

COLLECTION OF DEBT FROM EMPLOYEES

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INTRODUCTION:

From time to time employers are faced with a situation where an employee is indebted to the employer. In some cases the recovery of the debt is simple and painless however in other cases the situation can lead to significant difficulties and discord.

The aim of this article is to provide readers with an overview of the legal position and the procedures which should be followed in these circumstances.

WHEN CAN DEBTS BE RECOVERED FROM EMPLOYEES?

The starting point in answering this question is Section 34(1) of the Basic Conditions of Employment Act^[1]. It provides that employers may deduct an amount from an employee's remuneration only if the employee has consented thereto in writing or the deduction is permitted in terms of a law, collective agreement, court order or arbitration award.

HOW CAN DEBTS BE RECOVERED?

Section 34(2) of the BCEA provides for deductions from remuneration where the employer has suffered losses or damage on account of the employee and a specific process is provided for prior to the deduction of monies which is in short the following:

1. The loss/damage occurred due to the employee's fault during the course of his/her employment;
2. A fair procedure has been followed, including giving the employee an opportunity to give reasons why the loss/damage should not be deducted;
3. The deduction does not exceed the cost of the loss/damage;
4. The deductions do not exceed a quarter of an employee's monthly salary.

The losses/ damages suffered by an employer may arise from a variety of causes of action, including overpayments made to the employee.

IS THERE A DIFFERENCE IF THE STATE IS THE EMPLOYER?

The Public Service Act^[2] provides in section 38 thereof for the deduction of moneys from the remuneration of employees of the State, without the need for compliance with a process as set out hereinabove. The effect of this is that the State was able to unilaterally decide to impose deductions on an employee without the employee's consent thereto.

In the recent judgment of the Constitutional Court in *Public Servants Association obo Ubongo vs Head of Department of Health, Gauteng and Others*^[3] it was found that this 'self-help' provision was an unlawful limitation on section 34 of the Constitution and was consequently declared unconstitutional and invalidated.

As a result of this judgment the State is placed in the same position as any other employer in the recovery of debt from its employees.

CONCLUSION:

As employees are required to consent in writing to the deduction of monies from their remuneration it is advisable to obtain such consent from all employees prior to any damages or losses being suffered. This may be done through the incorporation of a clause to such effect in their contracts of employment. Thereafter should the position arise where monies need to be recovered they should only be recovered after a fair process has been followed. Deductions must be made within the prescribed limit of a quarter of an employee's monthly remuneration.

^[1] Act 75 of 1997, as amended

^[2] Act 103 of 1994

^[3] Unreported judgment under case number CCT6/17