

Ignore value added tax**1 Background**

Ms Sarah Maldash, a 46-year-old South African resident, worked as an associate director in the audit division of Makiti Inc. ('Makiti'). Makiti is an audit and advisory company based in Sandton with a February year end.

Sarah's remuneration package included the following:

- Gross monthly salary of R100 000.
- A monthly entertainment allowance of R5 000.
- 20 working days of paid annual leave.

Sarah's terms of employment included a restraint of trade (RoT) agreement, an extract of which is provided below. Makiti used the services of Le Roux Attorneys to prepare the RoT agreement at a cost of R13 000 when Sarah joined the firm as an associate director in January 2019. This RoT agreement does not form part of Makiti's standard employment contract.

**Annexure A to the employment contract
Restraint of trade (extract)**

1. In the event of the termination of my employment with the COMPANY for any reason whatsoever, I shall not be entitled, for a period of 12 (twelve) months after the date of termination of my employment with the COMPANY, to be or become –
 - 1.1. the proprietor or partner or member or director in any business or company; or
 - 1.2. connected in any way with any business, firm, company or other organisation (other than as an employee);which competes in any way with the COMPANY or which carries on the practice of audit or advisory services within a radius of 100 (one hundred) kilometres from any place of business of the COMPANY for the period of 3 (three) years that immediately preceded the termination of my employment with the COMPANY.
2. Neither shall I, for a period of 12 (twelve) months following the date of termination of such employment, be entitled to conduct any business of the nature conducted by the COMPANY, either on my own or as an employee of another business, with any person who was a client of the COMPANY during the period of 3 (three) years immediately preceding the termination of my employment with the COMPANY. This shall include being employed by such client.
3. The COMPANY undertakes to pay me the amount of R700 000 as full and final compensation for compliance with clauses 1 and 2 above on the last day of my employment.

2 First CCMA case

During an out-of-town audit in Richards Bay on 2 September 2022, Mr Simon Lemper, the audit partner, suggested to Sarah that they share a hotel room to save costs and comply with Makiti's policy on cost-cutting measures. This proposition made Sarah extremely uncomfortable, especially coming from someone to whom she reported directly. She refused to share a room with Simon, and immediately sent an email to the human resources manager

laying a complaint of sexual harassment. Simon retaliated by giving her a written warning and a poor performance review.

Simon failed to attend both an internal disciplinary hearing and subsequently a conciliation meeting of the Commission for Conciliation, Mediation and Arbitration (CCMA) during December 2022. Because of this failure to attend the Commissioner referred the matter for arbitration at the CCMA. On 15 March 2023, the CCMA ruled in Sarah’s favour. The ruling stated that the warning issued to Sarah was substantively unfair and that Makiti failed to take necessary steps to deal with her complaint. An extract from the ruling is set out below:

RULING	
1.	The respondent [Makiti Incorporated] is ordered to pay the applicant [Ms Sarah Maldash] damages of R800 000, based on the violation of her constitutional rights.
2.	The respondent is further ordered to pay the applicant’s full legal costs related to this matter.

Sarah and Makiti submitted the following schedules indicating the legal costs they incurred for legal practitioners to appear on their behalf at the CCMA in relation to this matter:

Date incurred	Description	Sarah’s legal costs	Makiti’s legal costs
		R	R
14 December 2022	Lodgement of a case	5 000	–
15 – 29 December 2022	Preparation of evidence	15 000	18 000
3 January 2023	Submission of evidence	2 500	3 000
30 January 2023	Appearance in CCMA	15 000	18 000
		37 500	39 000

3 Second CCMA case

Sarah’s performance at work deteriorated after the sexual harassment incident and she was placed on a performance improvement plan. Subsequent to this, her employment was terminated on 29 March 2023. On that date, Makiti paid Sarah the following severance package:

- Monthly salary for March 2023.
- Entertainment allowance for March 2023. However, she did not spend this allowance at all.
- R23 000 for leave accrued to her but not yet taken.
- R700 000 in fulfilment of the RoT agreement.

Sarah firmly believed the dismissal was directly connected to the sexual harassment case and was therefore unfair. After consulting a labour lawyer, she requested the intervention of the CCMA. The CCMA conducted a conciliation hearing but when an agreement acceptable to both parties could not be reached, the matter was referred for arbitration.

After considering the arguments and evidence of both parties, the CCMA arbitrator found in favour of Sarah and issued an award for reinstatement with compensation on 8 February 2024.

An extract from the CCMA arbitrator's award is reproduced below:

RULING

57. The dismissal of the applicant (Sarah Maldash) was both procedurally and substantively unfair.
58. The respondent (Makiti Incorporated) is hereby ordered to reinstate the applicant into its employ on terms and conditions no less favourable to her than those that governed the employment relationship immediately prior to the dismissal dated 29 March 2023.
59. The applicant must report for duty at the respondent by 1 March 2024.
60. The respondent is ordered to pay the applicant back pay in the amount of R1 155 000. This amount is based on the applicant's monthly salary of R100 000 plus an entertainment allowance of R5 000 from the date of her dismissal multiplied by the period she was unemployed until the resumption of her duties as ordered; thus R105 000 x 11 months.
61. The respondent is ordered to pay this amount to the applicant by no later than 29 February 2024.
62. The applicant is ordered to repay to the respondent the leave pay of R23 000, which was incorrectly paid in March 2023. The applicant must pay this amount to the respondent by no later than 1 March 2024.
63. Annual leave will accrue to the applicant in accordance with the employment contract which has been reinstated and continues to have full force and effect.
64. The restraint of trade payment is not required to be repaid by the applicant as all conditions of the restraint of trade agreement were complied with, despite the reinstatement of the applicant.

4 Employees' tax

Mr Lionel Shezi CA(SA) is one of the partners at Makiti and the chairperson of the board of directors of Makiti. He discovered that no employees' tax had been withheld from the back pay paid to Sarah because the chief financial officer (who is also a qualified CA(SA)) did not believe that Makiti was required to withhold employees' tax on CCMA awards.

INITIAL TEST OF COMPETENCE, JANUARY 2024

PROFESSIONAL PAPER 2

**This paper consists of two questions.
Answer each question in a separate answer book.**

PAPER 2 QUESTION 2 – REQUIRED		Marks	
		Sub-total	Total
(a)	<p>Discuss the income tax implications of the following legal costs:</p> <ul style="list-style-type: none"> (i) Whether the legal costs paid by Makiti to Le Roux Attorneys for the drafting of the restraint of trade agreement may be deducted by Makiti; (ii) Whether Makiti may deduct the legal costs relating to the sexual harassment case; and (iii) Whether Sarah may deduct her legal costs relating to the sexual harassment case. <p>Assume the current tax legislation applies for all relevant years of assessment.</p> <p><i>Communication skills – logical argument</i></p>	<p align="center">4</p> <p align="center">5</p> <p align="center">4</p> <p align="center">1</p>	<p align="center">14</p>
(b)	<p>Calculate the employees’ tax that Makiti should have withheld from the severance package paid to Sarah in March 2023.</p> <ul style="list-style-type: none"> • Provide a brief reason for your treatment of each item. • Where applicable, assume the current tax legislation and tax rates apply for all relevant years of assessment. <p><i>Communication skills – presentation</i></p>	<p align="center">13</p> <p align="center">1</p>	<p align="center">14</p>
(c)	<p>Discuss, with supporting calculations, the employees’ tax that Makiti should have withheld from the second CCMA arbitration award paid to Sarah in February 2024.</p> <ul style="list-style-type: none"> • Where applicable, assume the current tax legislation and tax rates apply for all relevant years of assessment. 	<p align="center">10</p>	<p align="center">10</p>
(d)	<p>Discuss whether Lionel has any professional obligations relating to the information that he discovered with regard to the employees’ tax situation.</p> <p><i>Communication skills – appropriate style</i></p>	<p align="center">11</p> <p align="center">1</p>	<p align="center">12</p>
Total for question 2			50
TOTAL FOR PAPER 2			100

Extracts from Act No. 19 of 2022: Rates and Monetary Amounts and Amendment of Revenue Laws Act, 2022

Section 6(2)

In the case of a natural person there shall, subject to the provisions of subsection (4), be allowed by way of –

- (a) a primary rebate, an amount of R16 425;*
- (b) a secondary rebate, if the taxpayer was or, had he or she lived, would have been 65 years of age or older on the last day of the year of assessment, an amount of R9 000; and*
- (c) a tertiary rebate if the taxpayer was or, had he or she lived, would have been 75 years of age or older on the last day of the year of assessment, an amount of R2 997.*

Section 6A(2)(b)

The amount of the medical scheme fees tax credit must be –

- (i) (aa) R347, in respect of benefits to the person, or if the person is not a member of a medical scheme or fund in respect of benefits to a dependant who is a member of a medical scheme or fund or a dependant of a member of a medical scheme or fund;*
- (bb) R694, in respect of benefits to the person, and one dependant; or*
- (cc) R694, in respect of benefits to two dependants; and*
- (ii) R234, in respect of benefits to each additional dependant, for each month in that year of assessment in respect of which those fees are paid.*

The following table must be used for the calculation of the employees' tax for all years of assessment:

**Schedule I
(Section 1)
RATES OF NORMAL TAX**

1. The rate of tax referred to in section 1(1) to be levied in respect of the taxable income (excluding any retirement fund lump sum benefit, retirement fund lump sum withdrawal benefit or severance benefit) of any natural person, deceased estate, insolvent estate or special trust in respect of any year of assessment commencing on or after 1 March 2022 is set out in the table below:

Taxable income	Rate of tax
Not exceeding R226 000	18 per cent of taxable income
Exceeding R226 000 but not exceeding R353 100	R40 680 plus 26 per cent of amount by which taxable income exceeds R226 000
Exceeding R353 100 but not exceeding R488 700	R73 726 plus 31 per cent of amount by which taxable income exceeds R353 100
Exceeding R488 700 but not exceeding R641 400	R115 762 plus 36 per cent of amount by which taxable income exceeds R488 700
Exceeding R641 400 but not exceeding R817 600	R170 734 plus 39 per cent of amount by which taxable income exceeds R641 400
Exceeding R817 600 but not exceeding R1 731 600	R239 452 plus 41 per cent of amount by which taxable income exceeds R817 600
Exceeding R1 731 600	R614 192 plus 45 per cent of amount by which taxable income exceeds R1 731 600