



## THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

### MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

**From:** The Registrar, Supreme Court of Appeal

**Date:** 17 January 2024

**Status:** Immediate

***The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal***

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

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Today, the Supreme Court of Appeal (SCA) upheld an appeal from the Eastern Cape Division of the High Court, Mthatha (high court). The order of the high court was set aside and replaced with one dismissing the applications. The appeal revolved around certain deductions of employee salaries by their employer, the Mhlontlo Local Municipality (municipality). The deductions were related to a notch increase, initially granted retrospectively to 2015, in terms of a resolution taken by the municipality in 2019, but subsequently revoked, contrary to the provisions of s 34(1) of the Basic Conditions of Employment Act 75 of 1997 (the Employment Act).

Two applications were launched separately in the high court by the first and second respondents, both of whom contended that their employer had effected unauthorised deductions from their basic salaries and their essential use allowance. Both received letters from the municipality in 2020 informing them that the notch increase was identified as an irregular expenditure by the Office of the Auditor-General, and both had to ensure repayment of the amounts by 2021. The municipality contended that the decision to recover the money was lawful as both employees had not been placed on salary scales as their job evaluation processes were still ongoing, the completion of which was considered a qualifying condition for the notch increment. As such, they were overpaid. The municipality contended that the decision to cease paying the notch increase was both lawful and justifiable and it alleged that its conduct did not constitute a 'deduction' as contemplated in sub-sections 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.

The high court was satisfied that the dispute as framed by the employees implicated a breach of their contracts of employment and 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. The municipality was ordered to re-instate the 'terms and conditions' of the employees' employment contracts which prevailed prior to the deductions.

In this Court the respondents alleged that the appeal had become preempted in that after filing its application for leave to appeal in September 2022, the municipality paid all its employees, including the respondents, amounts due in terms of a SA Local Government Bargaining Council (SALGBC) wage agreement, with retrospective effect. In order to succeed on preemption a respondent must have demonstrated with reference to the facts that an appellant's unequivocal conduct after having obtained leave to appeal, is inconsistent with an intention to appeal. This Court reiterated that preemption is not lightly presumed and the onus rested on the party alleging preemption to establish conduct that clearly

and unconditionally demonstrates acquiescence to abide by a judgment or order. This Court was not satisfied that the respondents provided any evidence to conclusively prove that the appellant waived its rights in this regard. The Court found that the appeal was not perempted.

Furthermore, the respondents claimed the matter has become moot and was based on the repayment of money in terms of the SALGBC wage agreement. The respondents contended that this repayment constituted an admission that their claim was well founded and that the judgment of this Court would serve no purpose. However, this court found that the matter was still live as there were real consequences attributable to the high court order until the judgment was set aside.

Lastly, the appellants contended that the high court was wrong when it found that the municipality's decision to cease paying the notch increase was unlawful. They submitted firstly, that the court did not have the requisite jurisdiction to entertain the claim and secondly, the employees failed to establish that the non-payment of the notch increase constituted a breach of the employment contracts. However, this Court found that the first contention was without merit and, as to the second, it confirmed that only employees who met the qualifying criteria of a notch increment were entitled to the accompanying benefits. In light of the respondents having no legal entitlement to the notch increase, it could not be held that they were disentitled by the municipality.

In the result, the SCA upheld the appeal and replaced the order of the high court with one dismissing the appeal.

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