

'Illegal' salary increases must be repaid

By [Richard Brown](#)

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Staff of the Mhlontlo local municipality in the cash-strapped Eastern Cape must have been delighted to get increases, back-dated and across the board, but after some months, the council said it had made a mistake. Those whose salaries were wrongly paid at the higher rate would have to pay back the money, the council said. But was the municipality allowed to do so? Or would two senior employees, whose pay was being docked to refund the mistaken increases, persuade the courts that it was unfair and a breach of their employment contract?



Image source: Tima Miroshnichenko from [Pexels](#)

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Many readers of this Supreme Court of Appeal (SCA) judgment could find their sympathies lying instinctively with one side – before reading the full facts.

In a nutshell, as laid out in the first couple of paragraphs of the decision, two senior employees of a municipality in the Eastern Cape were among many other staff who were overpaid, and their employer, the Mhlontlo Local Municipality, wanted to get the money back.

What could make readers feel sympathy for the two employees is this: they were given seven months to repay more than R210,000. That would be more than R30,000 a month, and not many people have the means to slice that amount off their income for seven consecutive pay checks.

But as often happens with legal disputes, the story is more complicated than this.

Increases declared an irregular expense

The origins of the case go back to March 2019, when the municipality decided to pay its employees a 2.5% increase on their basic salaries. Not just that – the increase would be backdated to 2015. Among the staff affected were the municipality's chief traffic officer, Gcinikhaya Ngcangula, and the municipality's deputy director: local economic development, Malibongwe Nqeketho.

Then the auditor-general declared that these increases had been an irregular expense. In response, the municipality informed its employees that the increases already paid would be deducted from their salaries over the next few months.

Ngcangula and Nqeketho decided to take legal action against the municipality in the high court and launched two separate cases, based on similar facts. Their complaint was that their employer had made what were essentially 'unauthorised deductions' from their salaries in February 2021.



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Employees 'weren't legally entitled to the increase' – municipality

Their disputes were heard first in the high court, where the presiding judge, deputy judge president, Zamani Nhlangulela, consolidated them into one case.

Putting its position, the municipality justified the deductions on the grounds that the two employees had been 'overpaid'. They weren't in fact legally entitled to the increase and the municipality was thus obliged to get the money back from them, the council argued.

No written agreement by employees, so deductions 'unlawful' – claim

But for the two officials, and the high court, it was a simple, obvious matter that had to be resolved in favour of the employees.

This was because the Basic Conditions of Employment Act (BCEA) says that an employer may only make deductions from an employee's salary where the employee has agreed in writing to the deductions, or where it is legally necessary, for example, following a court order.

In this case, there had clearly been no such written agreement by the employees, and so the deductions weren't lawful,

according to argument by the legal team representing the two staffers.

The high court agreed. Summarising the council's position, Nhlangulela said that according to the employer, to qualify for the notch increment, employees had to undergo job evaluation in terms of a municipal programme that had started, but hadn't been completed, by the time the increases were granted.

In other words, although the municipality granted the 2.5% notch increases, the salaries and car allowances shouldn't actually have gone up, because the employees hadn't met the 'conditions prescribed under the grant'.

Municipality had 'no right' to reduce pay – high court

But this argument didn't square with the conditions stipulated for salary reductions in the BCEA, said the judge, who found that the employees had a right to be paid the agreed salary and car allowance and the municipality had 'no right' to reduce their pay unilaterally.

He ordered that the employer continue paying the increased salary to the employees. And he said that since the municipality had acted unlawfully, forcing the employees to find funds to go to court, it was only right that the employer be ordered to pay the costs on a punitive scale.

At first the municipality said it wouldn't appeal, and even decided to 'condone' the contested payments. But it later asked to test the high court's decision on appeal after all.

Agreeing to hear the matter, the appeal court said that the basis on which the high court had decided the matter had already been 'found wanting' in both the Labour Court (LC) and the Labour Appeal Court (LAC), and the issue was thus far from merely academic.

Was the increase a 'term of employment contract'?

In the view of the SCA judges, the key issue was whether the notch increment was a 'term of the employment contract'. The municipality said it wasn't and that it was a payment 'erroneously made to all municipal employees as opposed to only those who qualified'. The municipality also said that the two staffers who took the dispute to court hadn't established that they had a 'contractual entitlement' to the increase.

All the evidence indicated that the notch increment was payable only to those who 'met the qualifying criteria', and these two staffers did not do so. Writing for a unanimous court, acting appeal court judge Mahendra Chetty said, "Payment made erroneously to [employees] cannot give rise to a contractual entitlement," and to hold otherwise would effectively "entrench an illegality and permit [employees] to enforce continued payment into the future."

The LC and the LAC had also considered the municipality's dispute with employees over this issue and the latter had concluded that council's resolution to pay a '2.5% notch increase' to all its employees was 'fundamentally irrational and illegal' [and] also 'reckless'. It also held that the municipality was 'constitutionally obligated' to ensure that the money was recovered.



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High Court decision 'cannot stand'

The two employees had 'no lawful entitlement' to the increase because they didn't meet the qualifying criteria, said Chetty.

“Accordingly, the decision of the High Court cannot stand.”

As for the punitive costs order made against the municipality by the High Court, the SCA judges didn't agree. “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,” said Chetty, concluding that the High Court erred in making its costs order.

Where should one's sympathies lie?

So, although a reader's initial instincts might have been to sympathise with the employees who had to pay back the money, there are other facts that a reader has to consider as well: taxpayers and the municipality's rate payers whose funds were wrongly, and therefore wastefully, channelled into increases the council had no right to pay.

It's only right that public money be properly spent and accounted for, even if it makes for temporary difficulties when individual employees must repay what they hadn't fairly earned.

But wherever one's sympathies, this judgment could well have implications for its readers.

The SCA concluded that an increase, paid in error, even over a long period, can't become part of one's employment contract. And that, for even the most optimistic reader, could change one's view of any future increase in salary. You'd be justified in feeling concerned about whether it's real, legitimate and permanent, or whether, as happened here, it will end up having to be repaid.

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