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1. From the General Secretary's Desk

The ELRC is pleased to provide stakeholders with its December 2017 issue of the *Labour Bulletin*. The *Bulletin* contains articles that are relevant to the education sector.

We hope to both inform and stimulate readers. Some of the issues covered are contentious. It goes without saying that the views are those of the authors alone.

We would encourage an exchange of views on the jurisprudence generated by the courts and by the ELRC because these rulings shape the way the sector operates.

We trust you will find value in these pages.

Ms NO Foca
ELRC, General Secretary

2. Medical certificates from traditional health practitioners

There has been an ongoing debate as to whether or not an employer should accept a traditional health practitioner's certificate as proof of incapacity (ill health). Centre to this debate, are the wording of the BCEA, and the status and supporting structures of the Traditional Health Practitioners Act 22 of 2007 ('THPA'). What follows below, is our analysis of the current relevant legislation.

Relevant legislation

Whereas a traditional health practitioner's medical certificate is acceptable in terms of Sectoral Determinations 12 (the Forestry Sector) 13 (the Agricultural Sector), the balance of employers are hesitant to adapt to follow. In *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi* 2014 (1) SA 585 (SCA) where the SCA found in favour of an employee who claimed she was unfairly dismissed because she attended training as a traditional health practitioner (her belief being that a refusal to heed to the calling of her ancestors, would result in something ill - including death - befalling her), the SCA did not address the issue of whether the traditional health practitioner's medical certificate should have been accepted by the employer for purposes of sick leave, as the respondent had

asked for unpaid leave, not sick leave in terms of the BCEA.

The wording of section 23 of the BCEA, is rigid and clear regarding when an employee will qualify for sick leave in terms of section 22 of the BCEA. Section 23 of the BCEA sets out the requirements for a medical certificate to be valid for purposes of the BCEA, and states (own emphasis):

“23. Proof of incapacity

(1) An employer is **not required to pay an employee in terms of section 22** if the employee has been absent from work for more than **two consecutive days** or on more than **two occasions** during an **eight week period** and, on request by the employer, does not produce a medical certificate stating that the employee was unable to work for the duration of the employee’s absence on account of sickness or injury.

(2) The **medical certificate** must be issued and signed by a **medical practitioner or any other person** who is **certified to diagnose and treat patients** and who is **registered with a professional council established by an Act of Parliament**”.

Put differently, an employer is entitled to request the employee to submit a **valid medical certificate**, and will not be required to pay the employee if the employee is unable to comply. Rule 16 of the HPCSA Ethical Rules of Conduct prescribes the information that needs to be contained in the medical certificate for it to be valid.

The requirements for a traditional health practitioner’ certificate to be a valid medical certificate, can found in section 23 of the BCEA, and requires that i) the traditional health practitioner needs to be certified to diagnose and treat, and ii) the certification process must be as a result of an Act of Parliament.

On 30 April 2014 the President signed the Traditional Health Practitioners Act 22 of 2007 (“THPA”) which was scheduled to come into effect progressively through promulgation in the Government Gazette. The THPA provides for the registration of **‘traditional health**

practitioners’ who performs a **‘traditional health practice’** based on a traditional philosophy that includes the utilisation of traditional medicine or traditional practice and which has as its object to (amongst others) **diagnose, treat or prevent a physical or mental illness.**

It therefore appears as if the statutory requirements of the BCEA have been met.

On 22 Augustus 2011 the Minister of Health issued Regulations in terms of the THPA, which established the Interim Traditional Health Practitioners' Council (hereafter 'the Council'), which drives the implementation of the THPA. It is responsible for the main administrative and enforcement function of the THPA. The Council is responsible for the registration of traditional health practitioners as provided for in section 6(2)(j) of the THPA through the structures put in place by the THPA. In addition, the Council accepts complaints against traditional health practitioners, after which they will investigate same and take the necessary remedial actions accordingly. Section 21 of the THPA sets out the application procedure and peers has to attest to the capacity of practitioners on the basis of empirical evidence of performance. Once registered, the traditional health practitioner will be issued with a certificate and his/her name will be added to the register. The THPA however fails to outline a clear set of criteria for granting a license, or the mechanisms for monitoring traditional health practitioners. At present, the mechanism of determining qualification or issuing of licenses is potentially not impartial and might be prejudicial against more vulnerable parties, i.e. minority groups as there are different types of traditional health practitioners who all have different approaches to the practice.

The Council has no website; consequently it is not possible to easily ascertain whether any traditional health practitioners have been registered in terms of the THPA. Also, the Minister of Health has to date not published a register or any supplementary list of registered traditional health practitioners contemplated in terms the THPA.

Consequently, the onus would be on the traditional health practitioner to prove to his patient or an enquiring employer that he was registered in accordance with the THPA. Until such time that the register or any supplementary list of registered traditional health practitioners

have been published, this is likely to be challenging.

As it stands, any traditional health practitioners' medical certificate issued by a traditional health practitioner that is **registered** with the Council is deemed to be valid. At this stage, employers will be obligated to accept a traditional health practitioners' medical certificate if issued by a **registered** traditional health practitioner.

The traditional health practitioner's certificate must also be valid in respect of its content.

The THPA; unlike Rule 16 of the HPCSA's Ethical Rules of Conduct, which contains guidelines relating to the issuing of valid medical certificates for medical practitioners; is silent with regards to the content and/or requirements of a valid medical certificate from a traditional health practitioner. In addition to the latter, no regulations have been promulgated by the Minister of Health ("Minister") to provide any guidance in this regard. It is in part the responsibility of the Council to issue guidelines concerning the traditional health practice.

In our opinion, in the absence of any guidelines regarding the technical requirements for traditional health practitioners' medical certificates to consider as valid by the Council, the system is open to abuse of the issuing of non-compliant documents. However, once the register is published and guidelines pertaining to the technical requirements for traditional health practitioners' medical certificates are made available, this may then be verified with the Council if there is any doubt regarding its authenticity. As a result, it will be difficult to determine the validity of a certificate even if issued by a registered practitioner.

Concluding remarks

If the traditional health practitioner is registered in accordance with the THPA, he is certified to diagnose and treat as per section 23 of the BCEA, and any traditional healers' certificate issued by him, will be valid **unless** such certificate does not comply with the technical guidelines to be published by the Council.

If the employee is not able to prove that the traditional health practitioner is registered in accordance with the THPA or the certificate does not confirm same, the employer has discretion to either convert the number of days indicated on the any traditional healers'

certificate to annual leave, or deal with same on the basis of no-work-no-pay.

While the objects of the THPA may be commendable and hopefully provide better protection against abuse, whether the Council will have the necessary capacity to be able to carry out its mandate – which includes providing the structures for registration and monitoring traditional health practitioners – also remains to be seen.

Given the size of the traditional health sector (currently estimated at over 200 000 practitioners) and the administrative challenges referred to above; it seems unlikely to take place soon.

Mr. Ali Ncume
Maserumule Consulting

Powers of bargaining council confirmed

The Labour Court (LC) of South Africa heard a matter on 31st October 2017 where the applicant referred a promotion dispute to the ELRC outside of the 30-day period as per the ELRC constitution (Collective Agreement No. 6 of 2016).

Facts of the case

The applicant referred a promotion dispute to the ELRC outside of the 30-day referral period.

The Council responded to the applicant and advised that he should apply for condonation as the matter was referred outside of the applicable time-frame. The applicant however refused and decided to refer the matter to the LC to argue that the ELRC had violated the provision of the Labour Relations Act (LRA), as amended, in that ordinarily promotion is a form of unfair labour practice and in terms of the LRA, such disputes are referred within 90 days and not 30 days as per the ELRC constitution.

Issue to be decided by the Court

Whether or not the bargaining council (the ELRC in this regard) is entitled to vary a time limit for the referral of a dispute where that time limit is fixed by the LRA. In other words, was the ELRC wrong in declaring the referral defective when the applicant referred a promotion dispute

outside of the 30-day period (as per its constitution, which is a Collective Agreement?)

The Court's decision

The LC, as per *van Niekerk J*, held that the applicant is indirectly a party to and bound by the collective agreement that contains clause 9.1.3 (which states that a party may refer a dispute to the General Secretary.... 9.1.3. In the case of promotions, within 30 days from the date on which the employee became aware of the employer's final decision not to promote the employee.'). The court went further to say "as a member of a union party to the agreement, the applicant is therefore bound by the Collective Agreement that regulates dispute resolution procedures".

The court further confirmed that bargaining councils are voluntary bodies that operate according to the principles of self-regulation and autonomy.

In accepting our submission on the rationale behind the 30-day period, the court re-affirmed the same in that it held that the reasons for the bargaining council to truncate the periods within which promotion disputes must be referred are obviously rational, intended as they are to serve the legitimate ends of minimising disruptions to learning and the expeditious resolution of disputes.

The matter was dismissed, and the applicant was granted 14 days to apply for condonation to the bargaining council.

[The full judgment is provided below.](#)

CASE NO: J 2264/17

In the matter between:

LEON LOGAN APPELS

Applicant

And

EDUCATION LABOUR RELATIONS

First Respondent

And 11 other respondents

Application heard: 31 October 2017

Judgment delivered: 7 November 2017

JUDGMENT

VAN NIEKERK J

- [1] The question to be answered in this case is whether a bargaining council is entitled to vary a time limit for the referral of a dispute where that time limit is fixed by the Labour Relations Act.
- [2] Section 191(1) (a) of the LRA provides that any person who claims that his or her employer has committed an unfair labour practice may refer a dispute to a bargaining council (or to the CCMA, if there is no bargaining council that has jurisdiction). Paragraph (b) states that the referral must be made within 90 days of the act or omission which is alleged to constitute the unfair labour practice, or if it is a later date, within 90 days on which the employee became aware of the act or occurrence.
- [3] The applicant, Mr. Appels, is currently employed at the Alabama School in Klerksdorp. During late 2016, he unsuccessfully applied for appointment to the vacant post of principal at the school. Appels took the view that the failure to appoint him was an unfair labour practice. He lodges a grievance, which was heard by the district review panel during February 2017. On 9 March 2017, Appels was advised that the panel had upheld the appointment of the successful candidate.
- [4] Appels referred a dispute to the bargaining council on 30 May 2017, within the 90-day period established by s 191 (1). The bargaining council said that his referral was defective because in terms of the council's constitution, all disputes about promotion had to be referred within 30 days of the date of which the employee became aware of the employer's final decision not to promote the employee.

The referral had been made about 82 days after Appels had become aware of the review panel's decision. The council advised Appels to apply for condonation for the late referral.
- [5] After consulting his attorney, Appels disputed that the council's dispute resolution procedure could lawfully

override a time limit established by the LRA. He refused to apply for condonation for the late referral of his dispute, because given the time limits established by the LRA, he did not believe that it had been referred late. The council refused to accept the referral without an application for condonation, because in terms of its constitution, the referral had been made out of time. That impasse is what these proceedings are about.

- [6] The relevant statutory provisions are to be found in s 51 of the LRA, a section dealing with the dispute resolution functions of bargaining councils. Section 51 (9) of the LRA reads as follows:

A bargaining council may, by collective agreement –

- (a) establish procedures to resolve any dispute contemplated in this section;

...

Disputes contemplated in the section include unfair labour practice disputes, the kind of dispute that is at issue in this case. Section 51(9) needs to be read with s 28 (1) which, amongst other things, empowers a bargaining council within its registered scope to conclude and enforce collective agreements, prevent and resolve labour disputes, and perform the dispute resolution functions referred to in s 51.

- [7] The bargaining council's constitution, which the parties acknowledge is a collective agreement between the parties to the council, incorporates a dispute resolution procedure. The procedure was adopted in August 2016. Clause 7.3 refers specifically to disputes about promotions and provides that a party to a dispute may refer the dispute for conciliation-arbitration when the head of department has made a decision about the promotion, that the general secretary must set down the dispute for arbitration within 30 days of the referral on an expedited basis where that is decided and a requirement that the process be completed within a maximum of three hearings. Clause 9 regulates the time periods within which a dispute must be referred. The clause mirrors s 191 of the LRA, except in the case of what is referred to as 'promotions'. Clause 9.1.3 reads:

9.1 A party may refer a dispute to the General Secretary: ...

9.1.3 In the case of promotions, within 30 days from the date on which the employee became aware of the employer's final decision not to promote the employee'.

- [8] The bargaining council submits that properly read, these provisions permit a councils to design their own dispute resolution systems that ensure the efficient and cost effective resolution and prevention of disputes. In doing so, the council may deviate from the time periods fixed by the LRA, and s 191 of the LRA in particular. The rationale for reducing the 90-day time limit in s 191 to 30 days is concerned with the need to ensure expeditious dispute resolution. It is not disputed that during the course of the last year, 225 disputes about promotion were referred to the council. (In the previous year, 248 disputes were referred.)

The council submits that it is in the interests of learners and all other interested parties that disputes about promotion are resolved as quickly as possible. A dispute about promotion presupposes a vacancy that must be filled. Any failure to fill the vacancy pending the resolution of a dispute about who should be appointed to the post has obvious consequences for the quality of teaching. Further, successful appointees often have to relocate to occupy the new positions. An unresolved dispute always has the potential for the reversal of an appointment and the obvious prejudice to the incumbent in the form of a reversal of salary and even relocation. Where the initially successful incumbent is required to revert to his or her previous position, very often another person has been appointed to that position resulting in a domino effect. In short, the purpose of the expedited procedure that applies to promotion disputes is to limit and if possible avoid all of these consequences.

- [9] Appels takes a different view. He emphasises that clause 9.1.3 does more than establish a simple procedural bar to the reference of disputes after the expiry of the 30-day period. He submits that clause 9.1.3 also determines jurisdiction in the sense that it places a limitation on the power or competence of the bargaining

council to hear and determine issues between parties. In this sense, clause 9.1.3 of the dispute resolution procedure extinguishes a referring party's right to refer an unfair labour practice dispute relating to promotion within the 90-day period established by s 191.

Appels also argues that bargaining councils are creatures of statute and that the rules they make governing dispute resolution should not be in conflict or inconsistent with the LRA. He makes reference to Premier Gauteng and another v Ramabulana N.O and others [2008] 4 BLLR 299 (LAC) in support of this proposition. That case dealt with rules for the conduct of proceedings made by the CCMA, and can thus be distinguished from the present case, which concerns the application of statutory provisions that relate specifically to bargaining councils and their right to design dispute resolution procedures by way of collective agreements.

[10] In my view, there are at least two reasons why Appel should not succeed. The first is that Appel is indirectly a party to and bound by the collective agreement that contains clause 9.1.3. It is not disputed that Appels is a member of a trade union that is a party to the council, and also a party to the collective agreement that incorporates clause 9.1.3. In terms of s 23 (1) of the LRA, a collective agreement binds the parties to the collective agreement and each party to the agreement and the members of every other party, in so far as the provisions are applicable between them. Further, members of the registered trade union there is a party to the collective agreement about by the agreement if the agreement regulates the terms and conditions of employment or the conduct of employers in relation to their employees or of employees in relation to their employers.

As a member of a union party to the agreement, Appels is therefore bound by the collective agreement that regulates dispute resolution procedures. In these circumstances, it is not open to him to contend, as he has, that clause 9.1.3 of the agreement is of no force and effect. In short, the 30-day period within which promotion disputes must be referred is an

agreed period, and Appels is bound by that agreement.

[11] Even if I am wrong in coming to that conclusion and accept that Appels is entitled to challenge the terms of the agreement despite the fact that he is bound by it (if only because clause 9.1.3 stands in conflict with s 191 (1) (b) (ii) of the LRA), the key to a proper interpretation of s 51 (9) of the LRA is an understanding of the role of bargaining councils in the statutory dispute resolution system. Bargaining councils are voluntary bodies and operate according to the principles of self-regulation and autonomy. Having said that, bargaining councils are creatures of statute and may act only within the confines of the empowering legislation.

The question to ask is whether s 51 (9), which clearly empowers bargaining councils to 'establish procedures to resolve any dispute...', must be read subject to a condition that any agreed procedure must replicate time periods and any other limitations as they find reflection in the LRA. There is nothing in the LRA that establishes such a condition, or which otherwise places constraints on a bargaining council that agrees to establish dispute resolution procedures. On the contrary, there is at least one authority to support the proposition that bargaining councils may establish procedures that differ from those established by the LRA.

[12] In MIBCO v Osborne & others [2003] 6 BLLR 573 (LC), Landman J in the case that concerned the enforcement of arbitration awards issued by bargaining council arbitrators, considered s 51 (8) and (9). Section 51 (8) provides that unless otherwise agreed to the collective agreement, sections 142A and 143 to 146 applied to any arbitration conducted under the auspices of a bargaining council. In the course of his judgment (at 577B), Landman J said the following:

However, section 51 (9) permits a bargaining council to exclude the operation of the LRA in the circumstances contemplated in that subsection, by establishing its own procedures by means of a collective agreement, which obviously can be extended to non-parties. The collective agreement, such as those to which I

have referred in this judgement, circumvent the operation of the LRA.

[13] In *Wanenburg v Motor Industry Bargaining Council & others* (2001) 22 ILJ 242 (LC), Pillay J considered a dispute that concerned a bargaining council procedure for applying for condonation and appealing against any refusal of condonation that different from what is provided in the LRA. The court held that it did not matter that the referring party was not a party to a dispute resolution agreement concluded by a bargaining council, or that not been extended to him. The court said the following in relation to the right of bargaining councils to design dispute resolution systems:

[20] Bargaining councils may design their own dispute systems in ways that ensure efficient and cost effect (sic) resolution and prevention of disputes. From the DRC terms of reference and procedures, there is nothing inherently prejudicial to nonparties. It provides a procedure for conciliation and arbitration of disputes and for granting combinations. It is consistent with the LRA. There is therefore no reason for the court to interfere by imposing any other procedure.

[21] in the circumstances the DRC terms of reference and procedures can be applied to nonparties not as a collective agreement but as a procedure developed by the bargaining council for the industry in order to give effect to its obligations in terms of ss 51 (3) and 191 (2) in order to carry out its functions in terms of s 28 (1) (c) and (d)....

[23] Firstly, bargaining councils must be allowed the flexibility to design their own dispute systems so that the most inexpensive and effective procedures are adopted. If that means having a condonation application followed by an internal appeal, so be it. Even if the NRA makes no express provision for such an appeal, it would be consistent with the general policy of encouraging maximum use of private and internal dispute resolution mechanisms and the settlement of disputes at the lowest possible level.

[14] In *Portnet v Le Grange & others* (1999) 20 ILJ 916 (LC), the court was concerned with an application to review and set aside an arbitration award in which the arbitrator had held that the provisions of a

bargaining council constitution binding on the parties, they are superseded by the provisions of s 191 (2) of the LRA. Further, the arbitrator held at the mere fact that the constitution was binding on the parties did not necessarily mean that any failure to comply with any provision of the agreement automatically disqualifies a referral and makes it incompetent in terms of the act. In that case, the referral was a week late if the constitution applied, but referred in time if s 191 applied.

The court upheld the review, concluding that the arbitrator had misdirected himself in regard to the law. In particular, the provisions of s 51 of the Act which requires parties to a council to attempt to resolve any dispute between them in accordance with the constitution of the council. Since the parties were all parties to the bargaining council and subject to its constitution the court concluded as follows:

[19] There was accordingly no basis in law for the first respondent to find that he was not bound by the provisions of the bargaining council's constitution which, in itself, also constituted a collective agreement.

[20] Collective agreements and the provisions thereof are binding in terms of the Act as the arbitrator himself admits. Further, s 1 of the act (which deals with the purpose of the act) identifies as one of the primary objects of the Act the promotion of orderly collective bargaining.

[15] There is a further authority that suggests that primacy should be given to collective agreements concluded in bargaining councils that regulate dispute resolution.

In *NBCRFI v Carlbank Mining Contracts (Pty) Ltd* [2012] 11 BLLR 1110 (LAC), the Labour Appeal Court emphasised the primacy of collective agreements concluded in bargaining councils and declined to give effect to a contract of employment that made provision for private arbitration in the event of a dispute. In short, s 51 empowers bargaining councils to establish procedures to resolve disputes and in doing so, to design their own procedures that address the

exigencies of the sector for which they are registered and to ensure efficient and cost effective dispute resolution. These procedures may deviate from those established by the LRA.

[16] Obviously, a bargaining council is not at liberty, when it establishes procedures to resolve disputes, act without constraint. The bargaining council in the present instance accepts that any procedures established by a council pursuant to s 51 (9) must be fair, reasonable and broadly consistent with the LRA.

Decisions taken by bargaining councils are subject to judicial review, if not in terms of the Promotion of Administrative Justice Act, then by way of a review in terms of the principle of legality (see *Free Market Foundation v Minister of Labour and others* [2016] 8 BLLR 805 (GP)). This will ensure that procedures are rational, not arbitrary and free from caprice or ulterior purpose.

The reasons proffered by the bargaining council for truncating the periods within which promotion disputes must be referred are obviously rational, intended as they are to serve the legitimate ends of minimising disruptions to learning and the expeditious resolution of disputes. Further, a referring party who fails to comply with the applicable time limit has a remedy in the form of an application for condonation. Rulings in these applications are similarly subject to review.

[17] In relation to costs, the scope is a broad discretion in terms of s 162 of the LRA to make orders for costs according to the requirements of the law and fairness. This court traditionally does not make orders for costs against individuals who in good faith seek to pursue what they perceive as their rights. There is no reason to depart from that convention. The requirements of the law and fairness are best served by an order that each party bear its own costs.

Finally, the court's finding in relation to the applicable time period for the referral of a dispute should not serve to non-suit Appels. I intend before to make an order in terms of which he may file an application for condonation for the late referral of his dispute within a specified period.

I make the following order:

1. The application is dismissed.
2. The applicant is granted 14 days from the date of this order to apply to the first respondent for condonation for the late referral of his dispute.

André van Niekerk
Judge

Representation

For the applicant:

Mr. W Scholtz
Scholtz Attorneys

For the first respondent:

Adv. M van As
Instructed by SolomonHolmes Attorneys

Public Service Act – Law on salary deductions

The Constitutional Court of South Africa heard a case this year that called into question the integrity of the Public Service Act 103 of 1994.

The Court's ruling on the matter is a feat for public servants as section 38 (2) (b) (i) of the Act was declared as unconstitutional. Employers can no longer make deductions from employee salaries without following due process.

Based on the ruling, employers now have to approach the courts to recover monies wrongfully paid to employees.

[The full judgment is provided below.](#)

CONSTITUTIONAL COURT OF SOUTH AFRICA

Cases CCT 6/17 and 14/17

Case CCT 6/17

In the matter between:

PUBLIC SERVANTS ASSOCIATION
obo OLUFUNMILAYI ITUNU UBOGU
Applicant

and

HEAD OF THE DEPARTMENT OF HEALTH,
GAUTENG
First Respondent

MEMBER OF THE EXECUTIVE COUNCIL
FOR HEALTH, GAUTENG
Second Respondent

MINISTER OF PUBLIC SERVICE
AND ADMINISTRATION
Third Respondent

MEMBER OF THE EXECUTIVE COUNCIL
FOR FINANCE, GAUTENG
Fourth Respondent

MINISTER OF FINANCE
Fifth Respondent

Case CCT 14/17

In the matter between:

HEAD OF THE DEPARTMENT OF HEALTH,
GAUTENG
First Applicant

MEMBER OF THE EXECUTIVE COUNCIL
FOR HEALTH, GAUTENG
Second Applicant

and

PUBLIC SERVANTS ASSOCIATION obo
OLUFUNMILAYI ITUNU UBOGU
Respondent

Neutral citation: Public Servants Association
obo Head of Department of Health, Olufunmilayi
Gauteng and Itunu Ubogu v Others [2017]
ZACC 45

Coram: Nkabinde ADCJ, Cameron J,
Froneman J, Jafta J, Khampepe J, Madlanga J,
Mhlantla J, Mojapelo AJ, Pretorius AJ and
Zondo J

Judgment(s): Nkabinde ADCJ (majority): [1]
to [80] Jafta J (dissenting): [81] to [102]

Heard on: 18 May 2017

Decided on: 7 December 2017

Summary:

[Constitutional declaration of invalidity] —
[section 38(2)(b)(ii) of Public Service Act] —
[Labour Court jurisdiction] — [unilateral
deductions of salary by state employer] —
[conflation of constitutional remedies] —
[unlawful limitation of section 34 of the
Constitution]

ORDER

On appeal from the Labour Court of South
Africa, Johannesburg:

1. It is declared that section 38(2)(b)(i) of the
Public Service Act 103 of 1994 is
unconstitutional.
2. The appeal is dismissed.
3. The interim interdict in paragraph 2 of the
order of the Labour Court of South Africa,
Johannesburg, on 29 September 2016
stands.
4. The matter is remitted to the Labour Court
for that Court to determine the disputes
between the parties regarding the
recovery of the amounts allegedly
overpaid to Ms Olufunmilayi Itunu Ubogu.
5. The Minister for Public Service and
Administration is ordered to pay the costs
of the applicant (in CCT 6/17) and the
respondent (in CCT 14/17).

JUDGMENT

NKABINDE ADCJ (Cameron J, Froneman J,
Khampepe J, Madlanga J, Mhlantla J, Mojapelo
AJ, Pretorius AJ, Zondo J concurring):

Introduction

- [1] This case concerns the validity of a
statutory provision that permits the state,
as an employer, to recover monies
wrongly paid to its employees directly from
their salaries or wages in the absence of

any due process or agreement between the parties. It brings into sharp focus issues regarding self-help an aspect of the rule of law procedural fairness, and the common law principle of set-off. Key issues are whether the order of constitutional invalidity made in the Labour Court falls within the ambit of section 167(5) of the Constitution – for confirmation by this Court – or whether it is an interpretative order that need not be confirmed.¹ If the order is a declaratory order of constitutional invalidity and is confirmed, what will be an appropriate remedy? If the declaration of invalidity is not confirmed, should the respondents' appeal be upheld?

- [2] The Labour Court declared section 38(2)(b)(i) of the Public Service Act³ (Act) unconstitutional but invoked an interpretative remedial mechanism to correct the defect in the impugned provision. That section empowers the state, as an employer, to recover monies wrongly paid to its employees directly from their salaries or wages without due process or agreement.

Parties

- [3] The applicant in the confirmation application is the Public Servants Association of South Africa (PSA), a duly registered trade union acting on behalf of one of its members, Ms Olufunmilayi Itunu Ubogu. She is a Clinical Manager: Allied, at the Charlotte Maxeke Johannesburg Academic Hospital.

- [4] The first to fifth respondents are the Head of the Department of Health, Gauteng, the Member of the Executive Council for Health, Gauteng (MEC for Health) who is the employer of Ms Ubogu, the Minister of Public Service and Administration (Minister of Public Service) who is responsible for the administration of the Act and its regulations, the Member of the Executive Council for Finance, Gauteng (Finance MEC) and the Minister of Finance, Gauteng (Finance Minister). They are cited by virtue of their interest in the relief sought.

The appellants are the Head of the Department of Health and the MEC for Health. PSA is the respondent in the appeal.

Background

- [5] Ms Ubogu was appointed in 2006 as the CEO of a hospital in Tshwane, falling under the Gauteng Provincial Department of Health. In 2010, she was transferred to a hospital in Johannesburg and was appointed to the position of Clinical Manager: Allied. At the time of the transfer, the remuneration paid to a Clinical Manager: Allied was equal to that paid to a Clinical Manager: Medical. Shortly after the transfer an occupational specific dispensation (OSD) came into operation. In terms of the OSD, the post of Clinical Manger: Medical attracted a higher remuneration (Grade 12) than the post of Clinical Manager: Allied (Grade 11).
- [6] From July 2010 until July 2015, Ms Ubogu received remuneration at the rate applicable to the post of Clinical Manager: Medical (Grade 12).
- [7] In a letter dated 10 September 2015, the Provincial Department of Health Gauteng (Department) informed Ms Ubogu that, in the process of her redeployment, she had been erroneously translated into a Grade 12 position (Clinical Manager: Medical), as opposed to a Grade 11 position (Clinical Manager: Allied). She was advised that she thus owed the Department R794 014.33. She maintained that the Department translated her as Clinical Manager: Medical and that the translation could not have affected her starting package in the new position, only the trajectory of her progression. She relied on clause 7.1 of Resolution 2 of 2010 of the Public Health and Social Development Sectoral Bargaining Council.
- [8] In September 2015, the Department unilaterally deducted a sum from her salary to compensate for a part of the overpayment. Ms Ubogu was opposed to this and maintained that the Department had no right to help itself to part of her salary. A dispute then arose between the parties.
- [9] Ms Ubogu referred the dispute to the Public Health and Social Development Sectoral Bargaining Council. The dispute was withdrawn at arbitration proceedings and the deductions were repaid. Ms

Ubogu was placed back on a Grade 12 salary level. In terms of the settlement between the parties, Ms Ubogu reserved her right to “refer the dispute should the need arise”. In July 2016, the Department again withheld a part of her salary. There is a dispute about whether Ms Ubogu was afforded an opportunity to make representations beforehand. The latest deductions prompted urgent proceedings in the Labour Court for interim relief.

[10] PSA challenged the lawfulness of the deductions on the grounds: that there was no overpayment; that if there was overpayment, part of the amount had prescribed; and that section 38(2)(b)(i) of the Act, in terms of which the deductions had been made, was unconstitutional.

[11] The Labour Court, per Steenkamp J, issued a rule nisi calling upon the Minister of Public Service, the Finance MEC and the Finance Minister to show cause why:

(i) it should not declare that the claim to recover the overpaid amounts had prescribed; (ii) the unilateral deductions of monthly instalments were not ultra vires; alternatively, (iii) section 38(2)(b)(i) should not be declared unconstitutional and falls to be read in a manner consistent with the Constitution; (iv) section 38(2)(b)(i) should not be declared unconstitutional and struck down; and (v) the Head of the Department of Health and the MEC for Health should not be directed to pay the costs jointly and severally. Pending the outcome of the application, the Head of the Department of Health and the MEC for Health were interdicted from making any further deductions.

[12] On the return day, orders 1.2 (that the deductions are ultra vires), 1.3 (that section 38(2)(b)(i) is declared unconstitutional and falls to be read in a manner consistent with the Constitution), and 1.5 (that the Head of Department of Health and the MEC for Health are directed to pay the costs) were pursued. PSA maintained that section 38(2)(b)(i) entitled the state to remain passive for extensive periods and thereafter recover amounts in respect of which the claims would otherwise have prescribed; that the Department should be directed to institute

legal proceedings against Ms Ubogu to allow her to challenge the basis of the alleged deductions; and that, if regard is had to sections 3(3) and 38(1)(c)(i) of the PFMA, read together with regulations 9.1.4 and 12 of the National Treasury (Treasury) Regulations

(Treasury Regulations) the Department is required to institute legal proceedings where any unauthorised, irregular, fruitless and wasteful expenditure was found.

[13] The Head of the Department of Health and the MEC for Health contended that the reliance on prescription was misplaced. They said that prescription started running only when the Department became aware of the overpayments. They also contended that Ms Ubogu could not claim benefits consonant with a position of Clinical Manager: Medical whereas she was translated to Clinical Manager: Allied and had to be considered as such during the implementation of the OSD; that Ms Ubogu had failed to avail herself of a number of opportunities to challenge the basis of the alleged indebtedness; and that the measures put in place through legislation, including, section 38(1)(c) of the PFMA and regulations 9.1.4 and 12 of the Treasury Regulations, ensured that recovery mechanisms were instituted in an effective and appropriate manner in the collection of all monies owed to the state.

[14] The Labour Court considered whether deductions made in terms of section 38(2)(b)(i) amounted to untrammelled self-help, as prohibited by section 1(c) of the Constitution.⁹ It held that the protections set forth in section 34 of the Basic Conditions of Employment Act¹⁰ (BCEA) – namely that an employer cannot make deductions from an employee’s salary to set-off past overpayments without the employee’s prior agreement or a court order – are not applicable to salary deductions in terms of section 38(2)(b)(i).

This is because section 34 exempts deductions effected in terms of other laws.¹¹ The Court held that sections 3(3) and 38(1)(c) of the PFMA, requiring the Department to seek the approval of the Treasury when collecting monies, could not be construed as limiting the state’s discretion under section 38(2)(b)(i), to the

extent that self-help was prohibited.¹² Section 38(2)(b)(i) thus gives the state, as an employer—

“a wide discretion in determining at any stage whether an employee has received remuneration according to an incorrect salary, salary scale or award. The State can therefore, absent an agreement between it and the concerned employee, or a collective agreement, or a court order, or an arbitration award, unilaterally decide on whether an overpayment has been made and if so, can decide on the method of recovery and the period over which such recoveries may be made.”

[15] The Court held that it was unclear why section 38(2)(b)(i) did not, in the same manner as section 31(1)(a) – which relates to “unauthorised remuneration” – make provision for recovery of overpaid remuneration through consent or legal proceedings.¹⁴ Moreover, the Court remarked, section 38(2)(b)(i) distinguishes between employees in the service of the state and those who are not, sanctioning self-help in respect of the former, whilst requiring legal proceedings in the recovery process in respect of the latter.

[16] The Labour Court concluded that the deductions in terms of section 38(2)(b)(i) violated the spirit, purport and objects of the Bill of Rights and amounted to untrammelled self-help. It made the following order:

“(i) Order 1.3 as granted by Steenkamp J on 29 September 2016 is confirmed to read:

‘It is declared that section 38(2)(b)(i) of the Public Service Act (Proclamation 103 of 1994) is unconstitutional as presently formulated, and accordingly falls to be interpreted in a manner which conforms with the provisions of the Constitution of the Republic of South Africa Act 108 of 1996 in particular sections 23(1), 25(1) and 34 thereof, to be read as follows:

‘(b) been overpaid or received any such other benefit not due to him or her—

(i) An amount equal to the amount of such overpayment shall be recovered from him or her by way of deduction from his or her salary of such instalments as the relevant accounting officer and employee, if he or she is in the service of the State, may agree, and failing agreement by way of legal proceedings, or if he or she is not so in service of the State, by way of deduction from any money owing to him or her by the State as the relevant accounting officer and former employee may agree, and failing agreement by way of legal proceedings, or partly in the former manner and partly in the latter;’

(ii) The first and second respondents who had opposed the confirmation of the order are ordered to pay the costs of this application, jointly and severally, the one paying the other to be absolved.”

[17] PSA then lodged a confirmation application in this Court. The appellants filed a notice of appeal in terms of section 172(2)(d) of the Constitution on the grounds that the Labour Court erred in finding, among other things, that the impugned provisions violated the principle of legality, allowed untrammelled self-help and violated sections 9(1), 23(1), 25(1) and 34 of the Constitution. They submitted that the Labour Court ought to have found that, in this context, the provisions regulated the right of set-off, which is neither self-help, arbitrary, unfair, a deprivation of property nor an inhibition to access to a court or other independent and impartial tribunal.

[18] Pursuant to the directions issued by the Chief Justice, the application for confirmation and appeal were consolidated and set down for hearing and

the parties were invited to file written submissions.

Submissions

- [19] PSA submits, among other things, that section 38(2)(b)(i) sanctions self-help in that it permits deductions where the state is the sole arbiter concerning any dispute on allegedly wrongly granted remuneration, as well as the appropriate means to recover the indebtedness. In addition, the state is the self-appointed executioner. Relying on Khumalo, PSA submits that all this happened in the context of an inherently unequal bargaining relationship. It argues that while section 34(5) of the BCEA does not entitle the employer to unilaterally effect deductions, the impugned provision is exempted from the limitations imposed in terms of the BCEA, because it is a “law” for the purpose of section 34(1)(b) of the BCEA. This distinction, it is submitted, has no justifiable rationale when regard is had to section 31 of the Act. It is argued that the unilateral powers given to the state in terms of the impugned provision constitute self-help and violate the employee’s rights guaranteed under sections 9, 23(1), 25(1) and 34 of the Constitution.
- [20] The Head of the Department of Health and the MEC for Health submit that section 38(2)(b)(i) is consistent with the Constitution and that the confirmation application therefore falls to be dismissed. They reject the Labour Court’s holding that deductions in terms of section 38(2)(b)(i) amount to arbitrary self-help and thus violate the principle of legality. They argue that, as stated in *Chirwa*¹⁹ and *Gcaba*,²⁰ actions taken in the context of the employment relationship between the state and its employees fall within the sphere of private law and cannot be qualified as administrative action. The principle of legality, they argue, only applies to the sphere of public law not the sphere of private law. Even if the deductions were subject to legality review, it is contended that the deductions could not be described as arbitrary, because they are based on an express statutory provision.
- [21] It is argued that the impugned provision permits deductions by way of set-off under the common law. The doctrine of set-off concerns a form of payment that occurs by operation of law where common parties are mutually indebted. It does not amount to a deprivation of property. Additionally, the Head of the Department of Health and the MEC for Health submit that the deductions are consistent with section 34(5) of the BCEA and not unfair. Regarding the employee’s right to access a court, the Head of the Department of Health and the MEC for Health maintain that action taken under section 38(2)(b)(i) is not determinative of any dispute. They submit that an employee is at liberty to pursue the claim in a court or other independent tribunal, where applicable, notwithstanding the provisions of section 38(2)(b)(i).
- [22] Finally, the Head of the Department of Health and the MEC for Health submit that the difference in treatment between public and private employees does not amount to a violation of the right to equal protection as enshrined in section 9 of the Constitution. The benefits conferred on private employees in terms of section 34(1) of the BCEA do not fall within the category of rights to which any employee is entitled in all circumstances.
- [23] Regarding their appeal, the submissions by the Head of the Department of Health and the MEC for Health are the same as those proffered in opposing the confirmation application. In the appeal, they ask this Court to set aside and replace the Labour Court’s order with an order dismissing the application with costs.
- [24] On 9 May 2017, PSA filed its written submissions in the appeal, elaborating on why section 38(2)(b)(i) infringes upon an employee’s rights under sections 9, 23, 25 and 34 of the Constitution. PSA contends that the mechanism in the impugned provision is not comparable to the doctrine of set-off, in that it does not operate *ex lege* (by operation of law) but pursuant to unilateral determinations by the employer as to the deductions to be effected.
- [25] The Minister of Public Service opposes the confirmation proceedings on the basis that the proceedings are not properly before this Court. It is submitted that, while the

Labour Court appears to have found that section 38(2)(b)(i) is constitutionally invalid, it did not issue an order of invalidity. Instead, and following the doctrine of subsidiarity, the Minister of Public Service argues that the Court interpreted the impugned provision in terms of section 39(2) of the Constitution. It is said that when doing so, it necessarily saved the provision from a declaration of invalidity because the exercise of interpretation is distinct from a declaration of invalidity. There is thus no order of invalidity to be confirmed by this Court.

[26] The Minister of Public Service submits that whether leave to appeal should be granted to this Court on the constitutionality of the interpretation depends on whether there is a proper application before this Court, namely an application for direct access. It is argued that PSA failed to demonstrate that it should be permitted to bypass the Labour Appeal Court and appeal directly to this Court. It is not in the interests of justice that this Court deprives the appellate court in labour matters of the opportunity to express its views. The issue, it is argued, raises a number of complex questions, including whether the Labour Court has jurisdiction to strike down legislation in respect of which it does not expressly have jurisdiction.

[27] In the alternative, the Minister of Public Service argues that section 38(2)(b)(i) does not infringe upon section 34 of the Constitution because section 34 only applies to disputes that are capable of resolution by application of the law. Even if section 34 applied to the employment relationship between the state and its employees, section 38(2)(b)(i) – allowing the state to recover monies without the consent of the employees – is not unconstitutional. Further, the Minister argues that the Act, read together with the BCEA, does not sanction self-help. It is submitted that section 25(1) of the Constitution does not find application as the property in question belongs to the state. Even if it is the property of the employee, the deprivation of that property is sanctioned by law of general application and envisages a lawful purpose. The deprivation therefore cannot be arbitrary.

[28] Finally, the Minister of Public Service submits that – in the event that the invalidity order is confirmed – this Court should suspend that order for a specified period in accordance with section 172(1)(b) of the Constitution to enable Parliament to remedy the constitutional defect.

Issues

[29] The key issues for determination are whether the Labour Court has jurisdiction to declare an Act of Parliament unconstitutional and invalid and whether the confirmation proceedings are competent and properly before this Court. If they are, whether the order of the Labour Court should be confirmed. If the declaration of invalidity is confirmed, what remedy would be appropriate? In deciding whether the declaration should be confirmed, it is necessary to determine whether the deductions in terms of section 38(2)(b)(i) constitute (i) “unfettered self-help” in violation of section 1(c) of the Constitution and (ii) set-off under the common law.

[30] It may also be necessary to determine whether that section limits the state employees’ rights in terms of sections 9(1), 23(1), 25(1)(a) and 34 of the Constitution and, if so, whether the limitation is justifiable in terms of section 36 of the Constitution. Who should bear the costs in the confirmation proceedings? If the declaration of unconstitutionality is not confirmed, whether the appeal should be upheld and who should bear the costs of the appeal?

Jurisdictional challenge

[31] The challenge regarding the Labour Court’s lack of jurisdiction to strike down legislation, other than that within its jurisdiction, in terms of the Labour Relations Act (LRA), is a novel constitutional issue and also needs consideration.

[32] The starting point is the Constitution. Section 166 of the Constitution lists a number of courts. The list includes “any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Court or the Magistrates’ Courts”.

The Labour Court is established in terms of the LRA. It is, in terms of section 151(1) of that statute, a court of law and equity. Section 151(2) reads:

“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.”

This provision makes it clear that the Labour Court’s inherent powers and standing, are equal to that of the High Court. It is a court of similar status to that of the High Court.

[33] Section 172 of the Constitution deals with the powers of courts in constitutional matters. In relevant parts, it reads:

“(1) When deciding a constitutional matter within its power, a court—

- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
- (b) may make any order that is just and equitable

. . .

(2) (a) The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

- (b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.

. . .

- (d) Any person or organ of state with a sufficient interest may appeal or apply directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection.”

It follows that, being a court of similar status with the High Court, the Labour Court has the power to make an order concerning the constitutional validity of an Act of Parliament.

[34] Section 172(2) of the Constitution must be read with section 157(2) of the LRA in terms of which the Labour Court has jurisdiction to decide constitutional issues. Section 157(2) provides:

“The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from—

- (a) employment and labour relations;
- (b) any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and
- (c) the application of any law for the administration of which the Minister is responsible.”

[35] In terms of this subsection, the Labour Court retains its concurrent jurisdiction with the High Court in its adjudication “of any alleged or threatened violation of any fundamental rights entrenched in chapter 2 of the Constitution.” Therefore, an enquiry on whether it is competent for the Labour Court to declare an Act of Parliament invalid must be confined to the interpretation of section 157(2). The claim in this case was based on unilateral deductions by the state that allegedly constituted self-help in violation of Ms Ubogu’s rights, including the right to equality, right to fair labour practices, and the right to have any dispute decided in a fair public hearing before a court. The

alleged violation of Ms Ubogu's rights arises from employment and labour relations. Additionally, it involves the constitutionality of an administrative act or by the state in its capacity as an employer.

[36] Unlike section 157(1) of the LRA in terms of which the Labour Court has exclusive jurisdiction in respect of all matters that are to be determined by it, that Court did have jurisdiction in terms of section 157(2) in respect of the violation of Ms Ubogu's rights, including the rights to fair labour practices and access to courts, arising from employment and labour relations, and disputes over the conduct of the state in its capacity as an employer, in making arbitrary deductions from Ms Ubogu's salary.

[37] Section 157(2) of the LRA must thus be read with section 172 of the Constitution. The powers of courts in constitutional matters, as set out in section 172 above, must be read and understood in conjunction with the powers of courts in section 167(5) of the Constitution.³⁰ In terms of the latter, the Constitutional Court makes the final decision whether an Act of Parliament is constitutional and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force.

[38] Notably, the items in Schedule 6 to the Constitution are relevant. Item 16 deals with courts. Item 16(1) reads:

"Every court . . . existing when the new Constitution took effect, continues to function and to exercise jurisdiction in terms of the legislation applicable to it . . . subject to—

(a) any amendment or repeal of that legislation; and

(b) consistency with the new Constitution."

[39] Item 16(6)(a) provides that as soon as practicable after the Constitution took effect all courts including their structures, composition, functioning, and jurisdiction, and all relevant legislation, must be rationalised with a view to establishing a judicial system suited to the requirements of the Constitution.

[40] The Superior Courts Act³¹ recognises, in its long title, that the rationalisation envisaged in item 16(6)(a) is an on-going process that is likely to result in further legislative and other measures in order to establish a judicial system suited to the requirements of the Constitution. The objects of the Superior Courts Act, set out in section 2, are—

"(1) . . .

(a) to consolidate and rationalise the laws pertaining to Superior Courts [including the Labour Court], as contemplated in item 16(6) of Schedule 6 to the Constitution.

(b) to bring the structures of the Superior Courts in line with the provision of Chapter 8 and the transformative imperatives of the Constitution.

. . .

(2) This Act must be read in conjunction with Chapter 8 of the Constitution, which contains the founding provisions for the structures and jurisdiction of the Superior Courts."

[41] Chapter 5 of the Superior Courts Act deals with orders of constitutional invalidity. Section 15(1) provides that if the "Supreme Court of Appeal, a Division of the High Court, or any competent court declares any Act of Parliament invalid as contemplated in section 172(2)(a) of the Constitution, that court . . . must refer the order of constitutional invalidity to the Constitutional Court for confirmation."

Notably, schedule 2 of the Superior Courts Act deals with the amended laws which include the amendment of the LRA. Section 151(2) of the LRA now states that the Labour Court is a Superior Court that has authority, inherent powers, and standing, equal to a court of a Division of the High Court of South Africa, in relation to matters under its jurisdiction.

[42] This matter was brought to the Labour Court as one falling within its jurisdiction. Ms Ubogu relied on, among other things,

the right to fair labour practices under section 23(1) of the Constitution. The preamble to the LRA makes it plain that the purpose of the LRA is to give effect to this right. Additionally, Ms Ubogu relied on the right to equality under section 9 and to have her dispute decided in a fair public hearing before a court under section 34 of the Constitution. The matter fell within the concurrent jurisdiction of both the Labour Court and the High Court. To that end, it was open for Ms Ubogu to approach either the High Court or the Labour Court. She approached the latter.

[43] In any event, section 158(1)(a)(iv) of the LRA empowers the Labour Court to make “a declaratory order”. Though the power to make a declaration of constitutional invalidity is not expressly listed, an interpretation of section 158(1)(a)(iv) – read with section 157(2) – that does not include such orders may lead to an absurdity. In *New Clicks*, Chaskalson CJ stated that a court may “depart from the clear language of a statute where that would otherwise lead ‘to absurdity so glaring that it could never have been contemplated by the Legislature, or where it would lead to a result contrary to the intention of the Legislature, as shown by the context or by such other considerations as the Court is justified in taking into account’”. The avoidance of absurdity, which is considered a “fundamental tenet of statutory interpretation” must be guided by the “riders”—

- “(a) that statutory provisions should always be interpreted purposively;
- (b) the relevant statutory provision must be properly contextualised; and
- (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity.”

[44] I have had the benefit of reading Jafta J’s judgment in which he concludes that the Labour Court lacked jurisdiction to declare the impugned provision invalid. I do not agree. If, in terms of section 157(2) of the LRA, the Labour Court shares the

High Court’s jurisdiction in respect of any alleged or threatened violation of any fundamental right entrenched in chapter 2 of the Constitution, the question is: what is the High Court’s jurisdiction in this regard? The High Court’s jurisdiction includes the ability to declare constitutionally invalid, legislation that is the source of the violation of the fundamental right concerned. Surely, then, that must mean in terms of section 157(2) the Labour Court has that same jurisdiction.

[45] The approach in Jafta J’s judgment and the conclusion that the Labour Court lacked jurisdiction will have serious practical ramifications, not only for litigants but also the proper administration of justice. If indeed the Labour Court lacked jurisdiction, this means that Ms Ubogu would have had to approach the Labour Court to review the decision of the state in its capacity as employer and the High Court for a declaration of constitutional invalidity of the impugned provisions, on a similar set of facts. The speedy resolution of this labour dispute would have been thwarted and the costs in this litigation for Ms Ubogu would have increased exponentially. Additionally, the judicial resources would have been unnecessarily doubled.

[46] Properly read, the LRA must be understood as permitting the Labour Court to have the power to declare an Act of Parliament invalid and for that Court to grant an effective remedy to safeguard against the alleged violation of employees’ rights, including the right to fair labour practices. That will moderate delays and high costs in litigation and will save judicial resources. Additionally, the jurisdiction of the Labour Court will be rationalised consistently with the Constitution. I conclude that the Labour Court is a court of a similar status as the High Court having jurisdiction to make an order concerning the constitutional validity of an Act of Parliament. To hold otherwise will make nonsense of the constitutional and legislative scheme. Besides, the envisaged and on-going rationalisation – to obviate fragmented courts’ structures, functioning and jurisdiction that existed at the advent of the Constitution – will be frustrated.

Are the confirmation proceedings properly before this Court?

[47] The Minister of Public Service contends that the confirmatory proceedings are not properly before this Court. It is argued that whilst the Labour Court seems to have concluded that section 38(2)(b)(i) is unconstitutional, it did not issue an order of invalidity. It is argued that the Labour Court merely interpreted the impugned provision in terms of section 39(2) of the Constitution and thus saved the provision from a declaration of invalidity. The Minister's challenge was that the order of the Labour Court does not constitute an order as contemplated in section 167(5) of the Constitution.

[48] To determine whether the confirmatory proceedings are properly before this Court it is necessary to have regard to the application before the Labour Court and the final order it granted.

[49] In the Labour Court, PSA challenged, among other things, the lawfulness of the deductions and the constitutionality of section 38(2)(b)(i) of the Act, in terms of which the deductions had been made. The application in that Court was confusing because the constitutional challenge was not explicitly pleaded. This requirement, as was stated in Phillips, "ensures that the correct order is made", and "that all interested parties have an opportunity to make representations."

[50] In Garvas, Jafta J (albeit the minority) emphasised the importance of accuracy in the pleadings. He remarked:

"Orders of constitutional invalidity have a reach that extends beyond the parties to a case where a claim for a declaration of invalidity is made. But more importantly these orders intrude, albeit in a constitutionally permissible manner, into the domain of the legislature.

The granting of these orders is a serious matter and they should be issued only where the requirements of the Constitution for a review of the exercise of legislative powers have been met.

...

Holding parties to pleadings is not pedantry. It is an integral part of the principle of legal certainty which is an element of the rule of law, one of the values on which our Constitution is founded. Every party contemplating a constitutional challenge should know the requirements it needs to satisfy and every other party likely to be affected by the relief sought must know precisely the case it is expected to meet."

[51] The inaccuracy in pleading in this case has, as will be illustrated in a short while, resulted in the confusing and extraordinary orders by the Labour Court. That Court issued a rule nisi declaring the impugned provision invalid. It called the Minister of Public Service, the Finance MEC and the Finance Minister to show cause, among other things, why the unilateral deductions of monthly instalments were not ultra vires. Alternatively, why section 38(2)(b)(i) should not be declared unconstitutional or could not be read in a manner consistent with the Constitution.

[52] On the return day, PSA sought confirmation of the rule nisi in relation to orders in paragraphs 1.2, 1.3, and 1.5.37 However, in its submission, it insisted on it being granted a "declaration of constitutional invalidity" of section 38(2)(b)(i).

[53] The Labour Court, per Tlhotlhemaje J, analysed the rule of law principle and its components, including principles of legality and self-help as was discussed in Chief Lesapo. It discussed and examined the principles of legality and considered whether deductions made in terms of section 38(2)(b)(i) amounted to untrammled self-help, as prohibited by the principle of legality in terms of section 1(c) of the Constitution. It held that an employer cannot make deductions from an employee's salary to set-off past overpayments without the employee's prior agreement or a court order.

It held further that the impugned provisions sanctions self-help and distinguished between employees in the service of the state and those who are not, in that, in respect of the former it does not require consent or legal proceedings in the recovery process. The Court held that the deductions violated the spirit, purport and

objects of the Bill of Rights and amounted to untrammelled self-help.

[54] The Labour Court also examined the interpretative provision of the Constitution in terms of which courts are enjoined to interpret legislation to “promote the spirit, purport and objects of the Bill of Rights.” It confirmed the provisional order by issuing a confusing order, declaring the impugned provision “unconstitutional as presently formulated, and accordingly falls to be interpreted in a manner which conforms with the provisions of the Constitution . . . [in] sections 23(1), 25(1) and 34.” The Court read words into the provision.

[55] By so doing, the Labour Court conflated the interpretative principles with those of legality. This conflation is illustrated by certain portions of the Labour Court judgment where it said that on its proper construction, the impugned provision allows untrammelled self-help on the part of the state in recovering public funds and that it cannot be countenanced. But then the Court, as shown above, fashioned a mixed-up order declaring the impugned provision unconstitutional and fashioned an interpretative remedy of reading-in to cure the defect.

[56] In *National Coalition*, this Court explicitly distinguished the remedies of reading-in and reading-down.⁴⁶ It said that reading-in is a constitutional remedy granted by a court after declaring an impugned provision unconstitutional and invalid with a view to adding words to the statutory provision in question to remedy the defect in it. This method of controlling the impact of invalidity must be distinguished from the interpretative method of reading-down.

[57] As Jafta J cautioned in *Garvas*, “holding parties to pleadings is not pedantry.”

The vague pleadings here resulted in the Labour Court conflating the interpretative process with the one of declaring the impugned provision to be inconsistent with the Constitution and thus invalid. The Court then confused the remedy generally referred to as reading-down – an interpretive tool – with reading-in; a more invasive remedy invoked after a provision has been found constitutionally invalid.

[58] Despite the inaccuracy and conflation, the Labour Court did, in substance, declare section 38(2)(b)(i) unconstitutional. The order was competent and the confirmation proceedings are thus properly before this Court. The question then arises whether the declaration of invalidity should be confirmed. And, if it should, what will be an appropriate remedy?

Should the declaration of invalidity be confirmed?

[59] The Labour Court is, in terms of section 172(2)(a) of the Constitution, a Court of similar status as a High Court. It may thus make an order of constitutional invalidity of an Act of Parliament, which has no force unless it is confirmed by this Court in terms of section 167(5) of the Constitution. The Labour Court held that “in line with Chief Lesapo . . . section 38(2)(b)(i) allows untrammelled self-help by the state and can thus not be countenanced in a constitutional democracy.”

[60] Section 38 of the Act bears repeating in relevant parts:

“Wrongly granted remuneration

(1) (a) If an incorrect salary, salary level, salary scale or reward is awarded to an employee, the relevant executive authority shall correct it with effect from the date on which it commenced.

(b) Paragraph (a) shall apply notwithstanding the fact that the employee concerned was unaware that an error had been made in the case where the correction amounts to a reduction of his or her salary.

(2) If an employee contemplated in subsection (1) has in respect of his or her salary, including any portion of any allowance or other remuneration of any other benefit calculated on his or her basic salary or salary scale or awarded to him or her by reason of his or her basic salary—
...

(b) been overpaid or received any such other benefit not due to him or her—

- (i) an amount equal to the amount of the overpayment shall be recovered from him or her by way of the deduction from his or her salary of such instalments as the relevant accounting officer may determine if he or she is in the service of the State, or, if he or she is not so in service, by way of deduction from any moneys owing to him or her by the State, or by way of legal proceedings, or partly in the former manner and partly in the latter manner.”

[61] The foundational values of the Constitution include the supremacy of the Constitution and the rule of law. This supremacy connotes that “law or conduct inconsistent with [the Constitution] is invalid, and the obligations imposed by it must be fulfilled.”

[62] In any event, to the extent that it is necessary to deal with the limitation of the right to have judicial redress as self-help denotes, section 34 of the Constitution guarantees everyone the right “to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court”.

This section not only guarantees everyone the right to have access to courts but also “constitutes public policy” and thus “represents those [legal convictions and] values that are held most dear by the society.” As this Court has repeatedly said before, the right to a fair public hearing requires “procedures . . . which, in any particular situation or set of circumstances, are right and just and fair”. Notably, none of the respondents has suggested that the limitation of the right to have judicial redress is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

[63] Regarding the principle of fair procedure, this Court remarked in *De Lange*—

“[a]t heart, fair procedure is designed to prevent arbitrariness in the outcome of the decision. The time-honoured principles that no-one shall be the judge in his or her own matter - and that the other side should be heard [audi alteram partem] - aim toward eliminating the proscribed arbitrariness in a way that gives

content to the rule of law. They reach deep down into the adjudicating process, attempting to remove bias and ignorance from it. . .

Everyone has the right to state his or her own case, not because his or her version is right, and must be accepted, but because, in evaluating the cogency of any argument, the arbiter, still a fallible human being, must be informed about the points of view of both parties in order to stand any real chance of coming up with an objectively justifiable conclusion that is anything more than chance. Absent these central and core notions, any procedure that touches in an enduring and far-reaching manner on a vital human interest . . . points in the direction of a violation”.

[64] Although section 38(2)(b)(i) is a statutory mechanism to ensure recovery of monies wrongly paid to an employee out of the state coffers, the provision gives the state free rein to deduct whatever amounts of money allegedly wrongly paid to an employee⁵⁸ without recourse to a court of law. The alleged indebtedness here is R675 092.56. The state determined, arbitrarily, the amount of the monthly instalments so as to avoid what it believed was the necessity for Treasury approval of an instalment plan over 12 months. Given that the alleged indebtedness was

R675 092.56, the monthly deduction was in the sum of about R56 257.72 from Ms Ubogu’s gross salary of R62 581.42. It meant that, even at the rate of her downgraded gross salary of R40 584.85, Ms Ubogu could not afford to pay the alleged debt.

[65] The effect of the provision is to impose strict liability on an employee. The deductions may be made without the employee concerned making representations about her liability and even her ability to pay the instalments.

The impugned provision also impermissibly allows an accounting officer unrestrained power to determine, unilaterally, the instalments without an agreement with an employee in terms of which the overpayment may be liquidated.

[66] Section 38(2)(b)(i) undermines a deeper principle underlying our democratic order. The deductions in terms of that provision constitute an unfettered self-help – the taking of the law by the state into its own hands and enabling it to become the judge in its own cause, in violation of section 1(c) of the Constitution.

Self-help, as this Court held in Chief Lesapo, “is inimical to a society in which the rule of law prevails, as envisaged in section 1(c) of our Constitution.” Although there may be circumstances when good reasons exist – justifying self-help – this is however not a case of that kind.

[67] By aiding self-help, the impugned provision allows the state to undermine judicial process – which requires disputes be resolved by law as envisaged in section 34 of the Constitution. This provision does not only guarantee access to courts but also safeguards the right to have a dispute resolved by the application of law in a fair hearing before an independent and impartial tribunal or forum.⁶¹ It is not insignificant that section 31 of the Act envisages recovery of money, in the case of unauthorised remuneration, “by way of legal proceedings”. The Minister of Public Service argues that Ms Ubogu’s section 34 right was not violated because that protection applies only to disputes that are capable of resolution by application of law.

This contention is flawed. The Minister does not explain why the existing dispute was not capable of resolution by the application of law in a fair public hearing before a court. The mechanism through section 38(2)(b)(i), as currently formulated, is clearly unfair. It promotes self-help and imposes strict liability on an employee in respect of overpayment irrespective of whether the employee can afford the arbitrarily determined instalments and was afforded an opportunity for legal redress.

[68] On those bases, section 38(2)(b)(i) does not pass constitutional muster. However, because of the conflation of the constitutional remedies by the Labour Court, the declaration of invalidity as currently fashioned cannot be confirmed. It needs to be reformulated. Accordingly, in

the view I take of the matter, it is not necessary to determine whether the impugned provision limits the rights in sections 9(1), 23(1) and 25(1) of the Constitution and whether the limitation of these rights is reasonable and justifiable in terms of section 36 of the Constitution.

Do deductions under section 38(2)(b)(i) regulate the right of set-off?

[69] Before I deal with the remedy, it is necessary to address the question whether the section 38(2)(b)(i) deductions regulate set-off. The appellants submit that section 38(2)(b)(i) regulates the right of set-off, which is not self-help, arbitrary or unfair. The underlying premise to the argument that common law set-off does not amount to a form of self-help, is not correct.

[70] The doctrine of set-off is recognised under the common law. The Appellate Division, as the Supreme Court of Appeal was then known, pointed out in

Schierhout that:

that head of department may in writing require that employee or that other person or that financial institution not to dispose thereof, or if it is money, not to dispose of a corresponding sum of money, as the case may be, pending the outcome of any legal steps for the recovery of that remuneration, allowance or reward or the value thereof.”

“When two parties are mutually indebted to each other, both debts being liquidated and fully due, then the doctrine of compensation comes into operation. The one debt extinguishes the other pro tanto [only to the extent of the debt] as effectually as if payment had been made”.

[71] In Harris, Rosenow J remarked that the “origin of the principle appears rather to have been a common-sense method of self-help”.⁶⁴ In my view, the mechanisms in the impugned provision are not comparable to set-off under the common law. The doctrine of set-off does not operate ex lege (as a matter of law). Besides, there are no mutual debts. Here, the deductions in terms of section 38(2)(b)(i) are made from an

employee's salary. The dispute regarding whether the translation of her position as Clinical Manager: Medical affected her starting package on the new position remains unresolved. Therefore, the parties cannot be said to be mutually indebted to each other. It is arguable that the alleged debt can, in the circumstance, be said to be fully due.

- [72] The doctrine cannot be invoked to defeat the employee's claim in relation to her salary. Particularly, where a dispute surrounding the translation of her position that, allegedly, did not affect her starting package, had not been resolved by the application of law in a fair hearing before a court. At the risk of repetition, the mechanism in the impugned provision constitutes self-help.

As the Labour Appeal Court correctly observed in *Western Cape Education Department*, the state has an obligation to exercise its power under section 38(2)(b)(i) reasonably and with regard to procedural fairness. Indeed, the notions of fairness and justice inform public policy – which takes into account the necessity to do simple justice between individuals.⁶⁶ The contention that a deduction under section 38(2)(b)(i) regulates the right of set-off is, in the circumstance, flawed. However, this should not be understood to suggest that there can never be instances in which the doctrine of set-off, especially where there are mutual debts in existence, may be invoked.

Remedy

- [73] This Court has broad remedial powers to fashion a remedy that is “just and equitable” following a declaration of invalidity in terms of section 172(1) of the Constitution. Orders of constitutional invalidity have a reach that extends beyond the parties. The envisaged order must also be effective in relation to the successful litigant and others similarly placed. It must take into account the interests of the state because such orders invariably intrude, albeit in a constitutionally permissible manner, into the domain of the other spheres of government. Depending on the circumstances of each case, the order that is just and equitable may include an order limiting the retrospective effect of the

declaration of invalidity or its suspension. This allows a competent authority to cure the defect. The evidence before us warrants a determination of a just and equitable remedy.

- [74] The Minister of Public Service submits that, if the Labour Court's order constitutes a declaration of constitutional invalidity and is confirmed, the declaration of invalidity must be suspended to enable Parliament to cure the defect in the legislation. The Minister submits that the question whether a different regime should apply in relation to the sphere of recovery of monies overpaid by the state engages a multi-faceted set of interests. It is submitted that the appropriate forum for balancing those interests is thus the legislative sphere.

- [75] The applicant has been successful because, as mentioned above, section 38(2)(b)(i) does not pass muster. Ms Ubogu is thus entitled to an effective remedy but the interests of good government should also be taken into account when an appropriate remedy is considered. Having established that the impugned provision offends the rule of law, in that it permits self-help and attenuates Ms Ubogu's procedural rights to fair legal redress, the appropriate remedy should obviate self-help and arbitrary deductions from Ms Ubogu's salary by the state.

- [76] When issuing a rule nisi, Steenkamp J, also interdicted the Head of the Department of Health and the MEC for Health from making any further deductions from Ms Ubogu's remuneration. The relevant part of that order reads:

“2. Pending the outcome of this application the [Head of the Department of Health and MEC for Health] be and are hereby interdicted from making any further deductions from [Ms Ubogu's] remuneration (including but not limited to her monthly salary, annual bonus or performance awards) in recovery of the amounts allegedly erroneously overpaid to her.”

- [77] On the return day, Tlhotlhemaje J confirmed part of the interim order, and the

interim interdict above was neither discharged nor confirmed nor appealed against.

The interim interdict stands. For clarity, it means that with effect from 29 September 2016, no deductions were made in light of that interdict. To that end, Ms Ubogu has been granted an effective interim remedy in her favour, pending the determination of the disputes between the parties.

The order that I make will reflect this. In the circumstances, it will be appropriate to remit the matter back to the Labour Court. This will make it possible for the disputes between the parties to be resolved by application of law in a fair public hearing. The disputes include the correctness of the recovery of the amounts allegedly overpaid to Ms Ubogu and whether the translation of her position as Clinical Manager: Medical affected her starting package on the new position.

[78] There can be no doubt that the recovery of monies overpaid by the state engages multi-faceted interests. Section 34(1) of the BCEA may be a point of reference when the defect in the impugned legislation is remedied. This section prohibits an employer from making deductions from an employee's remuneration unless by agreement or unless the deduction is required or permitted in terms of a law or collective agreement or court order or arbitration award.

It bears mentioning that section 34(5) read with section 34(1) of the BCEA does not authorise arbitrary deductions. Therefore, the appropriate forum for balancing different interests is Parliament and it will be open to it to consider, among other things, the impact of section 34 of the BCEA and the potential inequality between public service employees and those falling outside the public service who have been overpaid for reasons covered by section 31 of the Act. Accordingly, reading-in will not be appropriate here. It will be just and equitable to issue an order declaring section 38(2)(b)(i) of the Act unconstitutional.

Costs

[79] The applicant, as the successful party in challenging the constitutionality of the impugned provisions, is entitled to costs. The Minister of Public Service, who is responsible for the administration of the Act and its regulations, should pay the costs of PSA.

Order

[80] The following order is made:

1. It is declared that section 38(2)(b)(i) of the Public Service Act is unconstitutional.
2. The appeal is dismissed.
3. The interim interdict in paragraph 2 of the order of the Labour Court of South Africa, Johannesburg, on 29 September 2016 stands.
4. The matter is remitted to the Labour Court to determine the disputes between the parties regarding the recovery of the amounts allegedly overpaid to Ms Olufunmilayi Itunu Ubogu.
5. The Minister for Public Service and Administration is ordered to pay the costs of the applicant (in CCT 6/17) and the respondent (in CCT 14/17).

JAFTA J:

[81] I have had the benefit of reading the judgment prepared by the Acting Deputy Chief Justice (first judgment). I disagree that the appeal should be dismissed and that the declaration of invalidity made by the Labour Court must be confirmed. My disagreement with the first judgment hinges on whether the Labour Court had jurisdiction to declare an Act of Parliament invalid.

[82] Jurisdiction of all courts may be traced to the Constitution which vests the judicial authority in the courts. The entire judicial system is carefully constructed in the Constitution. The composition and jurisdiction of the various courts are provided for. But some specialist courts like the Labour Court, Equality Court and the Competition Appeal Court are

established in terms of legislation. Therefore the Constitution is the right place at which to commence the enquiry into whether the Labour Court had jurisdiction to declare an Act of Parliament invalid.

Court structure and jurisdiction

[83] The apex court is the Constitutional Court whose composition and jurisdiction are defined by section 167 of the Constitution.⁷³ Notably, section 167(5) mentions other Courts by name except courts of a status similar to the High Court. This provision does not confer jurisdiction on courts of a status similar to the High Court. Rather it stipulates that orders of constitutional invalidity made by other Courts have no legal effect unless and until confirmed by this Court. Implicitly, section 167(5) recognises that other courts too have jurisdiction to invalidate an Act of Parliament or conduct of the President. But this section cannot be read as the source of their jurisdiction. Each of those courts has its own source of jurisdiction.

[84] Immediately below the Constitutional Court, the Constitution places the Supreme Court of Appeal. Section 168 defines its composition and competence. As its name suggests, this Court entertains appeals on constitutional and non-constitutional matters. This means that it may declare an Act of Parliament or conduct of the President to be invalid, on appeal. If that occurs, its order is subject to confirmation by the Constitutional Court.

[85] The High Court occupies a position that is immediately below the Supreme Court of Appeal. The High Court is established in terms of section 169 of the Constitution but its composition is defined by the Superior Courts Act. Section 169 provides:

- “(1) The High Court of South Africa may decide—
- (a) any constitutional matter except a matter that—
 - (i) the Constitutional Court has agreed to hear directly in terms of section 167(6)(a); or

- (ii) is assigned by an Act of Parliament to another court of a status similar to the High Court of South Africa; and

- (b) any other matter not assigned to another court by an Act of Parliament.

(2) The High Court of South Africa consists of the Divisions determined by an Act of Parliament, which Act must provide for—

- (a) the establishing of Divisions, with one or more seats in a Division; and

- (b) the assigning of jurisdiction to a Division or a seat within a Division.

(3) Each Division of the High Court of South Africa—

- (a) has a Judge President;

- (b) may have one or more Deputy Judges President; and

- (ii) issues connected with appeals; and

- (iii) any other matter that may be referred to it in circumstances defined by an Act of Parliament.”

- (c) has the number of other judges determined in terms of national legislation.”

[86] It is apparent from the language of this section that the High Court enjoys a wide constitutional jurisdiction that is limited only in two respects. First, it may not decide matters that fall within the exclusive jurisdiction of the Constitutional Court. Nor may it entertain a matter which this Court has agreed to hear. Second, it may not adjudicate a constitutional matter assigned by an Act of Parliament to another court of a status similar to the High Court.⁷⁵ With regard to non-constitutional matters, the

High Court may decide any matter not assigned to another court by an Act of Parliament.

[87] A proper reading of section 169(1) reveals that no provision of the Constitution may be read as directly conferring jurisdiction upon the Labour Court or other courts of similar status. This is because section 169 declares that courts of a status similar to the High Court may be assigned constitutional jurisdiction by an Act of Parliament. If that jurisdiction is conferred on a court of a status similar to the High Court, the High Court's jurisdiction is ousted by section 169(1)(a)(ii).

Conversely, if the High Court has jurisdiction over a constitutional matter, on a proper interpretation of section 169, the other courts may have no jurisdiction over the same matter, barring the Supreme Court of Appeal and this Court.

[88] Since here we are concerned with the jurisdiction of the Labour Court over a constitutional matter, a court of status similar to the High Court, section 169 directs us to search for this jurisdiction in an Act of Parliament. And that Act of Parliament is the LRA.

Labour Court's jurisdiction

[89] Section 157 of the LRA provides:

“(1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.

(2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from—

- (a) employment and from labour relations;
- (b) any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act

or conduct, by the State in its capacity as an employer; and

(c) the application of any law for the administration of which the Minister is responsible.

(3) Any reference to the court in the Arbitration Act, 1965 (Act No. 42 of 1965), must be interpreted as referring to the Labour Court when an arbitration is conducted under that Act in respect of any dispute that may be referred to arbitration in terms of this Act.

(4)

(a) The Labour Court may refuse to determine any dispute, other than an appeal or review before the Court, if the Court is not satisfied that an attempt has been made to resolve the dispute through conciliation.

(b) A certificate issued by a commissioner or a council stating that a dispute remains unresolved is sufficient proof that an attempt has been made to resolve that dispute through conciliation.

(5) Except as provided for in section 158(2), the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if this Act or any employment law requires the dispute to be resolved through arbitration.”

[90] Section 157(1) sets out jurisdiction that is exclusive to the Labour Court. This section proclaims that all matters which “are to be determined by the Labour Court” in terms of the LRA or any other law, fall within the exclusive jurisdiction of that Court.⁷⁷ Whereas section 157(2) lists constitutional matters over which the Labour Court has concurrent jurisdiction with the High Court. This is evident from the opening words of the latter provision, especially the use of the word “concurrent”.

[91] Contrary to section 169(1)(a)(ii) of the Constitution, section 157(2) of the LRA does not confer exclusive constitutional jurisdiction on the Labour Court. This

misalignment may be due to the fact that the LRA preceded the Constitution. It came into effect under the interim Constitution in terms of which only the Constitutional Court could declare Acts of Parliament to be invalid. Parliament has not amended section 157 to remove the misalignment, after the Constitution came into operation in February 1997. As a result section 157(2) still retains the concept of concurrent jurisdiction.

[92] It is this concurrent jurisdiction that has led to conflicting decisions in the High Court.⁷⁹ This controversy was settled by this Court in *Fredericks*.⁸⁰ This Court construed section 157(1) restrictively to encompass only those matters which are to be determined by the Labour Court. With regard to section 158 of the LRA O'Regan J said:

“Whatever the precise ambit of section 158(1)(h), it does not expressly confer upon the Labour Court constitutional jurisdiction to determine disputes arising out of alleged infringements of the Constitution by the state acting in its capacity as employer. Given the express conferral of jurisdiction in such matters by section 157(2), it would be a strange reading of the Act to interpret section 158(1)(h) read with section 157(1) as conferring on the Labour Court an exclusive jurisdiction to determine a matter that has already been expressly conferred as a concurrent jurisdiction by section 157(2). Section 158(1)(h) cannot therefore be read as conferring a jurisdiction to determine constitutional matters upon the Labour Court sufficient, when read with section 157(1), to exclude the jurisdiction of the High Court.”

[93] The Labour Court's jurisdiction to decide constitutional issues is conferred by section 157(2) and by this provision alone. Therefore, an enquiry on whether it is competent for the Labour Court to invalidate an Act of Parliament must be confined to the interpretation of section 157(2) of the LRA. This is so because constitutional jurisdiction may be conferred on a court of status similar to the High Court only by means of an Act of

Parliament. It is apparent from the provisions of Chapter 8 of the Constitution that the Constitution itself does not bestow jurisdiction on specialist courts such as the Labour Court, the Competition Appeal Court and the Equality Court.

[94] But the Constitution embraces the fact that if these courts are given a status equal to that of the High Court, they may as well be granted jurisdiction to declare Acts of Parliament to be invalid. However, that declaration, like those of the High Court and the Supreme Court of Appeal, may only take effect if confirmed by the Constitutional Court. But this Court has the competence to confirm only a declaration of invalidity made by a court that has jurisdiction to do so. Absent the jurisdiction to declare the invalidity, there can be no confirmation.

[95] Since the enquiry has narrowed down to section 157(2) of the LRA, it is to that provision that our focus should be directed. That section raises three issues in respect of which it confers concurrent jurisdiction upon the Labour Court and the High Court.

All three relate to “any alleged or threatened violation” of any fundamental right entrenched in chapter 2 of the Constitution. However, the “alleged or threatened violation” must arise from—

- “(a) employment and from labour relations;
- (b) any dispute over the constitutionality of any executive or administrative act or conduct or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and
- (c) the application of any law for the administration of which the Minister is responsible.”

[96] Evidently a constitutional claim envisaged in section 157(2) must, first and foremost, be in respect of a violation of a fundamental right. Second, the dispute must be related to the constitutionality of specified acts like an executive or administrative act or conduct of the state. Third, the act or conduct itself must be

performed by the state in the particular capacity of an employer.

[97] While it is true that the current dispute arose from employment, it does not follow without more that this fact alone confers on the Labour Court the jurisdiction to declare an Act of Parliament to be invalid. Nor can a dispute arising from the application of a law falling under the administration of the Minister of Labour clothe the Labour Court with that power. The fact that these two issues may be described as constitutional issues does not empower the Labour Court to strike down legislation.

[98] The power of the Labour to declare something unconstitutional is contained in subsection (2)(b) of section 157. That power is limited to the constitutionality of executive acts, administrative acts and conduct or a threat to commit any of these acts. This list does not include the constitutionality of Acts of Parliament. The reason for this omission was that at the time the LRA came into force in November 1996, the Constitutional Court was the only Court that could declare an Act of Parliament to be invalid. Under the interim Constitution, all claims on the invalidity of an Act of Parliament were referred to the Constitutional Court. The other courts could decide issues other than the validity of an Act of Parliament because the interim Constitution conferred the jurisdiction to strike down those Acts on the Constitutional Court alone.

[99] Before the Constitution came into operation in February 1997, section 157(2) of the LRA could not be construed as giving the Labour Court jurisdiction to declare Acts of Parliament invalid. This was so because its language did not reasonably carry that meaning. Nor was the provision contemplated to confer that power. There is nothing that warrants that the same language be now given a different meaning. The scope of section 157(2) remains the same. The fact that the Constitution now recognises that courts of a status similar to the High Court may be given the power to invalidate Acts of

Parliament does not justify a different interpretation of section 157(2).

[100] The provision does not extend the entire constitutional jurisdiction of the High Court to the Labour Court. The concurrent jurisdiction is limited to claims including the violation of fundamental rights, arising from one of three specified instances which do not include validity of an Act of Parliament. While it is true that deductions made on Ms Ubogu's salary may have violated her fundamental rights and as a result the Labour Court had jurisdiction to entertain that dispute, it did not follow automatically that the Labour Court could declare invalid the Act in terms of which the deductions were effected. Expanding the constitutionality jurisdiction conferred on the Labour Court by section 157(2) of the LRA to include constitutionality of an Act of Parliament, is at variance with the approach adopted in Zantsi.

[101] It follows that the Labour Court lacked the jurisdiction to declare the impugned provision invalid. Consequently its order may not be confirmed.

[102] For all these reasons I would uphold the appeal and decline to confirm the declaration of invalidity made by the Labour Court.

For the Applicant:

C Nel instructed by Macgregor Erasmus Attorneys.

For the First and Second Respondent:

J Peter SC and K Nondwangu instructed by Mncedisi Ndlovu & Sedumedi Inc.

For the Third Respondent:

T Ngcukaitobi and R Tulk instructed by the State Attorney, Pretoria.

3. Questions & Answers



Dear General Secretary

Question:

Herewith a kind request for advice/guidance regarding the following:

I am employed at a primary school as an assistant to the teachers for two years and counting. If there is available teacher posts may I apply although I have no teacher qualification but I am currently studying B.Ed at Unisa and I am registered with SACE?

There is also a dire need for Afrikaans teachers in the development phase and now the black teachers are forced to teach a language they themselves do not properly understand and they are afraid of victimisation. I am too passionate to teach and on numerous occasions recommended that I be conditionally appointed in the post. The new acting principal then decided to use me in the Afrikaans teacher post but after three weeks of teaching when I started to enquire about my salary and appointment letter, I was immediately removed from the post.

Thank you kindly for the advice/guidance.

Anonymous

Dear Anonymous

Kindly note that the minimum qualification for one to be permanently appointed as an educator is REQV13, which is matric plus three years of post-matric education qualification (degree or diploma).

.....

Dear General Secretary

Question:

I am a senior and FET phase physical science and mathematics educator and a father of two children. I am passionate about teaching and have done so for over three years. From January 2015 I taught physical science and mathematics and had a problem with senior management addressing serious discipline issues i.e. smoking of dagga at the back of my classroom. It continued and I stopped complaining. In April 2016 I was informed that I was never going to see my daughter again and due to the immense pressure at my workplace and my personal life, I decided not to return to work which resulted in me being absconded and my PERSAL suspended in June 2016.

I consulted priests and traditional healers because I felt terrible psychologically and spiritually in June and September respectively. In March 2017 I returned to Gauteng with the hope of resolving the grievance.

I contacted various officials within the Gauteng Department of Education's Dispute management unit and they issued me with a letter. All the instructions were followed and I was employed from 1st August 2017 to 31st August at a primary school. The Principal of the school was instructed by the district department to 'let me go' because no one at the GDE head office communicated with them. I have since tried to contact the relevant parties (Moeffiedah Jaffer and Deidrie Viljoen) AND AFTER A MILLION emails to them, I have decided to put my trust in this organisation.

Sir/Madam, please help me for the sake of my children.

Anonymous

Dear Anonymous

Your query is noted, kindly refer to our dispute referral forms, which you can obtain from on our website (<http://www.elrc.org.za/downloads/dispute-referral-forms>)

Further note that the ELRC does not have jurisdiction to deal with section 14 (abscondment) disputes.

Those matters are referred to the Labour Court. The Council may only deal with disputes of non-payment of salary (for the period 1-30 August 2017), provided that you were appointed by the Department and not the School Governing Body.

Ms NO Foca, ELRC General Secretary

Dear Readers

We would like to hear your views on education related queries or disputes. We will respond to questions in the next issue of the Labour Bulletin. Please send any questions relating to labour law to the ELRC Research & Media Manager, Ms Bernice Loxton.



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