



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA  
JUDGMENT**

**Not Reportable**  
Case No: 1154/2022

In the matter between:

**MHLONTLO LOCAL MUNICIPALITY**

**First Appellant**

**THE SPEAKER: MHLONTLO LOCAL MUNICIPALITY**

**Second Appellant**

**THE MUNICIPAL MANAGER:**

**MHLONTLO LOCAL MUNICIPALITY**

**Third Appellant**

and

**GCINIKHAYA NGCANGULA**

**First Respondent**

**MALIBONGWE NQEKETHO**

**Second Respondent**

**Neutral citation:** *Mhlontlo Local Municipality & 2 others v Ngcangula and Another* (Case no 1154/2022) [2024] ZASCA 5 (January 2024)

**Coram:** NICHOLLS, CARELSE and MATOJANE JJA and CHETTY and TOKOTA AJJA

**Heard:** 24 November 2023

**Delivered:** This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time of hand-down is deemed to be 11:00 am on 17 January 2024.

**Summary:** Jurisdiction of the high court – whether withdrawal of salary increment constitutes a breach of contract of employment – jurisdiction of civil courts in terms of s 77(3) of the Basic Conditions of Employment Act. Analysis of pleadings – decisive in determining jurisdiction. Whether subsequent payment to the respondents after obtaining leave to appeal results in the appeal being perempted.

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## ORDER

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**On appeal from:** Eastern Cape Local Division of the High Court, Mthatha (Nhlangulela DJP sitting as court of first instance):

- 1 The appeal is reinstated with no order as to costs.
  - 2 The appeal is upheld with costs, save that no costs are to be paid by the respondents for the preparation of the appeal record.
  - 3 The order of the high court is set aside and substituted with the following order:  
'The applications in case numbers 1343/2021 and 1466/2021 are dismissed with costs.'
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## JUDGMENT

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**Chetty AJA (Nicholls, Carelse and Matojane JJA and Tokota AJA concurring):**

[1] The first and second respondents instituted proceedings against their employer, the Mhlontlo Local Municipality (the municipality), in the High Court, Eastern Cape Division, Mthatha contending that the deductions made from their salary were unlawful in terms of s 34(1) of the Basic Conditions of Employment Act 75 of 1997 (the Employment Act). These deductions related to a 'notch increase' initially granted in terms of a resolution passed by the municipality, only to be subsequently revoked. The high court determined that it had the necessary jurisdiction to adjudicate the matter and upheld the claim. It ordered the reinstatement of the amounts deducted. The municipality applied for leave to appeal that order. The matter comes before this Court with leave of the high court.

### **Factual background**

[2] The background facts are largely undisputed. Two applications were launched separately by the first and second respondents, both of whom contended that their employer had effected unauthorised deductions from their salaries in or about February 2021.<sup>1</sup> The first respondent, Mr Gcinikhaya Ngcangula, who was employed by the municipality as the Chief Traffic Officer, contended that in February 2021 his basic salary and his essential use allowance were reduced without his consent. The second respondent, Mr Malibongwe Nqeketho, was employed in the position of Deputy Director: Economic Development. He contended along similar lines that his basic salary and his essential use allowance were also reduced, without his consent. It is not disputed that both respondents were contractually entitled to their basic salaries, residential allowances, cellular allowances and essential use allowances as set out in their contracts of employment.

[3] On 25 March 2019 the municipality passed Resolution No. 01-18/19 to pay its employees a 2.5% notch increase on their basic salaries, retrospective to 2015. Both respondents benefitted from the notch increase. Mr Ngcangula then received a letter from the municipality dated 24 November 2020 informing him that the 2.5% increment to his salary paid in accordance with Resolution No. 01-18/19 must be repaid as it was identified by the Office of the Auditor-General as an irregular expense. Mr Ngcangula was directed to repay the amount of R218 306.33 before 30 June 2021. Mr Nqeketho received a similar demand to repay the amount of R 216 582.95 before 30 June 2021.

### **In the high court**

[4] In the high court, the municipality contended that the decision to recover monies paid to the employees (including the respondents) was lawful as they were 'overpaid' because they had not been placed on salary scales in terms of an ongoing job evaluation process which was considered a qualifying condition for the notch increment. Accordingly, it was contended that they were never entitled to the 2.5% notch increase. It was uncertain whether the two respondents had reached the top of the applicable salary scales.

[5] The municipality contended that the decision to cease paying the notch increase was both lawful and justifiable as it was aimed at correcting its earlier decision. It alleged that its conduct did not constitute a 'deduction' as contemplated in

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<sup>1</sup> The judgment of the high court erroneously refers to the deductions taking place in January 2020.

sub-secs 34(1) and 34(2) of the Employment Act. The respondents however contended that the decision to cease paying their notch increase was made without any representations being sought from them. The decision was therefore unlawful and in breach of s 34(1) of the Employment Act as there was no agreement from either of the respondents for such deductions to be effected.<sup>2</sup>

[6] The high court dismissed the various grounds of opposition advanced by the municipality, finding that it had jurisdiction to deal with the matter on the basis of s 77(3) of the Employment Act which grants concurrent jurisdiction to the Labour Court and the 'civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract'. The high court was satisfied that the dispute as framed by the employees implicated a breach of their contracts of employment. As to the merits, the high court concluded that the municipality's decision to unilaterally reduce the employees' remuneration, without due process, was unlawful, of no force and effect and was a resort to unfettered self-help.<sup>3</sup> The fact that the salary grading system had not yet been completed did not dissuade the high court to disentitle the employees to the 'benefits' of the 2.5% notch increment. The municipality was ordered to re-instate the 'terms and conditions' of the employees' employment contracts which prevailed prior to the deductions.

### **Application for condonation and reinstatement of the appeal**

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<sup>2</sup> Section 34 of the Employment Act provides

(1) An employer may not make any deduction from an employee's remuneration unless—

- (a) subject to subsection (2), the employee in writing agrees to the deduction in respect of a debt specified in the agreement; or
- (b) the deduction is required or permitted in terms of a law, collective agreement, court order or arbitration award.

(2) A deduction in terms of subsection (1) (a) may be made to reimburse an employer for loss or damage only if—

- (a) the loss or damage occurred in the course of employment and was due to the fault of the employee;
- (b) the employer has followed a fair procedure and has given the employee a reasonable opportunity to show why the deductions should not be made;
- (c) the total amount of the debt does not exceed the actual amount of the loss or damage; and
- (d) the total deductions from the employee's remuneration in terms of this subsection do not exceed one-quarter of the employee's remuneration in money.

<sup>3</sup> *Public Servants Association obo Ubogu v Head of Department of Health, Gauteng and Others* [2017] ZACC 45; 2018 (2) BCLR 184 (CC); (2018) 39 ILJ 337 (CC); [2018] 2 BLLR 107 (CC); 2018 (2) SA 365 (CC).

[8] The appellants applied for condonation for the late filing of the notice of appeal. Leave to appeal was granted on 22 September 2022. The application for condonation was filed on 9 November 2022. The delay is not excessive, but blame for this is entirely attributable to the appellants' attorneys for not being diligent in ensuring compliance with the time periods in this Court.

[9] A further application for condonation was sought owing to the failure to lodge the appeal record within three months of the filing of the notice of appeal as required by rule 8(1) of this Court's rules. No extension of the time period was agreed upon between the parties or requested from the Registrar in terms of rule 8(2). Consequently, the appeal lapsed. The record ought to have been lodged no later than 13 March 2023. The application for the reinstatement of the appeal was only filed on 10 May 2023. As with the late filing of the notice of appeal, blame is again attributed to the appellants' attorney.

[10] It is trite that applications for condonation must contain a proper explanation for the period(s) of delay.<sup>4</sup> This Court held in *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and others*<sup>5</sup> that other factors to be considered in determining whether to grant condonation include:

'... the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice (per Holmes JA in *Federated Employers Fire & General Insurance Co Ltd & another v McKenzie* 1969 (3) SA 360 (A) at 362F-G).'<sup>6</sup>

[11] Although both applications were opposed, I considered that it would be in the interests of justice to grant condonation as the delay was not excessive and the respondents have not been financially or otherwise prejudiced. I took into account the prospects of success, which is an important, though not decisive consideration.<sup>7</sup> Counsel for the appellants accepted that the appellants' attorney's non-compliance with the time periods could be sanctioned with an appropriate order for costs.

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<sup>4</sup> *SA Express Ltd v Bagport (Pty) Ltd* [2020] ZASCA 13; 2020 (5) SA 404 (SCA); para 34.

<sup>5</sup> *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others* [2013] ZASCA 5; [2013] JOL 30158 (SCA); [2013] 2 All SA 251 (SCA).

<sup>6</sup> *Ibid* para 11.

<sup>7</sup> *Commissioner for South African Revenue Services, Gauteng West v Levue Investments (Pty) Ltd* [2007] ZASCA 22; [2007] 3 All SA 109 (SCA) para 11.

## Peremption

[12] The respondents alleged that the appeal before this Court had become perempted in that after filing its application for leave to appeal in September 2022, the municipality paid all its employees, including the respondents, the ‘amounts due to them in terms of the applicable SA Local Government Bargaining Council (SALGBC) wage agreement with retrospective effect’. Their attorney, Mr Winter Mdlangazi, deposed to an affidavit in opposition to the condonation application and said the following:

‘9. I emphasise that this was to my surprise because in January 2023 I received notice that the Second Respondent had resolved to “condone” payment of the back-pay which was the subject of the Respondent’s application in the High Court and which was paid to all the First Appellant’s employees, including the Respondents. This decision was taken in compliance with a resolution taken at a special council meeting on 14 December 2022, the resolution and minutes of which are annexed marked “A”.<sup>8</sup>

10. Since this payment to the respondents fully satisfied their monetary claims, which the appellants had unsuccessfully sought to resist in the proceedings a quo, I naturally thought that the present appeal and the decision to defend an appeal against a conflicting judgment on the same issues of the Labour Court had been abandoned.

11. By way of background, I interpose to mention that it was strongly argued in the Respondent’s application for leave to appeal, heard remotely by his Lordship Nhlangulela DJP on 21<sup>st</sup> September 2022 that the right to appeal had been abandoned (perempted) on the strength of letters by the Mayor and the Acting Municipal Manager . . . which stated that the First Respondent would not be pursuing an appeal against the High Court judgment.’

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<sup>8</sup> Annexure A refers to Resolution No. 05-2022/2023 issued by the Mhlontlo Local Municipality dated 14 December 2022 entitled ‘Employees back pay’. It records that ‘the council resolved that the money taken from savings to pay the employees be condoned’.

The minutes of the Council meeting pertaining to the relevant Resolution read as follows:

“Employees back pay

Hon. Mayor Cllr Jara presented the report as follows:

There were two judgments on the issue of employees where their money was deducted by the municipality and there was a resolution that the Acting Municipal Manager must seek legal opinion from a senior counsel and the advice was requested from Mr NZ Mtshabe who is the senior counsel and he advised that all the employees must be paid.

RECOMMENDATION: The Exco recommended to council that the money taken from savings to pay the employees be condoned.”

[13] The principle of peremption safeguards the integrity of the judicial process by preventing litigants from oscillating between contradictory positions, ensuring judicial consistency and fairness.<sup>9</sup> It ensures finality and stability in legal proceedings,<sup>10</sup> which is essential for maintaining public trust in the justice system.<sup>11</sup> The underlying principle of the doctrine of peremption is that a litigant cannot take two inconsistent positions. Accordingly, an unsuccessful litigant cannot appeal a judgment it has acquiesced to. In order to succeed on peremption a respondent must demonstrate with reference to the facts before court that an appellant's unequivocal conduct after having obtained leave to appeal, is inconsistent with an intention to appeal.<sup>12</sup> In *Qoboshiyane NO v Avusa Publishing Eastern Cape*<sup>13</sup> the test to determine whether an appeal had become perempted was set out as follows:

'Where, after judgment, a party unequivocally conveys an intention to be bound by the judgment any right of appeal is abandoned. The principle can be traced back to the judgment of this court in *Dabner v South African Railways & Harbours*, where Innes CJ said:

"The rule with regard to peremption is well settled, and has been enunciated on several occasions by this Court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. And the onus of establishing that position is upon the party alleging it. In doubtful cases acquiescence, like waiver, must be held non-proven."<sup>14</sup>

[14] The appellants submitted that the payments to the respondents were made in error and should not be construed as an indication that the municipality abandoned

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<sup>9</sup> *Hlatshwayo v Mare and Deas* 1912 AD 242 at 259.

<sup>10</sup> *Minister of Defence v South African National Defence Force Union* [2012] ZASCA 110 para 23.

<sup>11</sup> *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) para [101] :

"It is trite that the doctrine of peremption finds application across our legal landscape. The doctrine tells us that "[p]eremption is a waiver of one's constitutional right to appeal in a way that leaves no shred of reasonable doubt about the losing party's self-resignation to the unfavourable order that could otherwise be appealed against". The principle that underlies this doctrine is that "no person can be allowed to take up two positions inconsistent with one another, or as is commonly expressed, to blow hot and cold, to approve and reprobate".

<sup>12</sup> *Government of the RSA & others v Von Abo* [2011] ZASCA 65; [2011] 3 All SA 261 (SCA) para 15

<sup>13</sup> *Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others* [2012] ZASCA 166; 2013 (3) SA 315 (SCA).

<sup>14</sup> *Ibid* para 3.



or waived its right to proceed with the appeal. In *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and others*<sup>15</sup> it was held that: 'Peremption is a waiver of one's constitutional right to appeal in a way that leaves no shred of reasonable doubt about the losing party's self-resignation to the unfavourable order that could otherwise be appealed against.'<sup>16</sup>

[15] Peremption, like waiver, is not lightly presumed and the onus rests on the party alleging peremption to establish conduct that clearly and unconditionally demonstrates acquiescence to abide by a judgment or order.<sup>17</sup> There are no outward manifestations on the part of the municipality, whether in the form of words or some other conduct, from which the intention to waive its right to appeal can be inferred.<sup>18</sup>

[16] The respondents have not adduced any evidence to substantiate the contention that the municipality, through its resolution in December 2022, has effectively settled the matter and paid to the employees all of the amounts awarded in terms of the high court's order. More importantly, there is nothing on record indicating that subsequent to the resolution in December 2022, the respondents received and continue to receive their salaries (inclusive of the 2.5% notch increment). One would have expected the employees to have annexed copies of their salary advice slips following upon the municipality's decision to pay them. There is no evidence of this on record. I am accordingly not persuaded that the appeal has been perempted.

### **Mootness**

[17] The high water mark of the respondents' case on mootness rests on the inference to be drawn from the wording of the resolution taken on 14 December 2022 and the accompanying minutes of the Council meeting in terms of which the municipality paid the respondents the amounts due to them in terms of the wage agreement with the South African Local Government Bargaining Council (SALGBC). On this basis, the respondents contend that the payment by the municipality constitutes an 'admission' that their claim was well founded and that no purpose would

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<sup>15</sup> *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and others* 2017 (1) SA 549 (CC) .

<sup>16</sup> *Ibid* para 26.

<sup>17</sup> *President of the Republic of South Africa v Public Protector* [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP).

<sup>18</sup> *National Union of Metal Workers of South Africa v Intervolve (Pty) Ltd and Others* [2014] ZACC 35; 2015 (2) BCLR 182 (CC); [2015] 3 BLLR 205 (CC); (2015) 36 ILJ 363 (CC) paras 60-61

be served by any judgment of this Court as the matter has now become academic. In *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*<sup>19</sup> Ackermann J said the following regarding mootness:

‘A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.’

[18] In the present matter, the interests of justice justify looking past the issues of mootness and peremption. This is particularly so as there are two judgments subsequent to the decision of the high court in which the resolution which authorised the payment of the 2.5% notch increment to the employees was set aside and declared null and void. To that end, the underlying edifice on which the high court arrived at its decision has been found wanting in both the Labour Court and the Labour Appeal Court. It cannot therefore be said that the appeal will have no practical effect, or has become academic. The ‘live controversy’ is very much extant, especially as the municipality is obliged in terms of the high court’s order to continue paying the respondents the 2.5% notch increase until that judgment is set aside. In the result, I am not persuaded that the argument based on mootness and peremption can be sustained.

### **In this Court**

[19] The thrust of the appellants’ case is that the high court erred in finding that the decision to cease payment of the 2.5% notch increment to its employees, including the respondents, was unlawful. Its case rests on two main pillars – first, that the high court had no jurisdiction to entertain the claim of the two employees under section 77(3) of the Employment Act, and second, that the employees failed to establish that the non-payment of their 2.5% notch increment constituted a breach of their contracts of employment. Success on either of these grounds would be dispositive of the appeal in favour of the appellants.

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<sup>19</sup> *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC) para 21 fn 8.

## Jurisdiction of the high court

[20] In assessing whether the high court lacked jurisdiction, the starting point is that the high court has jurisdiction to adjudicate on *any* matter, except where the legislature has assigned jurisdiction to another court, similar in status to the high court.<sup>20</sup> The legislative framework which underpins the exclusive jurisdiction of the Labour Court in labour-related matters<sup>21</sup> is located in s 77 of the Employment Act which reads as follows:

‘(1) Subject to the Constitution and the jurisdiction of the Labour Appeal Court, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters in terms of this Act.

(1A) The Labour Court has exclusive jurisdiction to grant civil relief arising from a breach of sections 33A, 43, 44, 46, 48, 90 and 92.

(2) . . .

(3) The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.

(4) Subsection (1) does not prevent any person relying upon a provision of this Act to establish that a basic condition of employment constitutes a term of a contract of employment in any proceedings in a civil court or arbitration held in terms of an agreement.

(5) If proceedings concerning any matter contemplated in terms of subsection (1) are instituted in a court that does not have jurisdiction in respect of that matter, that court may at any stage during proceedings refer that matter to the Labour Court.’

[21] As stated in *Baloyi v Public Protector and others*<sup>22</sup> (*Baloyi*) ‘the provisions of section 77(1) do no more than confer a residual exclusive jurisdiction on the Labour Court.’ A plain reading of s 77(3) of the Employment Act makes it clear that the Labour Court and the civil courts have concurrent jurisdiction to determine any matter concerning a contract of employment irrespective of whether any basic condition of

<sup>20</sup> Section 151(2) of the LRA provides: ‘The Labour Court is a superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a court of a Division of the High Court of South Africa has in relation to matters under its jurisdiction.’

<sup>21</sup> See *Amalungelo Workers’ Union and Others v Philip Morris South Africa (Pty) Limited and Another* [2019] ZACC 45, 2020 (2) BCLR 125 (CC); (2020) 41 ILJ 863 (CC) (*Amalungelo*) para 20: ‘The section tells us in unambiguous terms that the Labour Court has exclusive jurisdiction over matters arising from the Basic Conditions Act’, with the exception being in section 77(3).

<sup>22</sup> *Baloyi v Public Protector and others* [2020] ZACC 27; 2021 (2) BCLR 101 (CC) para 26.

employment constitutes a term of that contract.<sup>23</sup> *Baloyi* held further that ‘disputes arising from contracts of employment do not, without more, fall within the exclusive jurisdiction of the Labour Court is further made clear by section 77(4) of the Employment Act, which emphasises that the exclusive jurisdiction of the Labour Court referred to in section 77(1).’<sup>24</sup>

[22] In determining whether the high court had the necessary competence to adjudicate the matter, the starting point is whether the claim is of such a nature that it is required, in terms of the LRA or the Employment Act, to be determined exclusively by the Labour Court. *Gcaba v Minister for Safety and Security and Others*<sup>25</sup> set out the approach to be followed where the jurisdiction of a court is challenged. The position was articulated as follows:

‘In the event of the Court’s jurisdiction being challenged at the outset (*in limine*), the applicant’s pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court’s competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant’s claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognisable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim under the LRA, one that is to be determined exclusively by the Labour Court, the High Court would lack jurisdiction.’<sup>26</sup>

[23] If regard is had to the pleadings in the present matter, the notice of motion makes no mention of an employment contract or the breach of any terms thereof.<sup>27</sup> The employees adopted the terminology used by the municipality in referring to the decision taken on 25 March 2019 and the steps to recover the 2.5% notch increment

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<sup>23</sup> *Amalungelo* para [21] declared that the Labour Court has jurisdiction ‘in respect of all matters’ arising from the Employment Act.

<sup>24</sup> *Ibid* para 28.

<sup>25</sup> *Gcaba v Minister for Safety and Security and Others* [2009] ZACC 26; 2010 (1) BCLR 35 CC.

<sup>26</sup> *Ibid* para 75.

<sup>27</sup> *The National Prosecuting Authority v PSA obo Meintjies and 55 others and Others and The Minister of Justice and Correctional Services and Director-General: DoJCD v PSA obo Meintjies and 55 others and Others* [2021] ZASCA 160; [2022] 1 All SA 353 (SCA) para 61, which noted: ‘Thus, the notice of motion and founding affidavit has to be analysed to ascertain whether the enforcement of employment contract terms was relied upon. In performing this exercise, substance must prevail over form and proper regard must be had to context.’

as an 'over payment'. The remaining paragraphs of the notice of motion are directed at the demand for payment of the amounts deducted from their salaries.

[24] In *Lewarne v Fochem*<sup>28</sup> (*Lewarne*) this Court held that where the dispute relates to, is linked to, or is connected with an employment contract, s 77(3) of the Employment Act which confers concurrent jurisdiction on the civil courts and the Labour courts, applies. In overturning the decision of the high court that the Labour Court had exclusive jurisdiction in such matters, this Court concluded that the appellant's claim was for money due to her in terms of her employment contract and affirmed the competence of the high court to determine the matter.

[25] The focus of the founding affidavit is directed at addressing the deductions having been made without consent and that such conduct was in breach of s 34(1) of the Employment Act. According to the appellants, this alone would ensure that the matter should fall under the exclusive jurisdiction of the Labour Court. In order for the civil courts to acquire concurrent jurisdiction with the Labour Court, the respondents would have had to plead that the 2.5% increment formed a term for their employment contract. While no specific reference is made in the founding affidavit of Mr Ngcangula to any term of his contract of employment, Mr Nqeketho attached a copy of his contract of employment to his affidavit. The respondents' case was that the conduct of the municipality in deducting the 2.5% notch increment from their salaries constituted a breach of their employment contracts. They considered the notch increment to form part of their salary, despite the appellants' view to the contrary. As stated in *Makhanya v University of Zululand*<sup>29</sup>

'When a claimant says that the claim is to enforce a right that is created by the LRA, then that is the claim that the court has before it, as a fact. When he or she says that the claim is to enforce a right derived from the Constitution then, as a fact that is the claim. That the claim might be a bad claim is beside the point.'<sup>30</sup>

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<sup>28</sup> *Lewarne v Fochem International (Pty) Ltd* [2019] ZASCA 114; [2020] 1 BLLR 33 (SCA). The appellants cause of action in that case arose out of and was related to her contract of employment, a term of which provided that she would be paid a 13<sup>th</sup> cheque in December of each year. When her employer only paid a portion of her 13<sup>th</sup> cheque, she launched proceedings in the high court under s 77(3) of the Employment Act.

<sup>29</sup> *Makhanya v University of Zululand* [2009] ZASCA 69; [2009] 4 All SA 146 (SCA).

<sup>30</sup> *Ibid* para 71.

On this basis, I am satisfied that the high court correctly, on the basis of the respondent's pleadings, determined that it had jurisdiction to adjudicate the dispute. Whether or not the cause of action was well founded is entirely a different enquiry and has no bearing on the question of a court's jurisdiction. Accordingly, the argument relating to the high court's lack of jurisdiction is without merit.

### **Was the notch increment a term of the employment contract**

[26] The position adopted by the appellants, which it maintained throughout, was that the respondents were never entitled to the 2.5% increment in the first instance, as this was a payment erroneously made to all municipal employees as opposed to only those who qualified for the benefit. More importantly, the appellants contended that the respondents failed to establish a contractual entitlement to a 2.5% increment in their salary.

[27] The issue of the notch increase is not a red herring as the respondents contend, but is critical in determining the merits of the appeal. As stated earlier, the employment contract adduced by Mr Nqeketho does not contain any reference or entitlement to a notch increment. Mr Ngcangula did not adduce his contract of employment as part of his papers. His founding affidavit is silent regarding the notch increment being a term of his contract of employment. If the increment formed a component of either of their contracts of employment, such terms should have been pleaded in the respondents' founding affidavits, alternatively should have been self-evident from a perusal of their contracts. On both fronts the respondents fail to overcome this hurdle.

[28] On Mr Ngcangula's own version he attached a letter to his founding affidavit from the SALGBC dated 20 February 2019 which states that the notch increase would apply '*to employees who have been placed on salary scales (in terms of the erstwhile Industrial Council) and who have not yet reached the top of the said salary scales.*' Implicit in this is the recognition that the increment was not to be paid to all employees. Apart from the absence of the notch being a term of their contracts of employment, there is no averment from either of the respondents that they qualified for the notch increment or otherwise met the criteria to benefit under the resolution No. 01-18/19 of 25 March 2019. To the extent that Mr Ngcangula understood that his entitlement to

the 2.5% increment stemmed from an agreement concluded in the SALGBC, this is contrary to the conditional wording in the Circular from the SALGBC dated 20 February 2019.

[29] Once the municipality ascertained that it had mistakenly paid all employees the 2.5% increment instead of only those who qualified for the increment, it set about to recover such monies to reverse the illegality. It passed Resolution No. 01-18/19 on 25 March 2019 authorising it to take measures to recover amounts paid to employees who did not qualify for the notch increment. Mr Ngcangula and Mr Ngeketso fell within this category of employees. No challenge was mounted by the respondents against the lawfulness of the resolution directing the municipality to take steps to recover monies improperly paid to employees or to them specifically.

[30] The high court erred in concluding that the 'breaches pleaded by the applicants read together with the evidence show[ed] that [the] 2.5% increment was applied to all employees of the Municipality and actually paid the increased nomination over a period of time . . . amounts to the acceptance by conduct on the part of the Municipality that payments were lawful'. Firstly, the 'evidence', even on the documents attached to the founding affidavit of Mr Ngcangula, establish that the notch increment was payable only to those employees who met the qualifying criteria. The respondents were not in that category. Secondly, this conclusion suggests that because the respondents received the notch increment over a 'considerable period of time', this amounted to an 'acceptance by conduct'. Payment made erroneously to the respondents cannot give rise to a contractual entitlement. Moreover, to hold otherwise would effectively entrench an illegality and permit the respondents to enforce continued payment into the future.

[31] Prior to the hearing of this matter, the Registrar of this Court received two judgments from the appellant's attorney, one from the Labour Court and another from the Labour Appeal Court. The Labour Court judgment<sup>31</sup> by Lallie J was handed down on the same day as the judgment by Nhlangulela DJP. The applicant in the Labour

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<sup>31</sup> *Independent Municipal and Allied Trade Union (IMATU) v Mase and Others* [2022] ZALCPE 39; [2022] 12 BLLR 1107 (LC).

Court, the trade union IMATU sought to hold the municipal manager of the Mhlontlo Municipality in contempt for failing to comply with an arbitration award. The award sought to be enforced concerned the 2.5% notch increment. The Labour Court noted that the municipality ceased paying the 2.5% increment and sought to challenge its legality. IMATU sought a declaratory order that the notch increment was a term and condition of *all qualifying* employees' contracts of employment. The issue before the Labour Court was whether the implementation of the 2.5% notch increment was a term and condition of the contracts of employment. The Labour Court found that the municipality acted outside the scope of its powers in awarding the notch increment to *all* employees – without regard to the qualifying criteria. Its Resolution No. 01-18/19 dated 25 March 2019 was reviewed and set aside.

[32] IMATU then appealed the decision to the Labour Appeal Court (LAC), which confirmed the decision of Lallie J that only those employees who met the qualifying criteria for the 2.5% notch increment were entitled to the benefit.<sup>32</sup> The LAC noted that *'it does not appear to be in dispute that the notch payments to employees who did not qualify in terms of the Evaluation Agreement were irregular.'*<sup>33</sup> The LAC noted that the municipality was 'constitutionally obligated' to 'put in motion a process to ensure that the monies were recovered.'<sup>34</sup> The LAC concluded that

'...there can be little doubt that the resolution adopted by the Municipal Council to pay the 2.5 % notch increase to all employees was not only fundamentally irrational and illegal, but also reckless. At no time could the Municipality reasonably have laboured under the misapprehension that all its employees were entitled to the increase. IMATU itself has been at pains to point out that it accepts that the increase only applies to qualifying employees...'.<sup>35</sup>

[33] In the high court there was a dispute as to whether the two respondents in the present matter had been placed on salary scales, or whether their job evaluations had been completed. Nhlangulela DJP found that it was through no fault on the part of the respondents that the TASK grading system had not been implemented by the municipality, and accordingly found that they could not be 'disentitled' from enjoying

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<sup>32</sup> *IMATU v T Mase and Others* (ZALAC, Gqeberha) case no. PA11/2022, unreported, 26 October 2023, para 53.

<sup>33</sup> *Ibid* para 51.

<sup>34</sup> *Ibid* para 61.

<sup>35</sup> *Ibid* para 62.



the benefits of the 2.5% notch increment. As the respondents had no lawful entitlement to the benefit from inception on the basis that they did not meet the qualifying criteria, there can be no complaint of 'disentitlement' thereafter. As set out above, the LAC confirmed the setting aside of the resolution in terms of which *all* municipal employees received the 2.5% notch increase on the basis that it offended the principle of legality. Accordingly, the decision of the high court cannot stand.

### **Costs**

[34] The high court awarded costs against the municipality on an attorney-client scale, concluding that there was no 'legal reason' for the municipality to reduce the remuneration of the respondents. It is trite that the high court has a wide discretion to decide on the issue of costs which may only be interfered with where the court below misdirected itself as to the facts and legal principle. In the present matter there is no suggestion that the conduct of the municipality was dishonest or fraudulent, justifying a punitive order for costs. The fact that employees elect to litigate against their employer and incur costs in the process, is no justification for a punitive order for costs. The high court erred in considering this as a basis for awarding punitive costs against the municipality. In this Court it was conceded by the appellants that in light of the delays incurred in the late filing of the notice of appeal and non-compliance with rule 8(2), the costs of the preparation of the appeal record should be excluded from any costs order granted.

### **Order**

[35] In the result, I make the following orders:

- 1 The appeal is reinstated with no order as to costs.
- 2 The appeal is upheld with costs, save that no costs are to be paid by the respondents for the preparation of the appeal record.
- 3 The order of the high court is set aside and substituted with the following order:  
'The applications in case numbers 1343/2021 and 1466/2021 are dismissed with costs.'

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CHETTY AJA  
Acting Judge of Appeal

Appearances:

For appellant: A Katz SC (with him L Haskins)

Instructed by: Mvuzo Notyesi Incorporated, Mthatha  
Phalatsi and Partners, Bloemfontein

For respondent: N van der Sandt (heads of argument drawn by J G Grogan)

Instructed by: W Mdlangazi Attorneys, East London  
Webbers Attorneys, Bloemfontein