cancelled by another. It takes place when debts are mutually owed by two persons in such a way that each is simultaneously the debtor and creditor of the other. If the debts are for the same amount, both are extinguished simultaneously and completely and with them the obligations from which they arose. If they are not for the same amount, the smaller debt and the obligation from

⁷ www.wikipedia.org/wiki/Common_law

⁸ Article on Absenteeism, *The SA Labour Guide*

⁹ The Basic Conditions of Employment Act 75 of 1997

¹⁰ Sectoral Determination 9: Wholesale and Retail sector, *SA Government Gazette* No. 24207, 2002

which it arose are extinguished while the larger debt is reduced by the amount of the smaller.¹¹

In cases decided before the promulgation of the BCEA, set-off was regarded as a form of payment.¹² Two recent cases have looked at the notion of set-off. In *Penny v 600 SA Holdings*¹³ an employer deducted an amount from an arbitration award (awarded to the employee by the CCMA) for the balance of a loan made by the employee during the course of his employment. The Labour Court had to determine whether a loan by the employee and alleged to be due to the employer may be set off against the award made by the Commissioner. The employee stated that the amount of the indebtedness was not capable of prompt ascertainment. The employee admitted to the debt and there was a written agreement to this effect. However, the employer had given different amounts due and therefore could not prove that the amount was capable of prompt and easy ascertainment.¹⁴ No set-off was therefore allowed in this case. Had the amount been proven the opposite outcome would have occurred therefore allowing for set-off. Although the employee had signed an agreement authorising the company to make deductions for the loan, the company had not given a proper account of the final balance owing therefore not proving a quantifiable amount.

In *Barry and African Defence Systems*,¹⁵ Commissioner Epstein said in the event of him (the Commissioner) having found that the employee was entitled to severance pay, the employer would be entitled to set off the amount of the bonus paid to the employee against the retrenchment pay to which he (the employee) would then be entitled. This illustrates the applicable principle of set-off, as commissioners are willing to consider and apply set-off under the new BCEA.

¹¹ *Law of South Africa* vol 19 second edition, 30 June 2006, LexisNexis Butterworths para 243

¹² *Lawson v Stevens* 1906 TS 481, *Smiles' Trustee v Smiles* 1913 CPD 739, *Joint Municipal Pension Fund (Tvl) v Pretoria Municipal Fund* 1969 2 SA 78 (T), *Public Carriers Association v Tolcon Road Concessionaries (Pty) Ltd* 1989 4 SA 574 (n) 589

¹³ *Penny v 600 SA Holdings (Pty) Ltd* (2003) 24 ILJ 967 (LC)

¹⁴ Para 18

¹⁵ *Barry and African Defence Systems (Pty) Ltd* (2004) 25 ILJ 11202 (CCMA)

In *Schierhout v Union Government*¹⁶, the Appellate Division stated

the doctrine of set-off with us is not derived from statute and regulated by rule of court, as in England. It is a recognized principle of our common law. 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* as effectively as if the payment had been made. Should one of the creditor seek thereafter to enforce his claim, the defendant would have to set up the defense of *compensatio* by bringing the facts to the notice of the court – as indeed the defense of payment would also have to be pleaded and proved. But, compensation once established, the claim would be regarded as extinguished from the moment the mutual debts were in existence together.

What we have learnt from looking at these cases is that the principle of set-off has been used in the past and that if the two parties legitimately and quantifiably owe each other money – in the case of this mini-thesis an employer and employee – then the principle of set-off should be allowed to be applied.

2.2 Unemployment Insurance Act¹⁷ (UIA)



When looking at South African legislation and provisions for deductions, the Unemployment Insurance Act (UIA) contains a chapter that deals specifically with the recovery of losses caused by employees. I thought it pertinent to examine these provisions and the way deductions are dealt with.

Chapter IX administration

S60. Recovery of losses caused by employee of fund

(2) If an employee of the fund causes any loss or damage to the fund, the Director General may-

(a) institute an enquiry into the loss or damage;

(b) determine whether the employee is liable for the loss or damage;

¹⁶ *Schierhout v Union Government* 1926 AD 286. This was later confirmed in *Mahomed v Nagdee* 1952 1 SA 410 (A) 416 H

¹⁷ Unemployment Insurance Act 63 of 2001 *Government Gazette* No. 23064 28 January 2002

(c) if the employee is found to be liable for the loss or damage, determine –

(i) the amount of the loss or damage; and

(ii) how and when the amount is to be paid by the employee;

(3) If, at the termination of an employee's employment, there remains any amount outstanding in respect of a determination made in terms of subsection (2), that outstanding amount may be deducted from any monies due to the employee.

This final calculation includes leave pay due to the employee. Section 60 of the UIA is problematic as it does not help the average employer in terms of recourse for deductions, as it only applies to government employees who are employees of the fund and not to all government employees thereby limiting this recourse for a broader spectrum of employers. What distinguishes government employees from nongovernment employees? Why should defrauding the employer, be it government or private sector, be any different? Since theft, fraud, losses and damages remain the same, it should not matter who the employer is. It is unfair to allow more protection for government employers than for normal employers, as the UIA applies only to the employees of the Unemployment Insurance Fund (UIF), not to government employees generally. Perhaps it could be argued that this is justifiable as it is the state's funds that are being stolen or misappropriated, and that it is the purpose of this fund to assist the poorest of the poor who are unemployed. This was confirmed in correspondence with the DOL where it was stated that "the funds in the UI Fund are intended for the unemployed and their interests must be protected".¹⁸

The essential point of this Act is that it shows that it is not unheard of for deductions to be permissible in South African legislation.

¹⁸ Information provided via email from Ivan Polson from Cape Town Department of Labour office 21 August 2009.

2.3 Wage Act¹⁹

Although the Wage Act was subsequently replaced by the BCEA,²⁰ it is interesting to look at previous legislation that dealt with the provisions relating to set-off and deductions. In this regard, the Wage Act contained a provision specifically prohibiting set-off. Further on in this mini-thesis I will look at the wording of the current BCEA to understand whether it contains a possible remedy for employers in terms of the principle of set-off. The Wage Board, established under the Wage Act, has been replaced by the Employment Conditions Commission whose functions include advising the Minister on sectoral and ministerial determinations, while most of the investigative and reporting functions of the Wage Board have been transferred to the DOL.²¹

The provisions of the new BCEA, as stated below, authorise the Board to make recommendations relating to deductions, set-off and notice due by the employee to the employer if the Board elects to do so. Despite the flexibility when making recommendations, Polson states:

In the previous dispensation the labour laws specifically provided for the common law principle of set-off. The current employment laws intentionally do not allow for this, but it does provide for the civil courts to have concurrent jurisdiction with the Labour Court. In view of the aforementioned, the ECC has not and does not intend making any recommendations to this effect.²²

It is interesting to note that deductions, set-off and notice are specifically mentioned.

8(1) A recommendation submitted by the board in pursuance of any direction under section six may include provisions as to all or some or any of the following matters...

(d) the prohibition of deductions from remuneration payable to any employee...

¹⁹ Wage Act 5 of 1957

²⁰ Basic Conditions of Employment Act 3 of 1983 repealed when the Basic Conditions of Employment Act 75 of 1997 was enacted

²¹ *Labour Relations Law – A comprehensive guide* 4th ed Du Toit *et al*, 35 Basic Conditions of Employment Act 75 of 1997 s 59

²² Correspondence provided via email by Ivan Polson from Cape Town Department of Labour office 14 April 2009.

(e) the prohibition or restriction of set-off of debts mutually owing between an employer and his employee.

(u) the payment by an employee to an employer of an amount in lieu of notice of termination of employment.

6 (1) The Minister may direct the board to submit to him, in addition to any report, a recommendation as to the terms and conditions of employment to be applied in respect of the employees concerned²³

In *The Government v Regna-Adwel Business Machines*²⁴ the employer held a liquid document signed by the employee for an amount due to the employer and providing for it to be paid by means of set-off. The Supreme Court was called upon to decide *inter alia* whether the set-off was a “deduction” as envisaged by section 8(1)(d) of the Wage Act.²⁵ Because the Act clearly distinguishes between the two concepts, it was held, the argument that the legislature intended “deduction” to include “set-off” could not be sustained.

The BCEA and SD9 are significant as there is no mention of set-off, although it was specifically mentioned in the former Wage Act. The BCEA was promulgated under a new government that was promoting workers’ rights, which is why set-off may have been omitted.²⁶ It could be argued that the government would have wanted as few inroads to be made into workers’ rights as possible and it may be an indication that they did not want to allow employers to use set-off to get their money. The BCEA is protective legislation and allows for variation and deviation in some circumstances. If it does not allow for this, then it could be interpreted as not being permitted, such as set-off. Under the old provisions set-off was mentioned, under the new BCEA it is not, therefore this may be an indication it is not allowed. On the other hand, it may be argued that if the BCEA and SD9 do not expressly exclude it, there is room to argue that set-off may be used.

²³ Statutes of the Union of South Africa Part 1 nos. 1-44, *Cape Times Ltd* 1957

²⁴ *The Government v Regna-Adwel Business Machines* 1970 (2) SA 428 (T)

²⁵ Wage Act 5 of 1957

²⁶ At the time of its (BCEA) promulgation, it was applicable to over six million workers – Department of Labour Annual Report 1998 (RP 65/1999)2

Perhaps there is some link to be made here with the judgment in *Fedlife v Wolfaardt*²⁷ (SCA) where (albeit in the context of the Labour Relations Act (LRA)) the court found that common law remedies may still be relied on despite the LRA regulating fairness in the context of the termination of employment contracts. Nugent, AJA, deals specifically with the matter of whether common law rights fall away when an act is promulgated. The SCA noted that the unfair dismissal provisions in the LRA were not intended to be exhaustive of the rights and remedies that accrue to an employee upon the termination of a contract of employment and were promulgated to supplement the common law rights of an employee.²⁸ In this judgment the court often refers to the fact that although the Constitution, the LRA and the BCEA have been promulgated, it does not diminish the common law principles. Nugent AJA states that the Act (referring to the LRA) retains and builds on concepts and principles that were developed by the courts when interpreting the LRA.²⁹ Nugent goes on to say that the clear purpose of the legislature was to supplement the common law rights,³⁰ He looks in depth at whether the constitutional dispensation deprives people of common law remedies and arrives at the conclusion that the 1995 LRA does not “expressly abrogate and employee’s common law entitlement to enforce contractual rights and nor do I think so by necessary implication. On the contrary there are clear indications in the 1995 LRA that the legislature had no intention of doing so”.³¹

While it would appear that the court is making the judgment with reference to the LRA, the court specifically mentions the BCEA as a parallel Act to the LRA. The court is trying to make the point that although the LRA, the BCEA and the Constitution have been promulgated, they do not replace common law rights.³² Froneman AJA states that the LRA does not purport to change the pre-constitutional common laws by expressly mentioning each and every aspect of

²⁷ [2001] 12 BLLR 1301 (SCA)

²⁸ Para 17

²⁹ Para 1

³⁰ Para 13

³¹ Para 17

³² Para 24

them that it wishes to change. Froneman specifically mentions the BCEA in a similar light once again.³³ In the context of the BCEA, it must be accepted that the set-off mechanism remains an option for employers unless the legislature clearly intended to deprive employers of that remedy.

2.4 Basic Conditions of Employment Act and Sectoral Determination 9

Section 34 of the BCEA and section 8 of SD9 have the same wording in the deductions clause. The issue of losses and damages payable by the employee to the employer is specifically provided for and limited in these sections³⁴ as follows:

Deductions and other acts concerning remunerations.-

(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 remunerations in money.

³³ Para 14

³⁴ s34 of the BCEA and s8 of SD9

Scrutinising the wording relating to deductions in both the BCEA and SD9 (which have the same wording), one must look at the following four major points of interpretation:

1. “An employer **may not** make any deduction from an employee’s remuneration **unless**” ... This wording is critical. “May not ... unless”, means you may make deductions under certain conditions. The wording is not peremptory; had the legislature wanted to state that there can be no deductions at all, it would have written, will not, shall not, or must not. The Wage Act contains the wording “must not”. The presence of “may not ... unless” means that the employer can make deductions but only in the circumstances listed in subsection (1).
2. “Section 34(1)(a) **subject to subclause (2)**” – one interpretation could be that this subsection qualifies 34(1)(a). There is no provision in subclause 2 for the deduction to be in writing. If it were meant to be, there would have been clause (e) where the employee must agree in writing. The four conditions, (a) to (d), set out the conditions for deductions being made without the employee’s consent in writing, where the employer may lawfully deduct from the employee. A contrasting interpretation could be that the two sections cross reference each other. 2 talks about 1. “In terms of 1” means to meet the requirements of 1 in addition to the requirements set out in 2 and that, even with written permission, the employer cannot deduct unless the requirements of 2 have been met. The employer and the employee should agree up front when concluding the employment contract that, should there be an amount owing at the time of termination, the whole amount falls due. This way there can be no ambiguity upon termination. The contract should reflect the agreement between the parties and perhaps even set out certain scenarios, such as till shortages and so on. With regard to the written terms of a contract, Christie³⁵ states that it is a matter of common knowledge that a person

³⁵ Christie RH *The law of contract in South Africa* 5 ed LexisNexis Butterworths 2006

who signs a contractual document therefore signifies his assent to the contents of the document and if these subsequently turn out not to be to his liking he has no one to blame but himself.³⁶ Christie goes on to say that one must make sure the contract does not contravene some rule of law thus making the contract unenforceable.³⁷

3. **“Debt specified”** means it must be specific as to the nature of the specified debt. What is the debt, what are the reasons for the debt, how much is the debt and can the debt be quantified? A good example of this is notice. Notice is a debt owed by the employee to the employer and is quantifiable. This is discussed in the following chapter in more detail.
4. Section 34(1)(b) speaks of **“a law”**, which excludes the common law principle of set-off as discussed above.³⁸ Law, in terms of definitions contained in the Interpretation Act,³⁹ reads: “‘law’ means any law, proclamation, ordinance, Act of Parliament or other enactment having the force of law. The common law is not included.” Therefore deductions that the common law might have permitted are no longer allowed by section 34. This is an indication that the BCEA overrides the common law as it does not mention the common law as a source of deduction.

In summary, sub-clause 2 gives exceptions for situations in which the employer can make a deduction without the employee’s written consent. The requirements of (a) to (d) must be met, however, thereby adhering to the wording, “a deduction may be made to reimburse an employer for loss or damage”.

“only if” – These words mean you can only make the deduction after meeting these conditions.

If, after following all these steps, the employee still had to give permission in writing, it would be included as an additional point as a specific requirement. This would make the DOL’s interpretation correct, but it is not a requirement as it

³⁶ Pg 174

³⁷ Pg 337

³⁸ Deductions under the BCEA Grogan *Employment Law* vol 2 no 2 Oct 1985

³⁹ Interpretation Act 33 of 1957

is not specified; therefore, I believe their standpoint to be incorrect, as 34(1) says, subject to sub-clause(2), that the employer may make deductions. I believe that, in subsection 2, the prerequisite for having it in writing was omitted in order to allow employers to have an alternative remedy should there not be an agreement in writing. There are, however, specific steps the employer needs to take prior to making the deduction.

Levy⁴⁰ suggests looking at the mischief rule. When it is unclear as to whether the provisions of an act possibly includes or allows what is prohibited by another piece of legislation, the judges can apply the mischief rule. This means that the courts can take into account the reasons why the legislation was passed; what “mischief” the legislation was designed to cure, and whether the act in question fell within the “mischief”.⁴¹ Levy suggests that the mischief in this case would be that, if an employee caused damages or loss, the employer would be entitled to restitution once fairness was applied by ensuring that sections 34(2)(a) to (d) had been complied with. Levy suggests that if one applies logic to section 34, section 34(1) states that there is an overall prohibition on deductions unless they are in writing. Section 34(2) lays out the exceptions. Why does section 34(2)(a) to (d) require the employer to hold an investigation or hearing to determine the factors as stipulated if this could be vetoed by the employee? Not to allow the employer to recover an amount unless the employee agrees makes this section redundant, as it does not make sense in this context. If there is a debt due to the employer on the part of the employee, the intention could never have been for the employer not to be able to deduct it if it still needed to be in writing.

Should it be proved that the employee has caused loss or damage, it would mean that the employer has been impoverished and the employee possibly enriched and, unless the employee agrees in writing to rectify this, there can be no deduction. This is an absurd interpretation.

⁴⁰ Telephonic interview held with Andrew Levy of Andrew Levy Employment, held 3 October 2009

⁴¹ <http://legal-directory.net/english-law/interpretation-mischief-rule.htm>

The wording of the old BCEA⁴² may offer some clarification on this debate:

19. Prohibition of certain acts relating to payment of remuneration.-

(1) No employer shall-

(e) deduct from an employee's remuneration an amount except-

(i) in accordance with a written authority given to him by such employee;

(ii) in accordance with an order of court or a provision of any law...

The old BCEA and our current BCEA have a similar meaning. Section 34(2)(a) to (d) has been added to the 1997 BCEA; thus, if it simply meant that you could never deduct from an employee, section 34(1) would suffice. This supports my argument that section 34(2) was introduced to allow employers, after affording employees a fair procedure, to deduct in the absence of a written agreement.

Reynolds⁴³ argues that the BCEA specifically uses the word “deduct” and not the word “set-off”. She argues that the section on deductions does not exclude the common law remedy of set-off: “The criteria of set-off must be met and ... the circumstances [should be] such that a set-off is competent.” Although Reynolds refers to the old BCEA, the same argument would apply to our current BCEA. Section 34 does not specifically preclude set-off; it merely prohibits deductions.

Allardyce⁴⁴ suggests that employers obtain written consent from every employee to make deductions of up to 25% from their wages/salaries in the event of the company suffering loss or damages as a result of an employee's misconduct, following due process. Allardyce maintains that once an employee has consented to the deductions (usually indicated in the employment contract at the commencement of employment) and provided the employer holds an enquiry to determine and prove the guilt of the employee and the value is determined, under section 34 the employer is entitled to deduct up to 25% of the employee's

⁴² Basic Conditions of Employment Act 3 of 1983

⁴³ Nicola Reynolds from Webber Wentzel “Deductions from employees' monies arising out of monies owing to an employer” *People Dynamics* vol 12, issue 8 July 1994

⁴⁴ Leigh Allardyce “Surviving employee fraud: how to recover damages without going to court” *HR Highway* vol 1.2 May 2007

salary as part payment for the losses suffered. Allardyce states that the power that section 34 allows an employer is unprecedented and should be used to reduce company losses. Although this appears to be clearly allowed for by section 34, the DOL considers this to be a blanket clause and contests that it may be carried out by including it up front in the employment contract. These two opposing opinions result in a controversial viewpoint, as the BCEA does not explicitly state that it cannot be included in an employment contract.

2.5 The Constitution⁴⁵

The Constitution is the supreme law of South Africa and all other laws are informed by the Constitution. Section 23 of the Constitution states that “everyone has the right to fair labour practices”.

Du Toit *et al*⁴⁶ suggest that “the doctrine of ‘avoidance’ has been interpreted by meaning that, once a constitutional right is regulated in detail by statute, persons seeking to enforce that right are confined to the statutory remedies and may no longer rely directly on the constitutional provision. In the case of the LRA, it would mean that aggrieved employees (or employers) could only enforce their right to fair labour practices within the framework created by the LRA, failing which their only recourse would be to challenge the constitutionality of the statute.”

The Constitution is important in the interpretation of legislation, as stated in section 39 of the Constitution.⁴⁷ This is important in the context of my mini-thesis, as the Constitution informs the way in which section 34 of the BCEA and SD9 should be interpreted:

⁴⁵ The Constitution of the Republic of South Africa Act 108 of 1996

⁴⁶ Du Toit, D Woolfrey, D Bosch, S Godfrey, J Rossouw, S Christie, C Cooper, G Giles, C Bosch *Labour relations law: a comprehensive guide* 4 ed, 462

⁴⁷ S39 Interpretation of Bill of Rights ss (2) and (3)

S39(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

Fair labour practices should be about the proper balance of interests between employers and employees.⁴⁸ If the employee has caused the employer loss or damage, the employer should be able to withhold monies for those losses provided that the employer has proven their case on a balance of probabilities.⁴⁹ When interpreting the law that will permit employers to make such lawful deductions the Constitution should be used to develop this principle. The alternatives offered, such as the high court or civil court, means more costs and time, as proceedings in these courts are both time consuming and costly and subject to numerous appeals. Should the employer succeed then the employee will probably have spent the money already paid by the employer, and there is effectively no recovery – just an empty judgment. On termination, the employer should be entitled to deduct what they should receive, as this is the best chance of ever getting the money back. Why this is significant in terms of this mini-thesis will become apparent below. These issues are addressed in Chapter 6.

As an alternative to interpreting section 34 of the BCEA to include the common law principle of set-off, employers may also challenge section 34 of the BCEA as a limitation of rights (such as the right to fair labour practices) in terms of section 36 of the Constitution.⁵⁰ It will have to be determined whether it is reasonable and justifiable not to allow employers to make deductions for losses incurred. For example, employers arguably do not enjoy equal protection under the law where employees cause the employers loss or damage. If employees refuse to sign consent when a signature is the only means of allowing a deduction, the

⁴⁸ *NEHAWU v University of Cape Town and others* (2003) 24 ILJ 95 (CC) para 53

⁴⁹ The "balance of probability" is the method used for deciding guilt or innocence, based on the evidence submitted, in civil matters whereas "reasonable doubt" is applicable only in criminal cases. Derek Jackson www.labourguide.co.za

⁵⁰ S36 Limitation of Rights

employer's alternative is delayed and expensive, and probably ineffective, litigation. One must weigh up the practical difficulties of not allowing deductions against the protection of employees.

In *NEHAWU v UCT*⁵¹ the Constitutional Court stated that "the focus of section 23(1) is, broadly speaking, the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both. Care should therefore be taken to accommodate these interests where possible so as to arrive at the balance required by the concept of fair labour practice".⁵²

Currie and de Waal⁵³ state that it should be noted that section 23 of the Constitution is not the only provision in the Bill of Rights that impacts on relations between employers and employees. Other rights of relevance to the employment relationship include the right to equality (s 9).⁵⁴ Under the 1956 LRA, presiding officers of the Industrial Court were empowered to declare their view on labour relations policy. This power to give meaning to the concept of fair and unfair labour practices resulted in the court being used by both employer and employee as an arena of struggle.⁵⁵ "Equality", we are told in section 9(2), "includes the full and equal enjoyment of rights and freedoms".⁵⁶ Substantive equality requires an examination of the actual social and economic conditions of groups and individuals in order to determine⁵⁷ whether the Constitution's commitment to equality is being upheld. However, this equality has been diminished under the new LRA as there is no recourse that enables an employer to bring a case against an employee.

According to Ge Devenish,⁵⁸ *The Shorter Oxford Dictionary* defines equality as the condition of being equal in dignity, privileges, power and so on with others. From a constitutional and legal point of view, people are free if society imposes

⁵¹ *National Education Health and Allied Workers Union v UCT* 2003 (3) SA 1 (CC)

⁵² Para 40–41

⁵³ Currie and de Waal, *The Bill of Rights Handbook*, fifth edition, 2005 Juta

⁵⁴ pg 499

⁵⁵ pg 502

⁵⁶ Pg 231

⁵⁷ Pg 233

⁵⁸ Ge Devenish, *A commentary on the South African Bill of Rights*, 1999 Butterworths

no unjust, unnecessary or unreasonable limits on them. The laws of society must also protect their rights, basic liberties, powers and privileges.⁵⁹ Section 9(1) of the 1996 Constitution encapsulates two concepts: firstly, the right to equality before the law and, secondly, equal protection and benefit of the law. Devenish says “equal protection” is derived from the American Constitution and “equal benefit of the law” was taken from the Canadian Charter of Rights. “It is submitted that the phrase ‘equal benefit of the law’ is intended to broaden the equality review in order to extend it to the substance of the law and not merely to the way in which the law is administered.”⁶⁰

Therefore section 34 of the BCEA is arguably unconstitutional to the extent that it does not allow employers to make certain types of deduction. The alternative remedies considered in *NEWU v CCMA*⁶¹ are not sufficient (as discussed in chapter 6 below) and the finding that a statutory remedy is not required is problematic. The union argued that the fact that the employee did not give and work proper notice was an unfair labour practice. In reply, however, the Court stated that it was not, as employers do not need to rely on the LRA as they have the civil courts as a remedy. Under the BCEA both parties have the right to notice. This case did not effectively explore these remedies and their viability and prospects of success for employers. This brings about serious problems for employers and ineffective remedies, and should be revisited. In addition, in terms of section 9 of the Constitution, the laws are not applied equally in the context of the legislation, thus the employees get away without paying their employers for loss or damage caused and the employers have no effective remedy. This is not equal protection.

My conclusion on the various constitutional interpretations is that section 23(1) states that “everyone” has the right to fair labour practices, whereas section 23(2) has a narrower wording, granting “every worker” various rights. This would mean employers and employees have equal rights in terms of both section 23

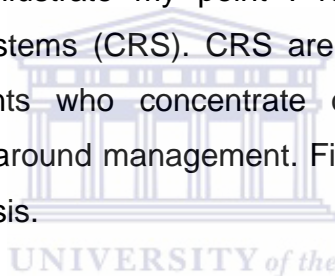
⁵⁹ Pg 36

⁶⁰ Pg 40

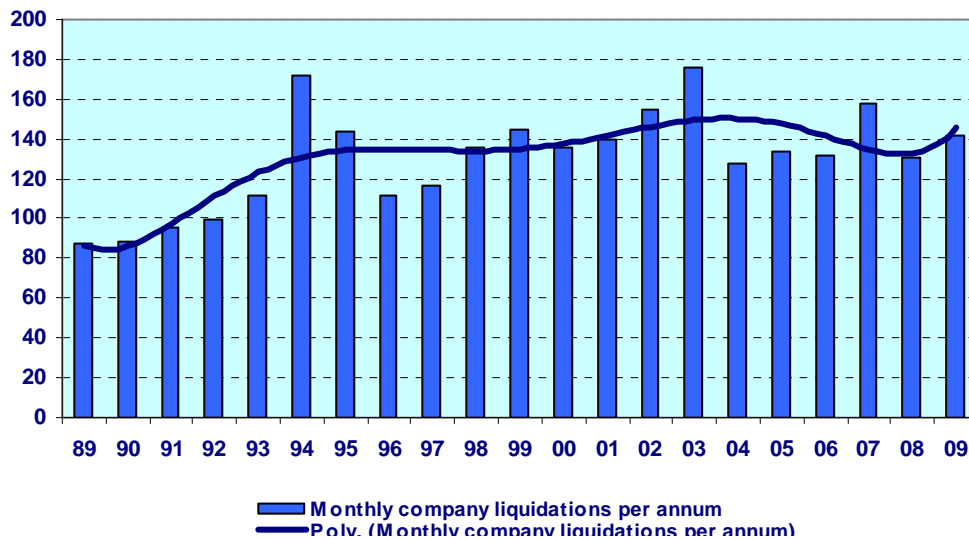
⁶¹ *National Education Health and Allied Workers Union v UCT 2003 (3) SA 1 (CC)*

and section 9. Against the background of the current world economic crisis, the old notion of the economically strong employer versus the weak employee rings less true. Examples of instances in which employers would seem to be at a disadvantage include strong unions that are in alliance with the African National Congress and government, scarce skills of employees, and above average inflation wage increases. All of these are indicators of employee strength, which did not exist prior to 1994.

Employee strength is especially evident in South Africa, as certain industries are seriously under threat, especially motor manufacturers, retailers and clothing manufacturers. Every day one hears reports of mass retrenchments, businesses closing down and liquidations. Employers are struggling to keep their businesses open. To illustrate my point I refer to the table published by Corporate Renewal Systems (CRS). CRS are based in South Africa and are management consultants who concentrate on business rescue, business transformation and turnaround management. Financial Mail refer to these same figures on a monthly basis.



Monthly company liquidations per annum



Note: The 2009 figure is for 7 months to July 2009 only

Table 1

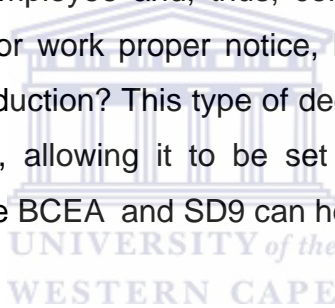
This table shows the pattern of liquidations of South African businesses. What is interesting to note is that, prior to 1994, liquidations were at their lowest; however, 1994 shows a massive peak. One of the reasons for this was that this was the period when South Africa went through huge political change and there was much uncertainty. The chart indicates that liquidations then settled down for the two years following 1994. However, 1997 saw the last of the low levels. Is this a coincidence considering the BCEA, the Employment Equity Act (EEA) and the Skills Development Act were all promulgated between 1997 and 1998? Since then, liquidation levels have shown a non-stop rising trend. I maintain that this new legislation was too restrictive and became too cumbersome for employers to contend with. Affirmative action may have also played a significant role in closures as it required existing management and staff structures to change in accordance with employment equity. The idea was to use the new legislation to protect employees yet the opposite has occurred as this chart shows: many employees will have lost their jobs as a result of these liquidations and closures. CRS writes that liquidations will continue the upward trend as a result of tougher business conditions.⁶²

Employers must be given equal opportunities according to their constitutional rights. I will consider one of these rights further in chapter 3.

⁶² www.turnaround-sa.com/liquidations/liquidations%20statistics.php

CHAPTER 3: DEDUCTIONS FOR FAILURE TO GIVE PROPER NOTICE

In this chapter I look at possible obligations by employees to their employers. Notice is an important part of the employment relationship and the BCEA specifically mentions the notice periods that an employee is required to give the employer. These notice periods are specifically set out in terms of definite time periods. The employer is entitled to have the employees serve full and proper notice and, should proper notice not be given, the employer may suffer a loss. Can such a loss be deducted from the employee's wages? The primary purpose of the BCEA and SD9 is to help and protect workers.⁶³ Notice is important for employers as it allows time to find and train a new employee, time for a proper handover to the new employee and, thus, continuity of business. However, if employees fail to give or work proper notice, how should this loss of time be treated in terms of a deduction? This type of deduction can be quantified in both a time and rand value, allowing it to be set as a debt specified. Therefore Section 34(2) of both the BCEA and SD9 can help employers within limits.



TERMINATION OF EMPLOYMENT

27. (1) A contract of employment terminable at the instance of a party to the contract may be only on notice of not less than-

(a) one week, if the employee has been employed for six months or less;

(b) two weeks, if the employee has been employed for more than six months but not more than one year; and

(c) four weeks, if the employee has been employed for one year or more.

(4) Notice of termination of a contract of employment must –

(a) be given in writing except when it is given by an illiterate employee...⁶⁴

⁶³ s2 Purpose of this Act

⁶⁴ s37 of the BCEA and s27 of SD9

Mischke⁶⁵ writes:

Generally, an employee's resignation is the flip-side of a dismissal: whereas a dismissal constitutes a termination of employment by the employer, a resignation is the termination of employment by the employee. While termination of employment by the employer is to a large extent regulated by the statute and employees are protected against unfair dismissal, there are considerably fewer rules relating to an employee's resigning... the essence of a resignation is that an employee gives the employer notice of termination of employment... the period of notice will be determined by the contract of employment or the BCEA. In some cases ...one may terminate the contract of employment without notice, but this will be a lawful step only in the context of a serious breach of contract by the employer.

From a contractual perspective, the resignation is a unilateral act by the employee, it is up to the employee to decide whether (and when) to resign.

Resignation is a unilateral or one-sided act by the employee. The employee does not need to give any reasons for resigning and the only procedure to follow may be the employer's resignation procedure (if it has one). Yet, at times, the employee does not even follow this procedure. Employees simply write a short note or inform the employer verbally that they are leaving without filling in the required documents. As stated above, the question arises as to whether the employer has any recourse against the employee under such circumstances.

Anecdotal evidence has shown that the CCMA and the DOL do not require the employee to follow the employer's procedure, however they do require the employer to pay out the final monies due even if the employee did not comply with the required resignation procedure or give the notice required by the BCEA. The employer does not have to formally accept a resignation (i.e. the resignation will be effective whether the employer accepts it or not). An employer cannot reject a resignation thereby trying to stop it;⁶⁶ a resignation terminates the contract of employment. A contract cannot be terminated unless it is done in accordance with the terms of the contract or the BCEA (where there is no

⁶⁵ "The over-hasty resignation", Carl Mischke, August 2006 www.irnetwork.co.za

⁶⁶ Mischke continues in his article ("The over-hasty resignation") that there is no obligation on the part of the employer to accept a withdrawal. In fact "an employer has no option to either accept or reject the resignation: it could try to change the employees mind, but the employer can not reject a resignation."

contractual provision or the contractual provision provides for less than the BCEA requires). Giving the incorrect amount of notice is a repudiation of the employment contract and, once this happens, the employer may decide whether to accept the repudiation and cancel the contract immediately or to hold the employee to the contract, in which case the contract continues to exist. A contract cannot be terminated simply because one of the parties says that it should be. However, what happens when an employer has legitimately refused to accept an unlawful resignation attempt? The Federated Employment Organisation of South Africa (FEOSA)⁶⁷ says a resignation is a unilateral action on the part of the employee and non-acceptance of a resignation by an employer does not render it invalid. Maeso⁶⁸ echoes this and states that a resignation is a unilateral act that does not require acceptance by the employer.

The question now arises as to how employers should deal with cases of improper notice. What are their remedies? Jackson⁶⁹ discusses employees who do not adhere to their contractual notice clauses and simply give 24 hours' notice or walk out and do not return to work. He comments that this is an increasing trend among employees. The employee who does not give proper notice is in breach of their contract and leaves the employer without an employee to do the work. The notice period usually allows the employer time to recruit a new employee, or to allow another employee to be trained for the position. Employees often leave after payday leaving the employer with nothing to deduct anything from. Jackson suggests stipulating a clause in the employment contract, which the employee agrees to, that should the employee terminate the employment contract without tendering the written contractual notice period, then the employer will be allowed to deduct an amount equal to the period of notice not given from the employee's final payment,. This effectively becomes a condition of employment that the employee is bound by and gives employers the legal right to make the deduction. Notice is both a

⁶⁷ Federated Employer Organisation of South Africa

⁶⁸ Michael Maeso of Shepstone and Wylie, article appears in the *Natal Mercury*, 12 March 2008

pg 3

⁶⁹ 24 hours notice – Does the employee pay? Derek Jackson, www.labourguide.co.za

quantifiable and calculated amount. In addition, it is a requirement by law to give proper notice. Further on in this chapter I will discuss a solution for employers that will fall within the requirements of section 34 of the BCEA and which allows employers some remedy.

Grogan⁷⁰ states:

In practice, an employer will seldom take an employee to court for his failure to comply with his statutory obligation to give proper notice ... The employer might, however, invoke the employee's obligation to pay him notice pay as a defense (though it may only be a partial one) to a claim for outstanding wages; and the employee may rely, as they have in the past, on their employer's failure to comply with the Act (BCEA) to support an unfair dismissal claim.

However, in South Africa it is common for some employees to give inadequate notice just after payday. In such cases there may be no money due to the employee by the employer and therefore no money available to make a deduction from and the employee may be fully aware of this. The DOL does not allow employers to make any deductions against the employee's untaken annual leave; instead, the DOL required employers to pay the employee up to their last day of service including annual leave, overtime and so on. The DOL does not take into consideration that the employer does not recover their required notice.

The practice of giving 24 hours notice, or immediate notice, is improper as the BCEA sets out the notice provisions which are exactly the same as those in the SD9. The Act also provides that notice must be given in writing by the employee. One viewpoint on the significance of getting the resignation in writing is that it could serve as protection for the employer. Barnes⁷¹ states that it is beneficial for the employer to accept the resignation as, should the employee claim at an external dispute resolutions forum that he was unfairly dismissed, the onus is on the employee to first prove dismissal and then for the employer to prove that the dismissal was substantively and procedurally fair. If the employer produces a

⁷⁰ John Grogan "Saying goodbye, the notice provision in the BCEA" *Employment Law* Vol 2 no 1 August 1985, Butterworths

⁷¹ Gillian Barnes, Resignations: A unilateral act or a mutual agreement. Sep 2008 LabourNet

resignation, the employee will not be able to prove dismissal and thus the fairness of the dismissal will not be explored.

Employers should not have to accept a verbal resignation. Rather, the DOL should insist that the employee return to work, follow the prescribed law and give full and proper notice. Section 64(1)(a) of the BCEA provides that labour inspectors must advise employees and employers of their rights and obligations in terms of employment law and section 64(1)(c) provides for the investigation of complaints made to a labour inspector. Sections 68 and 69 deal with the issuing of undertakings and compliance orders by a “labour inspector who has reasonable grounds to believe that an employer has not complied with any provision of this Act”. There is no provision for issuing any such orders against employees who have not complied with the Act. This once again shows a limitation on employers’ rights and a lack of equality between employers and employees.

Another practice that has been used by employers to combat an employee giving improper notice is to hold the notice upfront. The employment contract states that in month one of employment the company will withhold one week’s salary, month seven another week’s salary and in month 13 and 14, a further two weeks’ salary. Should the employee give full and proper notice, this is refunded in full to the employee. Should the employee abscond without giving full and proper notice, the notice is effectively recovered. Anecdotal evidence has shown that this is a very useful tool for curbing payday walk-outs, as it has been put into practice by some employers. The employee who absconds knows that there are losses in their workplace that exceed one week’s pay, and it is worth it for them to forfeit the money being held rather than face a larger stock loss amount and disciplinary action.

This option may be a questionable practice as it relates to potential loss and not to actual loss suffered. This viewpoint is supported by the wording “loss occurred” in the BCEA. On the other hand, to support the employer the contrary view is that if it is agreed to upfront in writing in the contract, then an agreement

has been made and is binding on both parties. It is quantifiable at the outset, as, at the time the employment contract is drafted, one week's, two weeks' and four weeks' notice are easily quantifiable at the current rate of pay. This reinforces the employer's right to either proper notice or compensation. The employer could call the employee to a meeting to show cause why the employer should not deduct for costs, including retraining, advertising for new staff and inadequate notice, and thereby establish a process for estimating the actual loss, as the employer only needs *prima facie* evidence of loss. In the absence of an adequate explanation the employer should be able to make a deduction. Such a process would thereby comply with section 34 (2) of the BCEA.

The 1956 LRA allowed employers to sue employees for unfair labour practices under the common law,⁷² which could include claims for improper notice. Under the current LRA, the unfair labour practice definitions apparently do not allow for this. This is the issue that arose in *NEWU v CCMA*⁷³. I will look at the facts and rationale for the decisions of both the Labour Court and the Labour Appeal Court (LAC) in this case.

In *National Entitled Workers Union v Commission for Conciliation, Mediation & Arbitration & Others*,⁷⁴ an official of NEWU resigned without giving the required three months notice. The Union referred the matter to the CCMA as an unfair labour practice. The CCMA stated that it lacked jurisdiction and it was not an unfair labour practice under the 1995 LRA. NEWU took the case on review to the Labour Court. The Labour Court stated that the concept of an unfair labour practice as contemplated in the LRA did not embrace a labour practice committed by an employee against an employer. The Labour Court maintained that the CCMA was therefore correct in not accepting NEWU's case. The Labour

⁷² *NEWU v CCMA & others* (2007) 7 BLLR 623 (LAC) para 17: "Under the LRA 28 of 1956, employers had the right to bring unfair labour practice claims against employees for virtually any conduct on the part of the employees."

⁷³ *NEWU v CCMA & others* (2007) 7 BLLR 623 (LAC) para 15 : "It is true that the Act does not provide an employer with a cause of action and/or remedy where his employee resigns or terminates the contract of employment unfairly..."

⁷⁴ *National Entitled Workers Union v Commission for Conciliation, Mediation & Arbitration & Others* (2003) 24 ILJ 2335 (LC)

Court stated that section 23(1) of the Constitution which states that “[e]veryone has the right to fair labour practices” concerned the fact that the concept of a fair labour practice as contemplated in this section is that a labour practice should not only be lawful but also fair and that parity between the rights of employers and employees is not an absolute one.⁷⁵ An employee may, in limited circumstances, display conduct towards an employer that may be lawful but unfair. The LRA does not give effect to section 23 of the Constitution. The employer could have applied for an interdict or sued the employee for three months’ salary. The court held that the employer has a range of remedies available, including an order for specific performance or an action for damages under the common law or the BCEA. Section 77A(e) does permit claims for damages, however, the Labour Court is very costly and, as discussed in chapter 6 below, the civil remedies available to employers are ineffective. I discuss these options further in chapter 6 of this dissertation. The Labour Court held that this matter did not constitute an unfair labour practice.

In *NEWU v CCMA and others*⁷⁶ the Union argued that the LRA and EEA are unconstitutional as they fail to provide protection for employers against unfair labour practices perpetrated against them by employees. The union argued that the LRA and the EEA⁷⁷ infringed employers’ rights to equality and the equal protection and benefit of the law, as well as infringing on the employer’s right to dispute the fairness of an employee’s resignation in the legal forum of the CCMA.

The Union stated that the BCEA and the LRA did not offer any remedies to enforce their rights as stipulated in sections 9, 23(1) and 34 of the Constitution.⁷⁸ The Union also wanted desertion to become an automatically unfair labour practice.⁷⁹ The Labour Appeal Court (LAC) stated that, at common law, the

⁷⁵ Para 1

⁷⁶ *NEWU v CCMA and others* [2004] 2 BLLR 165 (LAC)

⁷⁷ Employment Equity Act 55 of 1998

⁷⁸ Para 9

⁷⁹ Para 7

employer was in a strong position against the employee.⁸⁰ The LAC maintained that owing to the balance of power, the LRA would not provide an employer with a remedy if an employee were to resign unfairly. The unfair labour practice was introduced to protect the employee in circumstances where they needed it. Under the 1956 LRA employers had the right to bring charges of unfair labour practices against employees, but hardly ever exercised this right which suggests there was no need for this at the time. The employer did not need the courts to deal with the loss of an employee by resignation as they were able to simply look for another employee and sue the absconding employee.⁸¹

The LAC went on to say that the International Labour Organization convention C158 on the termination of employment makes no provision for the protection of employers against unfair resignations by employees. The LAC maintained that employers did not need protection. In the case *Ex parte Chairperson of the Constitutional Assembly: In re certification of the Constitution of the Republic of South Africa*,⁸² employers wanted to be treated equally to employees. In terms of this case, the Constitutional Court stated that “collective bargaining is based on the recognition of the fact that employers enjoy a greater social and economic power than individual workers, therefore protection is for the employees, not the employers”.⁸³ If there were legislation to protect employers against resignations it would weaken the already weak position of the individual employee and strengthen the position of the employer,⁸⁴ which would be a step backwards in the field of labour relations and employment law in South Africa.⁸⁵ However, given our current weak economic climate, the assumption that employers are economically strong is not true. With consumer spending down,

⁸⁰ Para 15

⁸¹ Para 16-17

⁸² Para 21 in reference to *Ex parte Chairperson of the Constitutional Assembly: In re certification of the Constitution of the Republic of South Africa*, 1996 (1996) 17 ILJ 821 (CC) para 66

⁸³ Para 21 in reference to *Ex parte Chairperson of the Constitutional Assembly: In re certification of the Constitution of the Republic of South Africa*, 1996 (1996) 17 ILJ 821 (CC) para 66

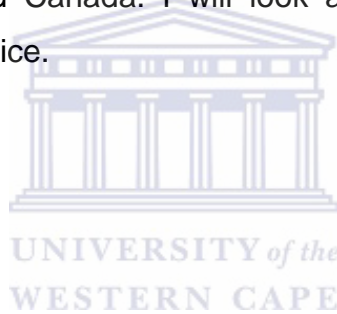
⁸⁴ Israelstam disagrees with this notion. He says the courts cannot make broad generalisations saying that every employer is more powerful than its employees, as many employers are in a situation where they are struggling to survive and forced by economic weakness to close down. Ivan Israelstam, “So what protection is there for employers?” www.labourguide.co.za

⁸⁵ Para 22

increased job losses and increases in daily living expenses (such as electricity) many employers are not making money and as a result are experiencing decreased profits and turnover. In addition, many face possible closure or downscaling. The courts therefore need a sound basis for making such statements, especially when there is no statistical evidence to substantiate them.

Although the BCEA was promulgated as remedial legislation whereby the employee was protected against the employer, there are unintended and unforeseen consequences for the smaller employer. Such employers may be vulnerable to abuse by their employees.

After discussing the laws pertaining to notice provisions in South Africa, the next chapter looks at similar issues in three foreign countries namely The United Kingdom, Australia and Canada. I will look at how their laws deal with the problem of improper notice.



CHAPTER 4: COMPARATIVE LABOUR LAW

In this chapter I conduct a comparative analysis of South African labour law, specifically deductions, and evaluate these against the law of three countries: the United Kingdom, Australia and Canada.

4.1 United Kingdom

Section 13 of the *Employment Rights Act 1996*⁸⁶ (ERA) provides:

(1) An employer shall not make a deduction from wages of a worker employed by him unless-

(a) the deduction is required or authorized to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

The worker must signify agreement or consent to the making of the deduction in writing.⁸⁷ In *Penname v. Paterson*,⁸⁸ a worker was informed at his interview that if he left without giving notice he would forfeit a week's wages, and this was subsequently reiterated in the letter confirming his appointment. The Employment Appeal Tribunal (EAT) held that as the worker had not signified his agreement *in writing* to such a deduction, the employer could not lawfully deduct the sum in question. It was held that if the deduction had been authorised by a relevant provision of the worker's contract, it would have been permissible.⁸⁹

I have adopted this form of recourse as an option for employers, as discussed in chapter 2.

⁸⁶ *Current Law Statutes* 1996 Vol. 1 chapter 18, Sweet & Maxwell Ltd 1997

⁸⁷ *Current Law Statutes* 1996 Vol. 1 chapter 18, Sweet & Maxwell Ltd 1997 Pg 18-26 under general notes

⁸⁸ [1989] IRLR 195, E.A.T.

⁸⁹ *Current Law Statutes* 1996 Vol. 1 chapter 18, Sweet & Maxwell Ltd 1997 Pg 26

Section 15 of the ERA deals with payments to the employer; it provides that

(1) An employer shall not receive a payment from a worker employed by him unless-

(b) the worker has previously signified in writing his agreement or consent to the making of the payment.

S17. Cash shortages and stock deficiencies in retail employment

(4) References in the following provisions of this Part to a deduction made from wages of a worker in retail employment, or to a payment received from such a worker by his employer, on account of a cash shortage or stock deficiency include references to a deduction or payment so made or received on account of-

(a) any dishonesty or other conduct on the part of the worker which resulted in any such shortage or deficiency, or

(b) any other event in respect of which he (whether or not together with any other workers) has any contractual liability and which so resulted in each case whether or not the amount of the deduction or payment is designed to reflect the exact amount of the shortage or deficiency.

Sections 17–22 give special protection to workers in retail employment where the employer makes a deduction or receives a payment in respect of a cash shortage or stock deficiency. Deductions may however be made in installments over successive pay days ...; and any amount still outstanding on a worker's final payday may be deducted at that time. Deductions and payments for other reasons, e.g. misconduct, dishonesty, poor workmanship or absenteeism, are not covered ..., and may therefore be made without limit. There is no requirement that the total amount deducted be fair and reasonable in all the circumstances.⁹⁰

The limitation period of 12 months was chosen in order to prevent employers from dredging up old events in respect of which memories may have become blurred while still allowing a sufficient time for cash shortages or stock deficiencies to be discovered in an annual stocktaking.⁹¹ If an employer pays retail workers a basic rate which takes account of likely cash shortages or stock deficiencies, but with an additional bonus payment if there are no such shortages or deficiencies, the worker's gross wages will be deemed to be the

⁹⁰ pg 18-30

⁹¹ Pg 18-31

amount which he or she would have received had there been no shortages or deficiencies.⁹²

Dowling⁹³ further investigates these specific provisions as set out above. Under sections 13–22 of the Employment Rights Act, an employer can make a deduction from wages if there is a “relevant provision” and if the worker has “previously signified” in writing his agreement or consent to the making of the deduction. A “relevant provision” can be one or more terms of the contract, the existence of which the employer has informed the worker of in writing.

Clauses relating to deductions from wages can also be contained in the written statement of employment particulars, as set out in section 1 of the Employment Rights Act 1996, as it does not require a signature. However, the worker does have to be notified personally of the provision. It is common for an employer to have the right to deduct for losses to company property which have arisen out of a worker’s carelessness or negligence. Sections 17–22 of the Employment Rights Act set out additional rules to deal with cash shortages and stock deficiencies in retail transactions. The deductions limit of one tenth deduction per month falls away on termination. Any outstanding amount can be deducted from the final wages. These types of deduction are commonly made in the retail trade. Workers in foreign exchange outlets, post offices and petrol stations are often also liable for these types of deduction.

Retail usually deals with small, high-value items and consumables. There is usually a higher labour turnover in the retail sector and employees often have access to the employer’s cash and stock; the combination of these factors leads to the need for employer protection specifically against cash shortages and stock losses.

⁹² Section 19

⁹³ Gillian Dowling, “Like a bull in a china shop’ Cyan Publishing October 2007 pg 39
Gillian Dowling is the technical consultant for Employment Law with Croner Consulting, a part of Wolters Kluwer (UK) Ltd.

My interpretation of the general notes as found in the ERA⁹⁴ is that South Africa should look at promulgating laws specific to the retail sector where losses occur more frequently. The United Kingdom has acknowledged this as a problem area and has adapted its laws accordingly. Deductions are allowed in certain circumstances without the employee's written consent. The advantage to the employer of allowing the full amount owing to be deducted is that, should the employee leave the employer, all the costs will hopefully be recovered by the employer.

4.2 Australia

Vranken⁹⁵ has written an interesting article on the current labour law struggles that Australia is faced with. The circumstances echo the current labour law situation that South Africa faces in that there are calls for deregulation. Vranken states that the labour law system in Australia is based on, among other things, hands-on government intervention to ensure the peaceful resolution of industrial disputes. These changes to their law put long-term social stability at risk for the sake of short-term political gain. There has been a call for "the removal of rigidities in the labour market which seemed the natural byproduct of deregulation in the economic and financial spheres. The overall aim was to boost international competitiveness".⁹⁶ Vranken states that the unsettling effect of a constant chopping and changing in the regulatory framework of labour law is a heavy, unnecessary price for employers and employees alike.⁹⁷ Considering his remarks, Australia seemed a good example to compare with South Africa.

Recovery of remuneration-no set-off or action for goods or services supplied by employer (1) In any proceedings by an employee against the employer to recover any

⁹² notes are in the form of a commentary

⁹⁵ Martin Vranken, Labour law reform in Australia and New Zealand; once united henceforth divided? 12 RJP/NZACL Yearbook 11, pg 25

⁹⁶ Pg 26

⁹⁷ Pg 41

amount due as remuneration, the employer is not entitled to any set-off or reduction of the claim in respect of:

(a) any goods or services supplied to the employee as, or as part of, remuneration, or

(b) any goods sold or supplied at any shop or other premises of the employer or in the profits of which the employer has any share or interest, or

*(c) any goods supplied to the employee by any person under the direction of the employer or the employer's agent.*⁹⁸

Sections 117 to 129 of the New South Wales Industrial Relations Act⁹⁹ deal with payment of remuneration. There is no actual wording specifically relating to deductions other than statutory deductions, but set-off is specifically prohibited in certain circumstances. The Office of Industrial Relations¹⁰⁰ gives some specific rules relating to “illegal pay deductions”¹⁰¹.

An employee may authorize an employer to deduct money from his pay. However, this must be done in writing and the deduction must relate to a payment that is principally for the benefit of the employee. Common types of deduction which are not permitted... unless authorized by law, court or industrial instrument include:

- * the cost of employees' uniforms
- * shortages from cash tills or cash floats
- * training courses provided to employees
- * the cost of mobile telephones provided to the employee for work-related use
- * tools and equipment supplied to the employees
- * the cost of damage to the employer's assets (including motor vehicles) and
- * the cost of breakages or accidents by employees.

The employers recourse for these type of deductions lies in a civil remedy.

In Queensland, section 397 of the Industrial Relations Act 1999¹⁰² states:

Division 3 Paying and recovering wages

⁹⁸ Industrial Relations Act no 17 of 1996, section 120

⁹⁹ Industrial Relations Act no 17 of 1996

¹⁰⁰ Office of Industrial Relations, NSW Department of Commerce accessed through www.industrialrelations.nsw.gov.au/rights/employee/illegal_pay_deduct.html

¹⁰¹ Rules issued on 18 December 2007

¹⁰² <http://www.deir.qld.gov.au/industrial>

S397 Deduction of wages in lieu of notice of termination

(2) The employer may deduct from the employee's wages an amount stated by the instrument to be forfeited or payable to the employer if notice of termination is not given for the period specified.

In Tasmania under their Workplace Standards Act¹⁰³, termination of employment, it reads "generally, if the employee leaves without giving proper notice, the employer may retain wages equivalent to the notice required and in some cases proportionate annual leave may be retained also.

In chapter 7 of this mini-thesis I will look at the South African call for labour market flexibility. In line with what South African employers want, the Australian small business size was increased thereby allowing more employers to fall within the small business category and to gain some relief from some of the rigid labour laws. What other measures can be put into place in South Africa to allow us to be more competitive in the global market, as was the aim in Australia? Queensland offers a solution for employers should their employees give improper notice. This is one remedy that could be incorporated into South African legislation to allow an effective and immediate remedy for employers without having to go through lengthy procedures. So should an employee fail to give proper notice, the equivalent amount should be allowed to be deducted from any monies owing to the employee.

4.3 Canada

Arthurs¹⁰⁴ states that globalisation and changes in the organisation of work have resulted from technological change, especially in terms of information technology.¹⁰⁵ This means that, in the broad sense, Canada must invent new structures and new processes to deal with all forms of social and economic conflict, structures that will enable Canada to improve the environment that its

¹⁰³ http://www.wst.tas.gov.au/employment_info/termination

¹⁰⁴ Harry Arthurs, Canadian Labour law and industrial relations: Back to the future? , Industrial Relations Centre Queens University 1998

¹⁰⁵ Pg 1

aggressive and reckless behaviour has created.¹⁰⁶ This is a situation similar to the one South Africa finds itself in, as the South African labour laws may not have had the initial desired effect that was sought.

Considering that part of our Constitution (s 9) was derived from the Canadian Charter of Rights, I thought Canada a good choice for a comparison with South African labour laws.

The federal Canadian Labour Code¹⁰⁷ states that:

No employer shall make deductions from wages or other amounts due to an employee, except as permitted by or under this section.

However, employers may make deductions where, *inter alia*, the employee authorises such in writing or where the employer has overpaid an employee's wages.¹⁰⁸

2.5.4.1 (3) *Damage or loss*

Notwithstanding paragraph 2(c), no employer shall, pursuant to that paragraph, make a deduction in respect of damage to property, or loss of money or property, if any person other than the employee had access to the property or money in question.

Edmondson¹⁰⁹ interprets this statute in terms of 2.5.4.1 (2) (c) as

... amounts authorized in writing by the employee, requires a written authorization by the employee assenting to the deduction of a specific amount. For every deduction made, the authorization must be in writing, should specify a particular sum, and be given in a way that is truly consensual. General blanket authorizations in employment contracts, with or without specific amounts, may operate to assign responsibility or liability to the employee, but the corresponding deduction requires a specific authorization. In order to meet these requirements, the written authorization must be obtained after the fact, i.e., after the incident or transaction to which it is related has occurred.

It should be noted that the relevant provisions of the *Canada Labour Code* are only concerned with the issue of when an employer may make a deduction from

¹⁰⁶ Pg 11

¹⁰⁷ s254.1

¹⁰⁸ s254.1(2)

¹⁰⁹ Warren Edmondson, Assistant Deputy Minister of Labour, Human Resources Development Canada accessed through www.hrsdc.gc.ca

wages or other amounts; it does not seek to regulate the items or costs for which an employee may be held responsible. Where a deduction is not permitted, the employer may seek recovery through the civil courts, appeal a payment order or pursue other means of redress, depending on the circumstances. One needs to differentiate between the employment contract, which spells out the responsibilities of the parties, and an authorisation allowing a specific deduction. Whether the employee is responsible for an item or costs, and whether the amount thereof may be deducted from wages, are two separate issues.

In summary, Edmondson notes it is the DOL's position that employers cannot deduct money alleged to be owed by an employee to the employer from the employee's wages without the employee agreeing to the deduction, in writing, at the time of the deduction.

Subsection 2.5.4.1 (3) provides that

... where the deduction related to damage to property, or loss of money or property, and any person other than the employee had access to the property or money in question, no deduction is permitted even in cases where the deduction has been specifically authorized in writing by the employee.

In *Canada Packers Inc. v Kennedy*,¹¹⁰ the employee, a driver, failed to deposit cash collected by him on behalf of the employer. He left it in the truck and the money went missing. Subsequently, the employer wanted to deduct the full value of the money lost from the employee. The court held that the employee acted in contravention of established practices and the direct orders of his employer. "This breach of contract was the direct cause of the loss for which the employee is liable to his employer."¹¹¹ The court cited Batt¹¹² which states the employee is liable only if he has been guilty of negligence. The onus is on the employer who seeks to claim damages against the employee to prove to the court the terms of the contract, the breach of such terms and the damages as a

¹¹⁰ *Canada Packers Inc. v Kennedy* (1334) 1983

¹¹¹ Para 8

¹¹² Batt, *Law of Master and Servant* 4th ed 1950

consequence of this breach.¹¹³ In this case the employer was entitled to recover the full sum of money lost from the employee.

Upon examination of these international labour laws, the United Kingdom has a specifically designed statute relating to deductions, especially in the retail industry where there seems to be a higher prevalence of shortages and losses. Employers cannot be expected to suffer such losses and not be able to recover them. South Africa should look at these provisions and incorporate them into the relevant statutes.

Looking specifically at three countries, the United Kingdom, Australia and Canada and their laws relating to deductions from employees' wages as a comparison to the South African law on deductions, I found the UK law most lenient with regards to problems employers face with regards to deductions for losses caused by employees. Although we are a separate jurisdiction to these countries, employers face similar problems. Considering and incorporating certain sections of these international labour laws could give rise to a change of our legislation, the way our courts may interpret our current legislation or suggestions for future changes of our legislation.

¹¹³ Para 15

CHAPTER 5: POSITIONS ON DEDUCTIONS

5.1 South African bargaining councils

Section 49 of the BCEA allows for variations, by agreement, to certain sections of the BCEA and sectoral determinations. The section on deductions (s 34) is not mentioned as a section that may not be altered. Under section 37(2)(a) of the BCEA, a collective agreement may not permit a notice period shorter than that required by subsection (1).

The Road Freight Transport Industry has an agreement with some of its members that if the employees agree to the deduction from wages for loss caused by the employee, it will count as a mitigating circumstance towards considering a sanction short of dismissal. The vehicles used in this industry are so expensive to insure that, should it be proven that the vehicle has been damaged as a result of the employee's negligence or fault, the employee will be held responsible.

The Metal and Engineering Industries Bargaining Council's (MEIBC)¹¹⁴ termination of service agreement provides that:

Whenever the contract of service is terminable by the notice period referred to ... above and the employee fails to give notice to work such notice period, the employer may deduct pay in lieu of such notice period in the establishment concerned.¹¹⁵

There is a similar provision in the Motor Industry Bargaining Council's (MIBC)¹¹⁶ termination of service agreement:

Should an employee fail to work for the appropriate period of notice, the employee shall forfeit ... an amount equal to the remuneration that would have been earned during the unexpired part of the notice period.¹¹⁷

¹¹⁴ Metal and Engineering Industries Bargaining Council, Consolidated collective agreements, Juta & Co Ltd 1987

¹¹⁵ clause 18(3)

¹¹⁶ Motor Industry Bargaining council consolidated agreements, Revision service 18, 2003, Juta

In section 10(4) of the service agreement, the MIBC goes one step further by allowing the employer to take from other benefits due to the employee should there not be sufficient money to cover the notice not given. This essentially protects the employer fully, as there are usually other monies due to the employee that in normal circumstances (i.e. no agreement in place) would not have been allowed to be touched or offset against monies due to the employer.

Section 40 of the BCEA and section 29 of SD9 state what outstanding monies are due to the employee on termination, that is, an employer cannot withhold leave pay in lieu of notice (unless in a collective agreement such as the above). Although these agreements do not come from the wholesale and retail sector, if they have been negotiated in other sectors they are not unlawful in terms of South African labour law, as the employer can do what the council agreements permit and that will not be unlawful.

5.2 Department of Labour (DOL)

The DOL publishes legislation that regulates labour practices and activities. The DOL is also the body that regulates and enforces these practices.

Over the last four years there have been extensive DOL inspections in the retail sector. In terms of these inspections, IES 6¹¹⁸ forms are filled in on the premises by an inspector, in the presence of the employer, and interviews are held with staff members in the workplace.

The main thrust of these inspections is to ensure that employers are complying with SD9, and that employees are being paid according to the minimum wage tables. There is very little emphasis on deductions or notice periods, in fact only two lines of the five-page form deals with these issues:

¹¹⁷ Clause 10(3)

¹¹⁸ Department of Labour: Inspection and Enforcement Services form 6, Sectoral Determination 9: Wholesale and Retail Sector, South Africa

10.14 Period of notice¹¹⁹:

10.16 Deductions: (please specify)¹²⁰

In my experience, at the time of a DOL inspection very little emphasis is put on deductions and notice; however, when an employee brings a claim against the employer, the DOL interprets the BCEA as meaning that only in the presence of a written authorisation by the employee may a deduction be made. The DOL does not insist that the employee work full and proper notice. It does not subscribe to subclause (2) of the BCEA as being alternate to (1). The employer thus has little recourse against the DOL.

Sections 71 to 73 of the BCEA deal with appeals by the employer against a compliance order issued by the DOL, and an appeal to the Labour Court should the employer still not agree with the Director General. Again this shows that the employer has to deal with time constraints and costs, as to appeal to the Labour Court would incur both time and money. My experience has shown that, in appeals to the Director General against compliance orders, none have been amended; this is merely a formality with little or no relief for the employer. The DOL is exercising a public function and its powers are constrained by the Promotion of Administrative Justice Act (PAJA).¹²¹ The issuing of compliance orders and inspections must be done within the ambit of the PAJA. Part of these constraints involve being reasonable and fair in dealing with employers.

Plasket states: "Administrative law serves both to empower administrative officials so that they can implement policies and programs and to limit the exercise of power by officials by requiring all administrative action to meet certain minimum requirements of legality, reasonableness and fairness."¹²²

Plasket continues by saying that "the common law still plays a role in this system, albeit a complementary, and far from dominant, role: it will fill in the gaps

¹¹⁹ P 4 of IES 6 form

¹²⁰ P 5 of IES 6 form

¹²¹ Promotion of Administrative Justice Act 3 of 2000

¹²² Clive Plasket, A paper presented to a Legal Resources Centre seminar on the Promotion of Administrative Justice Act 3 of 2000 in Johannesburg on 23 October 2001 on Administrative Action: The Constitution and the Promotion of Administrative Justice Act 3 of 2000, para 2

left by the Constitution and the Act and will be used to give meaning to many of the concepts and principles contained in both.”¹²³ Should Plasket’s viewpoint be valid, it would allow the flexibility needed by employers when it comes to recouping deductions and improper notice from employees.

5.3 Commission for Conciliation, Mediation and Arbitration (CCMA)

In a telephonic interview held with a case manager, Mr Thokazani, at the CCMA,¹²⁴ it was learnt that the CCMA selects its cases and has no jurisdiction over deductions. If a case relates to this only, it is referred to the DOL.

My experience has shown that, if an employee takes an employer to the CCMA for unfair dismissal, the CCMA can rule that the outstanding wages must be paid to the employee and issue a ruling. This is dealt with in section 74 of the BCEA. In *Douglas and Others V Gauteng MEC of Health*,¹²⁵ the Labour Court maintained that a dispute, as framed in the initial referral to the CCMA or bargaining council, is definitive and that it is not incumbent on a party to change the nature of the dispute at the second stage of referral at arbitration or adjudication.¹²⁶ In other words, the CCMA and the Labour Court can only deal with BCEA issues if they are mentioned in the 7.11 CCMA referral form. There have been cases where the Commissioner deletes certain wording from a settlement agreement concluded at conciliation. For example: “The above parties wish to record their agreement reached in full and final settlement of all claims arising **from the employment relationship**/this referral” [Words in bold deleted.]

¹²³ Para 26

¹²⁴ CCMA call centre 0861 161616 on 19 February 2008

¹²⁵ *Douglas and Others v Gauteng MEC of Health* (JS736/06) [2008] ZALC 8; [2008] 5 BLLR 401 (LC)

¹²⁶ Para 38

This allows the employer to continue with civil or criminal claims against the employee in order to recover losses.¹²⁷ However, in this particular case, it continued criminally and no recourse was found as the public prosecutor has the right to accept or deny a case. This is discussed further in section 6.3 of this thesis.

In a research survey conducted by Levy¹²⁸, he looked at the CCMA versus Bargaining Council and Private arbitration as options for dispute resolution in South Africa. Part of the research was to establish whether or not the dismissal provisions in the South African labour statute are effective and serve their purpose. Levy also made reference to the OECD¹²⁹ report which said that the subject of employers complaints with regard to South African labour legislation, was not the law itself, but rather the manner in which the law has been interpreted. The report also critical of the Labour Court which it saw as slow and cumbersome and also noted that the CCMA was particularly overburdened.¹³⁰

Levy noted that a number of companies, through contracts of employment, have contracted out of the CCMA dispute resolution system and have opted for private arbitration. One procedure at the CCMA is that the commissioner can not dismiss a case should the application not arrive. A certificate is issued of non-resolution therefore allowing the applicant to refer their case to arbitration. However should the respondent not arrive, the case can continue if it is proved that notice was served. This is very unfair towards employers. Levy's research shows there has been a shift in favour of employees overall. This can be explained to a large extent by the increase in the number of default awards, which are in 92% of the cases, in favour of the employee.¹³¹ Levy also says that one major area of interest is that there is little consistency between the CCMA and Bargaining Council / Private Arbitration when it comes to outcomes. Levy

¹²⁷ WE3733-06 CCMA case reference number

¹²⁸ Research Findings : The CCMA, Bargaining Councils and Private Cases, Andrew Levy and Tanya Venter. Tokiso Review 2008 – 2009, Tokiso

¹²⁹ Realising South Africa's Employment Potential: OECD Economic Surveys South Africa Economic Assessment, OECD 2008

¹³⁰ Pg 10

¹³¹ Pg 30

said the CCMA held that its outcomes showed an equality or outcome which indicated their neutrality. However Levy's research shows that the CCMA outcomes have favoured employees – not consistent with the argument of neutrality. Levy also says that there was a significantly greater probability of CCMA Commissioners finding for employees than was so in the Bargaining Council / private arbitration environment.¹³² A large problem at the CCMA is that commissioners are performance managed on the number of cases they hear and there is extreme pressure on them to reach their targets. The result is that over robust commissioners may bully parties into an early settlement rather than complete the process to their mutual satisfaction. Quantity comes before quality and employers may lose out. This also adds to the perception that there is bias towards employees and may cloud future employment decisions.¹³³



¹³² Pg 30

¹³³ Pg 35

CHAPTER 6: EMPLOYER REMEDIES

6.1 Substantive remedies and sources of law

There are few cases dealing with the section relating to deductions (other than cases dealing with deductions of union subscriptions which are not pertinent to this mini-thesis). It would possibly require an employers' organisation to take a test case to the Labour Court. However, two interesting cases deal with the issue of having an agreement in writing when making a deduction from an employee's remuneration.

In *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen*,¹³⁴ the employer approached the Supreme Court of Appeal to determine whether or not the boards of the Pension Funds had the power to withhold payment of pension benefits due to the employee pending the outcome of a damages action instituted against the employee by the employer.¹³⁵ The action was to recover for losses caused by the employee (Oosthuizen) as a result of misconduct. Rule 12 of the Provident Section Fund read with section 37D(1)(b)(ii) of the Pension Fund Act¹³⁶ allows the trustees of the funds to withhold or delay payments of benefits due to a member pending determination or admission of liability.

However, it was argued that the object of that section – the protection of an employer against loss occasioned by employees' acts of dishonesty – would be thwarted if an employee could simply circumvent it by resigning and claiming immediate payment of his benefits upon discovery of his criminal conduct.¹³⁷

Why this case is particularly interesting in terms of this mini-thesis is the argument relating to an admission of debt owing by the employee to the

¹³⁴ *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen* (103/2008) [2008] ZASCA 164 (01 December 2008)

¹³⁵ Para 2

¹³⁶ Pension Fund Act 24 of 1956

¹³⁷ *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen* (103/2008) [2008] ZASCA 164 (01 December 2008) Para 10

employer in writing, or in this case the absence of an agreement in writing. It is very similar to the predicament facing employers governed by the BCEA and SD9. The refusal by the employee to sign an agreement of debt thwarts the employer's possibility of recovering for loss or damage against the employee's remuneration.

Section 37D(1)(b)¹³⁸ provides:

(1) A registered fund may-

(a)...

(b) deduct any amount due by a member to his employer on the date of his retirement or on which he ceases to be a member of the fund, in respect of –

(i)...

(ii) compensation in respect of any damage caused to the employer by reason of any theft, dishonesty, fraud or misconduct by the member, and in respect of which –

(aa) the member has in writing admitted liability to the employer; or

(bb) the judgment has been obtained against the member in any court, including a magistrates court, from any benefit payable in respect of the member or a beneficiary in terms of the rules of the fund, and pay such amount to the employer concerned.

"It has been stated in a number of cases that the object of s 37D(1)(b) is to protect the employer's right to pursue the recovery of money misappropriated by its employees."¹³⁹ The Supreme Court of Appeal (SCA) states that the result of an order in the event of the respondent's success in the main application is that the appellant would most probably end up with a hollow judgment, precluded from enforcing the future compensation award it may obtain against the respondent in the pending action.¹⁴⁰ I discuss this further in section 6.2.2 of this thesis. The SCA then investigated the difficulties employers may face, such as the employer may only suspect the employee of dishonesty and need time to

¹³⁸ Pension Fund Act 24 of 1956

¹³⁹ Para 16

¹⁴⁰ Para 9

conduct an investigation. The SCA acknowledged that employers face lengthy delays in finalising cases in the South African justice system. Maya JA stated :

... these practicalities lead me to disagree with the submissions ... that the tense used by the legislature in s 37D(b)(ii)(aa) and (bb), in these words “has in writing admitted liability” and “judgment has been obtained” reflects an intention that proof of liability must be available on termination of the employment contract.¹⁴¹

Such an interpretation would render the protection afforded to the employer by s 37D(1)(b) meaningless, a result which plainly cannot have been intended by the legislature. It seems to me to give effect to the manifest purpose of the section, its wording must be interpreted purposively to include the power to withhold payment of a member’s pension benefits pending the determination or acknowledgment of such member’s liability.¹⁴²

The SCA granted the employer leave to intervene against the pension payout to the employee pending the employer’s action against the employee.

In *United Transport and Allied Trade Union on behalf of Harris and others and Promat, a division of Transnet Ltd*,¹⁴³ the employees failed to attend a course they had enrolled for and the employer had paid for. The arbitrator, Dawie Bosch, found that the employees were or should have been aware that the company would suffer a loss if they did not attend.

In a circular, the company invited employees to attend a training course. The circular also stated that, should the employees enrol and drop out, the cost of the course would be deducted from their wages. The value of the course was R10 500 per person. The employees arrived at the campus for the course but could not find the venue and returned to the warehouse and, subsequently, they did not return for the remainder of the course. The company paid a total of R42 000 for which they received no benefit.

¹⁴¹ Para 18

¹⁴² Para 19

¹⁴³ *United Transport and Allied Trade Union on behalf of Harris and others and Promat, a division of Transnet Ltd* (2002) 23 ILJ 457 (BCA)

The company argued that

... the grievants further admitted that they knew the company had to pay for the course. The grievants were at fault for the loss suffered by the company. The evidence shows on a balance of probabilities, that the grievants must have been aware that the money would be recovered from them if they failed to attend the course.¹⁴⁴

Therefore the company was entitled, in terms of s 34(2) of the BCEA, to deduct from the grievants' salaries the money it had lost.¹⁴⁵

The union's argument that the grievants did not sign an agreement authorizing the deductions is not in point. The company relies on the above statutory provision, which does not require that an agreement to deduct must have been signed.¹⁴⁶

Bosch stated that "the employees should also use their common sense and take independent action if problems arise and are not resolved by their manager. They knew that the course would have benefited them ... they knew that the company would suffer losses if they did not attend."¹⁴⁷ Bosch further found the procedure fair in that the employer informed the employees at least a month before the first deduction was made that the company intended to make these deductions.

In my view the one failing of this case was that the arbitrator only allowed the company to recover 25% of the loss, as the Act does not allow for 25% in total to be recovered, but 25% per month until the loss is paid in full. Section 34 of the BCEA should clarify this.

S34 (2) (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 employees remuneration in money.¹⁴⁸

¹⁴⁴ Para 11

¹⁴⁵ Para 12

¹⁴⁶ Para 17

¹⁴⁷ Para 27

¹⁴⁸ Basic Conditions of Employment Act 75 of 1997

Section 34(2)(c) states a total amount to recover, while section 34(2)(d) should be interpreted as per month, as remuneration is monies received for work done, therefore being deducted from daily, weekly, fortnightly or monthly remuneration.¹⁴⁹ Deductions are conventionally made as and when remuneration is paid, that is, monthly or weekly, so the “total deductions” referred to in section 34 must be in reference to total deductions per month or week. The definition of remuneration under the BCEA¹⁵⁰ states:

... ‘remuneration’ means any payment in money or in kind ... made or owing to any person in return for that person working for any other person

This definition gives the impression that work is being done not for payment upon termination. Therefore, 25% should be recoverable while employment continues and the balance should be due upon termination.

In *Labour law through the cases*,¹⁵¹ Du Toit writes that it was held that section 34(2)(a) of the BCEA authorises the deduction of losses incurred by the employee “due to the fault of the employee” and must be in proportion to the degree of the employee’s fault. Where the employer is also at fault, losses should be apportioned between the employer and the employee in proportion to the fault of the each. Although the section is not clear, it is submitted that this interpretation is correct since otherwise an employee could avoid a valid deduction simply by refusing to sign an agreement.¹⁵² This was the summary of *United Transport and Allied Trade Union on behalf of Harris and others and Promat, a division of Transnet Ltd*¹⁵³, where Bosch found that section 34(2) does not require a written agreement in respect of a deduction made in terms of section 34(2).¹⁵⁴ In the absence of a written agreement, the employer has to prove the loss which is (a) due to the fault of the employee and (b) whether the

¹⁴⁹ S32(1) An employer must pay to an employee any remuneration that is paid in money- (b) daily, weekly, fortnightly or monthly.

¹⁵⁰ S 1 Definitions

¹⁵¹ *Labour Law through the Cases*, edited by Prof Darcy Du Toit, Service issue 9 June 2007, LexisNexis Butterworths BCEA 24

¹⁵² Pg BCEA 24

¹⁵³ *United Transport and Allied Trade Union on behalf of Harris and others and Promat, a division of Transnet Ltd* (2002) 23 ILJ 457 (BCA)

¹⁵⁴ Para 17

employee had been given a fair and reasonable opportunity to show why the deductions should not be made.¹⁵⁵

In *South African Breweries Ltd (Beer Division) v Woolfrey & others*¹⁵⁶ a sanction of suspension without pay effected by means of deductions from the back pay to which the employee was entitled as a result of the order of reinstatement was given by the arbitrator. The Labour Court maintained that, during a suspension, the employment relationship is maintained but the obligations to tender services and to pay wages are suspended.¹⁵⁷ The Labour Court went on further to state that the section in the BCEA dealing with deductions is premised on remuneration or wages coming due after a tender of services or actual performance by the employee.¹⁵⁸ Mlambo also stated that “the Courts should in no way discourage parties from resorting to arbitration and should deprecate conduct by a party to an arbitration who does not do all in his power to implement the decision of the arbitrator promptly and act in good faith”.¹⁵⁹ The Labour Court found it was permissible to allow suspension without pay as a form of disciplinary penalty.¹⁶⁰ Rather than focus on the issue of suspension, for the purposes of this mini-thesis what is interesting is that in this case there is no mention of an agreement in writing. The employee never agreed to the deduction yet the Labour Court allowed the deduction to be made from pay due to the employee. This case¹⁶¹ shows there could be a deduction where the employee has caused loss by way of misconduct.

¹⁵⁵ Para 18

¹⁵⁶ *South African Breweries Ltd (Beer Division) v Woolfrey & others* [1999] 5 BLLR 525 (LC)

¹⁵⁷ Para 10

¹⁵⁸ Para 11

¹⁵⁹ Para 15

¹⁶⁰ Para 17

¹⁶¹ *South African Breweries Ltd (Beer Division) v Woolfrey & others* [1999] 5 BLLR 525 (LC)

6.2 Civil remedies

6.2.1 Small Claims Court

The Small Claims Court allows claims up to the value of R7 000, which could cover the employer effectively when claiming back losses or notice up to this value. However, the rules of the Small Claims Court state:

7 Parties who may appear in court

(1) Only a natural person may institute an action in a court and, subject to the provisions of section 14

(2), a juristic person may become a party to an action in a court only as defendant.¹⁶²

Anyone except juristic persons such as companies, corporations or associations may institute an action in the Small Claims Court.¹⁶³

This closes a potentially useful avenue that would allow an employer some relief in terms of recovery of losses or damages caused by an employee. This forum would be perfect as it does not allow attorneys or advocates to represent the parties and could be an effective, faster and cheaper method for the employer to recover losses or damages suffered by the employee. Section 34 of the Constitution provides the right of access to courts.

34 Access to courts

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

Considering this right, why should there be a limitation on a juristic person's right to the courts? It could be argued that preventing juristic persons from instituting actions in the Small Claims Court is an unjustifiable infringement of their Constitutional right. Should the "independent impartial forum" be referring to the

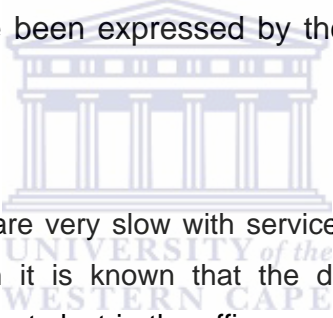
¹⁶² Small Claims Courts Act 61 of 1984

¹⁶³ www.doj.gov.za/brochure - Department of Justice

CCMA, then this has some serious implications for the employer. See chapter 5 where I discuss the findings about CCMA bias.

6.2.2 Magistrates Court

The procedure mentioned in section 65 of the Magistrates Courts Act¹⁶⁴ involves a debtor being summoned to appear in court and face an enquiry into his/her financial position. Then an agreement is secured to pay in instalments via an emoluments attachment order. A writ of execution is then issued which would become an order of court. The Sheriff attaches assets – first movables and then immovables – and then the Sheriff sells the assets in execution of the debt. The following concerns have been expressed by the Cape Law Society concerning sheriff procedures:

- 
- Some sheriffs are very slow with service. 90% of returns of writs are *nulla bona* even though it is known that the debtor owns assets which can be attached. Process gets lost in the offices and very often a year later one gets a phone call to enquire whether a writ which has been found must be executed.
 - Excessive removal costs and storage charges and excessive charges for sales in execution are general complaints.
 - Long delays in furnishing returns of service, executions of warrants and payment of proceeds of sales.
 - In many instances the sheriff's charges exceed the proceeds of sale in execution and the Plaintiff is liable for the shortfall.
 - Attempted services or executions cannot be controlled and when having a bill taxed, it is an impossible task to refute the sheriff's claims of attempted service.

¹⁶⁴ Magistrates' Courts Act 32 of 1944

- A further complaint is that sheriffs attach goods without taking the trouble of investigating claims of ownership by third parties. This results in unnecessary interpleader proceedings, which result in extra costs for the plaintiff.
- Commissions payable to sheriffs. Sheriffs attach items that are subject to hire purchases. Through this conduct the sheriff creates fees in the form of attachment costs, removal costs, storage costs, interpleader proceedings, costs of returning goods etc. All these costs have to be borne by the plaintiff.¹⁶⁵

Although this is a remedy available to employers, the practicalities of following through with this lengthy procedure may still result in no actual debt being recovered by the employer. These sentiments are echoed by labour lawyers who deal with these practicalities on a daily basis. Jacobs¹⁶⁶ states:

In many cases, apart from the cost and hassle factors involved for the employer, many employees are “men of straw”, unable to repay on a judgment debt, and the end result is perhaps the employer throwing good money after bad, and a judgment which is not worth the paper it is written on – an impractical and often hollow remedy.

Jacobs further states that even with an acknowledgement of debt signed by an employee, an employer may still have to seek relief from a court should the employee default on payment. The employer therefore accumulates more legal fees and more lengthy procedures to follow.

6.3 Criminal procedures

The Act¹⁶⁷ provides that the employer must be able to link the employee to that actual stock loss and there must be both direct and sufficient evidence. One cannot act on suspicion or possibilities relating to the employee.

¹⁶⁵ Information supplied by SH Christie – Legal Officer Training, execution of court orders
16 January 2009

¹⁶⁶ Gerald Jacobs, Labour Lawyer, *SA Pharmaceutical Journal*, April 2008 pg 50

¹⁶⁷ Criminal Procedure Act 51 of 1977

The Criminal Procedure Act¹⁶⁸ states:

Chapter 29 Compensation and Restitution

S300 The court may award compensation where an offence causes damage to or loss of property.

Criminal cases will usually involve fraud, but the employer needs resources and time to follow this avenue. The Public Prosecutor has the option to decide whether or not to allow a case to continue.

In one case,¹⁶⁹ an employer gave several statements to the police but the witnesses were not allowed to write the statements in their own handwriting, but had to dictate these to the police officers who were investigating the case. The police officers are not always able to write fluently in the language the statement is given in, as it may not be their first or second language, resulting in a poorly drafted statement that is unclear and that does not make sense to any reader. Despite the employee actually admitting to fraud and theft, sometimes the case does not get accepted by the public prosecutor. In this case, the employer received a SAP21 form from the South African Police Service with the following wording: "The Senior Public Prosecutor at Bellville Magistrates Court (the relevant court) declined to prosecute any person in the above case number." This effectively disallowed an option that is supposed to remain open to the employer as a means of recourse to recover money from the employee. This is despite a confession of fraud by the employee, documentary evidence and written testimony from a number of witnesses (all of whom were willing to testify in a court), relating to fraud, theft and losses caused by the employee.

Assuming a case reaches trial and is found in favour of the state. If the judgment debtor fails to comply, the matter is transferred to the Magistrates' Court and the execution procedure followed in terms of the Magistrates' Act,¹⁷⁰ this procedure only takes more of the employer' time and money, and is circuitous for the employer. The sheriff of the court must then serve summons on the employee.

¹⁶⁸ Criminal Procedure Act 51 of 1977

¹⁶⁹ CAS294/02/2006 South African Police Service

¹⁷⁰ Magistrates Court Act 32 of 1944

Failing payment a warrant of execution is issued. Should the employee turn out to be a “man of straw”, once again the employer is at a loss as there are no goods for the sheriff to attach in order to sell and repay the debt owed to the employer.

These remedies in law are very limiting for the employer and do not offer any effective relief or recovery. It would therefore be appropriate to change the law and policy on deductions in order to address this problem. The remedy under section 34(2) of the BCEA needs to allow for due process that allows for the rights of both employers and employees. Employers should also have better internal audits and oversight, but for genuine cases of loss or damage there are very limited remedies available.

The employer only has any sort of bargaining power if an employee wants to stay. If there is a possibility of continued employment, the employee may sign an acknowledgement of debt. However, if the employee does not want to stay, or has absconded, or the employer wants to dismiss the employee, then the employer has no bargaining power to try and persuade the employee to sign an acknowledgement of debt. Dismissal means no recovery from the employee under our current law. What if the loss caused was not simply a bad faith error, but was wilful or negligent? Surely the law cannot protect such employees and effectively punish the employer by not allowing the ability to recover losses or damages suffered?

How do small businesses or even large firms that suffer losses cope with the cumbersome legislation that governs employers? They clearly cannot rely on the courts as discussed above. The best solution would be to read the BCEA and SD9 (which has the same wording), and to allow the interpretation that section 34(2) is alternative to section 34(1). If an employee will not agree to the deduction in writing, the employer must hold a hearing to determine whether the four subsections (a) to (d) have been met and, if they have, the employer should be able to make the deduction. This is the only way they will be able to recover monies due to them for loss or damage.

When it comes to improper notice, all employers should cover themselves with a clause as suggested above in case an employee fails to give proper notice.



CHAPTER 7: CONCLUSION

In this mini-thesis I have discussed the following issues:

- The difficulties confronting employers when employees give improper notice and cause the employer financial loss
- The remedies available in such circumstances

I have made various suggestions and looked at ways in which the applicable legislation should be interpreted, This includes sections 34(1) and 34(2) of the BCEA and how they should be interpreted in light of section 23 of the Constitution.

Despite other arguments, I believe my point is valid, as my conclusions are in line with what I believe are the most significant words in this thesis. These are contained in the comment by Du Toit in *Labour law through the cases*,¹⁷¹ where he maintains that section 34(2) does not require a written agreement in respect of a deduction made in terms of section 34(2). Although the sections on deductions contained in the BCEA and SD9 are unclear, it is submitted that an employee could avoid a valid deduction simply by refusing to sign an agreement. This is illogical and is supported by Du Toit, who maintains that employees should not be able to avoid deductions simply by not wanting to sign an agreement allowing for a deduction to be made. Section 34(2) should be involved in cases where the employer needs to make a deduction and the employee has not signed any agreement. The procedures listed should be followed before the deduction can be made to ensure a fair procedure and a fair reason. I agree that deductions cannot be made arbitrarily and there must be some form of protection for employees, hence the procedures to follow. Once these steps have been complied with and the deduction has been proved valid, in the absence of the employees' signature the employer should be able to make the deduction without the employee's consent.

¹⁷¹ *Labour Law through the Cases* edited by Prof Darcy Du Toit, Service issue 9 June 2007, LexisNexis Butterworths BCEA 24

When a dismissal takes place, there are procedures to follow. The employee does not have to give his or her permission or agree in writing before the dismissal can take place. Therefore, a similar analogy should be made in the case of deductions.

These conclusions are supported by repeated calls for labour market flexibility, with similar trends being present in both Australian and Canadian labour law. In South Africa, businesses, particularly small businesses, have asked for similar dispensations to enable them to remain competitive and survive in the global and South African markets.

At the ANC conference held in July 2005, Deputy Minister Moleketi¹⁷² said that three specific issues need to be addressed in terms of the South African labour market:

1. The cost of dismissing nonperformers
2. The effect of extension of agreements to nonparties on small businesses
3. The cost imposed on small businesses by regulations, including labour and tax regulations

Some of the solutions Moleketi proposed include

- increasing the size of businesses exempt from labour regulations and SDL payments to 200
- allowing a different regime for certain industries
- allowing a different regime for small companies
- adapting labour market rules

In a survey done by Rankin,¹⁷³ some interesting perspectives were found to be harboured by South African businesses in terms of their views on the South African labour law system.

¹⁷² Development and underdevelopment – overcoming the two economy divide, Deputy Minister Moleketi, ANC NGC discussion document, July 2005

- Labour laws most frequently constrain businesses from hiring new employees before all other business factors.¹⁷⁴
- Changes in labour market regulations are the most common reason for the decline in employment..¹⁷⁵
- The responses indicate that more firms believe the various labour Acts have lead to a reduction in employment rather than an increase.¹⁷⁶
- Almost no firms view any of the components (the Acts) as a benefit.¹⁷⁷

Very few firms believe that the labour regulations have brought about any benefits for them.¹⁷⁸ Labour market regulations are mentioned frequently as a constraint in both the 1998 and 2002 surveys (by Rankin), suggesting that perceptions have not changed over the period.¹⁷⁹ In this section (the relationship between labour regulations and employment), we found that labour regulations are regarded by many firms as a constraint to expanding full-time employment and that the impact of labour regulations falls heavily on small firms and the unskilled.

Van Niekerk¹⁸⁰ states that the South African labour market is frequently cited in international studies as being among the world's most rigid. South Africa is 115th (out of 117 countries) in relation to the flexibility of hiring and firing practices.¹⁸¹ Costs of disputes are high and proceedings are overly technical. All these issues

¹⁷³ The regulatory Environment and SMMEs, Evidence from South African firm level data, Niel Rankin, School of Economics and Business Sciences, University of Witwatersrand, September 2006, Working paper 06/113

¹⁷⁴ P30

¹⁷⁵ P34

¹⁷⁶ P36

¹⁷⁷ P43

¹⁷⁸ P44

¹⁷⁹ P69

¹⁸⁰ Regulating flexibility and small business, Revisiting the LRA and BCEA, A response to Halton Cheadle's concept paper, Andre Van Niekerk, March 2007, Development Policy Research Unit 07/119

¹⁸¹ Regulating flexibility and small business, Revisiting the LRA and BCEA, A response to Halton Cheadle's concept paper, Andre Van Niekerk, March 2007, Development Policy Research Unit 07/119 at P7

have a particularly severe impact on small business, which is least able to apply the resources required to address them.¹⁸²

There is a general perception that, in terms of labour relations, it is hard to be an employer in South Africa. I have shown that it is a fact that it is hard to recover losses caused to the business by employees. This adds to the perception that it is hard to be an employer in South Africa as employers are frustrated as they cannot fire staff easily or get their money back easily from their employees.

In conclusion, the wording of the BCEA and SD9, although ambiguous on first glance, actually becomes clear on further scrutiny. The wording shows conclusively that deductions can be made without the employees' consent, provided four criteria, (a) to (d), are met. The interpretation accepted by the DOL is a political one, as it is there to protect employees and it feels that it has even more power to do so post-1994 and the new legislation. One of the purposes of the BCEA is to promote social justice, which should include ensuring that employers do not lose money at the hands of employees. This means both employers and employees have the right to fair labour practices.

On a balance of convenience, the employee is favoured. The employee has the DOL taking its narrow interpretation and suffers no cost when going to the DOL. The employer has money to pay back while the employee usually has little or none. The employer is easier to find for further action than a single employee. The LRA¹⁸³ stipulates that labour relations be resolved with the minimum of legal formalities. Forcing the employer to litigate to recover money is a direct contradiction of the LRA and promotes legal formalities rather than minimising the processes.

When faced with civil and criminal remedies, I have shown that the Labour Court is an expensive option, as well as being uncharted, as there is no case law or precedent to rely on. Employers are more willing to settle and not recover the debt than to dedicate more time and money to an uncertain outcome. The Small

¹⁸² P12

¹⁸³ Labour Relations Act 66 of 1995 section 138(1)

Claims Court is unavailable to most employers and criminal proceedings involve time and money and also have uncertain chances of success.

It should become a standard practice that section 34(2) be alternate section 34(1) in the BCEA and the SD9 and that deductions may lawfully be made providing the employer follows certain procedures. The DOL must align itself to this standard. It could enforce the adherence to all procedures rather than not even entertaining the possibility that it could be interpreting the law incorrectly.

Employers should protect themselves by including a clause in their contracts relating to notice, similar to those used by some labour unions, in order to curb staff abscondment. This might allow the employer some compensation should the employee leave without giving proper notice.

South Africa should adopt legislation similar to that of the United Kingdom, especially in the retail industry. The current situation faced by employers cannot continue. As shown in this mini-thesis, labour laws in South Africa are one of the major contributors to employers thinking twice before expanding their businesses. These concerns need to be addressed in order to allow South Africa to have a more positive future when it comes to trying to elevate employment levels and ensuring that more people are gainfully employed.

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