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 Olufunmilayi Itunu Ubogu v Head of Department of Health, Gauteng and 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]

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[1] Section 167(5) of the Constitution provides:

> "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of a similar status, before that order has any force."

[2] In terms of section 172(2)(d) of the Constitution—

> "[a]ny 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."

[2] The Labour Court declared section 38(2)(b)(i) of the Public Service Act[3] (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.

[3] 103 of 1994. In relevant part, section 38 reads as follows:

> "(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.
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> (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.
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> (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 or 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—
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> (a) been underpaid, an amount equal to the amount of the underpayment shall be paid to him or her, and that other benefit which he or she did not receive, shall be awarded to him or her as from a current date; or
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> (b) been overpaid or received any such other benefit not due to him or her—
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> (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;
>
> (ii) that other benefit shall be discontinued or withdrawn as from a current date, but the employee concerned shall have the right to be compensated by the State for any patrimonial loss which he or she has suffered or will suffer as a result of that discontinuation or withdrawal."

[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).[4] They are cited by virtue of their interest in the relief sought.[5] 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

[4] The Finance MEC and the Finance Minister did not file submissions in this Court. The Department of Public Service and Administration, not a party in these proceedings, filed papers allegedly on behalf of the Minister of Public Service without a confirmatory affidavit by that Minister.

[5] Concerning the impugned provision section 38(2)(b)(i), read with the relevant provisions of the Public Finance Management Act 1 of 1999 (PFMA) and the Treasury Regulations 2005 promulgated and published in the Government Gazette 27388 on 15 March 2005 (Treasury Regulations).

(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.[6]

[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.[7] 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;

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[6] Clause 7 reads:

> "7.1 Translation from the existing dispensation to appropriate salary scales attached to the OSD based on the principle that no serving employee's salary positions (notch or package) will be less favourable with the implementation of the revised salary and career progression dispensation.
>
> 7.2 The translation to the new dispensation provided for the recognition of relevant experience of serving employees."

[7] *Public Servants Association of South Africa obo Obogu v Head of Department: Department of Health Gauteng* [2016] ZALCJHB 544 (Labour Court judgment) at para 5. For a detailed description of the email exchange between Ms Ubogu and the Department in this regard refer to paras 5.8-5.11 of the Labour Court judgment.

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.[8]

[8] The full terms of the rule *nisi* read as follows:

> "(1) A rule *nisi* do hereby issue, calling upon the Respondents to show cause, if any, to this Court on 1st day December 2016 at 10h00, or so soon thereafter as the matter may be heard, why an order should not be granted in the following terms;
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> 1.1 It is declared that all amounts allegedly overpaid to the Applicant by the First and Second Respondent/Department of Health: Gauteng more than three years prior the institution of any legal proceedings against the Applicant by the First and Second Respondents have become prescribed and accordingly are irrecoverable pursuant to the provisions of section 38(1) and (2) of the Public Service Act (Proclamation 103 of 1994), or at all;
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> 1.2 It is declared that the unilateral deduction by the First and Second Respondents of monthly instalments from the Applicant's salary in order to recover amounts allegedly erroneously overpaid to the Applicant during period 2010 to 2016 without following a fair process and absent an agreement with the Applicant, alternatively in terms of a judgment of a competent court, is *ultra vires* the provisions of section 38(2)(b)(i) of the Public Service Act (Proclamation 103 of 1994) read together with sections 3(3) and 38(1)(c)(o) of the Public Finance Management Act 1 of 1999, read together with Regulation 12 of the Treasury Regulations 2005 and the National Treasury Instructions issued in May 2014 regarding unauthorised, irregular and fruitless and wasteful expenditure;
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> 1.3 In the alternative to paragraph 1.2 above, 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 9, 23(1), 25(1) and 34 thereof, to be read as follows:
>
> *'(b) been over paid 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*

[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

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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.'

1.4 In the alternative to paragraph 1.3 above it is declared that section 38(2)(b)(i) of the Public Service Act (Proclamation 103 of 1993) is unconstitutional and is struck down.

1.5 The First and Second Respondents (together with the Third to Fifth Respondents in the event of their unsuccessful opposition to the application), are directed to pay the costs of the application, jointly and severally;

(2) Pending the outcome of the application the First and Second Respondents be and hereby interdicted from making any further deductions from Olufunmilayi Itunu Ubogu's remuneration (including but not limited to her monthly salary, annual bonus or performance awards) in recovery of the amounts erroneously overpaid to her."

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 untrammeled 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 Act[10] (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

[9] Labour Court judgment above n 7 at paras 14 and 18.

[10] 75 of 1997. Section 34(1) reads as follows:

> "An employer may not make any deductions from an employee's remuneration unless—
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> (a) subject to subsection (2), the employee in writing agrees to the deduction in respect of a debt specified in the agreement; or
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> (b) the deduction is required or permitted in terms of a law, collective agreement, court order or arbitration award."

[11] Section 34(1)(b).

[12] Labour Court judgment above n 7 at para 23.

overpayment has been made and if so, can decide on the method of recovery and the period over which such recoveries may be made."[13]

[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.[15]

[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 untrammeled self-help.[16] 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

[13] Id at para 26.

[14] Id at para 27.

[15] Id at para 21.

[16] Id at para 28.

> *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]

[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 untrammeled 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

[17] Id at para 28.

Khumalo,[18] 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.[21] 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

[18] *Khumalo v MEC for Education, KwaZulu-Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC); 2014 (3) BCLR 333 (CC).

[19] *Chirwa v Transnet Ltd* [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC).

[20] *Gcaba v Minister for Safety and Security* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC).

[21] This was raised in relation to the constitutional protection against arbitrary deprivation.

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.[22] It is submitted that,

[22] The Minister of Public Service did not file an answering affidavit but filed written submissions. The Department of Public Service and Administration (DPSA) however, filed an answering affidavit deposed to by the Director-General (DG) of the DPSA, alleging that he is authorised to depose to the affidavit. He stated that both the Minister of Public Service and the DPSA oppose the confirmation application. The DG alleged that he

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,[23] 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.[24] 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

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was authorised to lodge the application for intervention by the DPSA as it was not cited as a party to the proceeding in the Labour Court. This application was brought at the eleventh hour before the hearing of the application. A confirmatory affidavit by the Minister of Public Service was not filed. In my view, the answering affidavit was not properly before this Court.

[23] *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31; 2016 (1) SA 132 (CC); 2015 (12) BCLR 1407 (CC) at para 53.

[24] The third respondent also refers to *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) (*National Coalition*); see also *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal* [2016] ZACC 2; 2016 (3) SA 160 (CC); 2016 (4) BCLR 469 (CC) (*Tronox*); and *Van Rooyen v the State (General Council of the Bar of South Africa intervening)* [2002] ZACC 8; 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC).

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.[25] Who should bear the costs in the confirmation proceedings? If the

[25] Section 36 of the Constitution provides:

> "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;

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[26] (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".[27] 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.

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

[26] 66 of 1995.

[27] Section 166(e) of the Constitution.

[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*—
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> *(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency*; *and*
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> *(b) may make any order that is just and equitable . . . .*
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> . . .
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> (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.
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> . . .
>
> (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."[28] 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.[29] 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.

[28] Section 157(2) of the LRA. See also *Fredericks v MEC for Education and Training, Eastern Cape* [2001] ZACC 6; 2002 (2) SA 693 (CC); 2002 (2) BCLR 113 (CC) at paras 36-8.

[29] It is not insignificant that the dispute had been referred to the Public Health and Social Development Sectoral Bargaining Council before the state withheld part of her salary, hence the review of the decision in the Labour Court, challenging, amongst other things, the lawfulness of the deductions on the basis that there was no overpayment and the constitutionality of section 38(2)(b)(i) of the Act.

[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 Act[31] 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) . . .

[30] See [1].

[31] 10 of 2013 as amended by the Judicial Matters Amendment Act 8 of 2017.

> (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'".[32] 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."[33]

[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.

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[32] *Minister of Health v New Clicks South Africa* (*Pty*) *Ltd* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) (*New Clicks*) at para 232.

[33] *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) (*Cool Ideas*) at para 28.

[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*,[34] "ensures that the correct order is made", and "that all interested parties have an opportunity to make representations."[35]

[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

[34] *Phillips v National Director of Public Prosecutions* [2005] ZACC 15; 2006 (1) SA 505 (CC); 2006 (2) BCLR 274 (CC).

[35] Id at para 43.

> 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."[36]

[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).[38]

[53] The Labour Court, per Tlhotlhalemaje J, analysed the rule of law principle and its components, including principles of legality and self-help[39] as was discussed in *Chief Lesapo*.[40] It discussed and examined the principles of legality and considered whether deductions made in terms of section 38(2)(b)(i) amounted to untrammeled self-help, as prohibited by the principle of legality in terms of section 1(c) of the Constitution.[41] 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

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[36] *SATAWU v Garvas* [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) (*Garvas*) at paras 113-4.

[37] See in this regard the Labour Court judgment above n 7 at para 4.

[38] Id at para 12.8.

[39] Id at paras 14-5. See also paras 22-3 and 26.

[40] *Chief Lesapo v North West Agricultural Bank* [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC) at para 11.

[41] Section 1(c) of the Constitution provides:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> . . .
>
> Supremacy of the constitution and the rule of law."

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 untrammeled self-help.[42]

[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 spirt, purport and objects of the Bill of Rights."[43] 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.[44]

[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 untrammeled self-help on the part of the state in recovering public funds and that it cannot be countenanced.[45] 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

[42] Labour Court judgment above n 7 at para 26.

[43] Id at para 16. See also paras 19-20 and 26.

[44] The order is set out in full at [16].

[45] See in this regard the Labour Court judgment above n 7 at para 26.

[46] *National Coalition* above n 24 at para 24.

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."[47] 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.[48]

[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,[49] a Court of similar status as a High Court.[50] 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.[51] The Labour Court held that "in line with *Chief Lesapo* . . . section 38(2)(b)(i) allows untrammeled self-help by the state and can thus not be countenanced in a constitutional democracy."[52]

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

[47] *Garvas* above n 36 at para 114.

[48] See *Tronox* above n 24 at para 38.

[49] Section 172(2) of the Constitution is outlined at [33].

[50] Section 151(2) is outlined at [32].

[51] Section 167(5) is set out in n 1.

[52] Labour Court judgment above n 7 at paras 26-7. The order is set out in full at [16].

"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.[53] This supremacy connotes that "law or conduct inconsistent with [the Constitution] is invalid, and the obligations imposed by it must be fulfilled."[54]

[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

[53] Section 1(c) of the Constitution above n 41.

[54] Section 2 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."[55] 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".[56] 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".[57]

[55] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at paras 28 and 33.

[56] *Stopforth Swanepoel & Brewis Inc v Royal Anthem (Pty) Ltd* [2014] ZACC 26; 2015 (2) SA 539 (CC); 2014 (12) BCLR 1465 (CC) (*Stopforth*) at para 19 including fn 8. See also *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus* [2016] ZACC 49; (2017) 38 ILJ 527 (CC); 2017 (4) BCLR 473 (CC) at para 23.

[57] *De Lange v Smuts N.O.* [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at para 131. This passage was quoted with approval in *Stopforth* above n 56 at para 19.

[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 employee[58] 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."[59] Although there may be

[58] "Employee" is defined, in section 1(a) of the BCEA, as:

> "[A]ny person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration."

[59] *Chief Lesapo* above n 40 at para 11.

circumstances when good reasons exist − justifying self-help[60] − 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".[62] The Minister of

[60] Id at para 12. For instance, when there is an immediate dispossession of a thief of stolen goods when he is caught where self-help concerns *contra flagrante delicto* (in the act of committing an offense).

[61] *Myathaza* above n 59 at para 23.

[62] Section 31(1) provides:

> "(a) (i) If any remuneration, allowance or other reward (other than remuneration contemplated in section 38(1) or (3)), is received by an employee in connection with the performance of his or her work in the public service otherwise than in accordance with this Act or a determination by or directive of the Minister, or is received contrary to section 30, that employee shall, subject to subparagraph (iii), pay into revenue—
>
> (aa) an amount equal to the amount of any such remuneration, allowance or reward; or
>
> (bb) if it does not consist of money, the value thereof as determined by the head of the department in which he or she was employed, at the time of the receipt thereof.
>
> (ii) If the employee fails to so pay into revenue the amount or value, the said head of the department *shall recover it from him of her by way of legal proceedings* and pay it into revenue.
>
> (iii) The employee concerned may appeal against the determination of the head of department to the relevant executive authority.
>
> (iv) The accounting officer of the relevant department may approve that the employee concerned retains the whole or a portion of the said remuneration, allowance or reward.
>
> (b) If—
>
> (i) in the opinion of the head of department mentioned in paragraph (a) an employee has received any remuneration, allowance or other reward contemplated in that paragraph; and
>
> (ii) it is still in his or her possession or under his or her control or in the possession or under the control of any other person on his or her behalf, or, if it is money, has been deposited in any bank as defined in section 1(1) of the Banks Act, 1990 (Act No 94 of 1990), or a mutual bank as defined in section 1(1) of the Mutual Banks Act, 1993 (Act No. 124 of 1993), in his or her name or in the name of any other person on his or her behalf,

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".[63]

[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.[65] 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

[63] *Schierhout v Union Government (Minister of Justice)* 1926 AD 286 at 289.

[64] *Harris v Tancred* 1960 (1) SA 839 (C) at 843H.

[65] *Western Cape Education Department v General Public Service Sectoral Bargaining Council* [2014] ZALAC 34; [2014] 10 BLLR 987 (LAC) at para 29.

[66] See *Barkhuizen* above n 55 at para 73.

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.[67] 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

[67] *Garvas* above n 36 at para 113.

an appropriate remedy is considered.[68] 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."[69]

[77] On the return day, Tlhotlhalemaje J confirmed part of the interim order,[70] 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.

[68] *S v Bhulwana; S v Gwadiso* [1995] ZACC 11; 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) at para 32.

[69] Above n 8 at 2.

[70] Id at 1.3.

[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.[71] 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.

[71] See above n 10.

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.[72] 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.

[72] Section 166 of the Constitution provides:

> "(a) the Constitutional Court;
>
> (b) the Supreme Court of Appeal;
>
> (c) the High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts;
>
> (d) the Magistrates' Courts; and
>
> (e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts."

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.[74] As

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[73] Section 167 of the Constitution provides:

> "(1) The Constitutional Court consists of the Chief Justice of South Africa, the Deputy Chief Justice and nine other judges.
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> (2) A matter before the Constitutional Court must be heard by at least eight judges.
>
> (3) The Constitutional Court—
>
> (a) is the highest court of the Republic; and
>
> (b) may decide—
>
> (i) constitutional matters; and
>
> (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court; and
>
> (c) makes the final decision whether a matter is within its jurisdiction."

[74] Section 168 of the Constitution provides:

> "(1) The Supreme Court of Appeal consists of a President, a Deputy President and the number of judges of appeal determined in terms of an Act of Parliament.
>
> (2) A matter before the Supreme Court of Appeal must be decided by the number of judges determined in terms of an Act of Parliament.
>
> (3)
>
> (a) The Supreme Court of Appeal may decide appeals in any matter arising from the High Court of South Africa or a court of a status similar to the High Court of South Africa, except in respect of labour or competition matters to such extent as may be determined by an Act of Parliament.
>
> (b) The Supreme Court of Appeal may decide only—
>
> (i) appeals;

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.[76] And that Act of Parliament is the LRA.

Labour Court's jurisdiction

[89] Section 157 of the LRA provides:

[75] *Fredericks* above n 28 at para 12.

[76] Section 169(2)(a)(ii) of the Constitution.

"(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.[78] 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:

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[77] *Mbayeka v MEC for Welfare, Eastern Cape* [2001] All SA 567 (Tk).

[78] Section 98 of the interim Constitution is titled "Constitutional Court and its jurisdiction", the relevant section provides:

> "(2) The Constitutional Court shall have jurisdiction in the Republic as the court of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of the Constitution, including—
>
> . . .
>
> (c) any inquiry into the constitutionality of any law, including an Act of Parliament, irrespective of whether such law was passed or made before or after the commencement of this Constitution;
>
> . . .
>
> (3) The Constitutional Court shall be the only court having jurisdiction over a matter referred to in subsection (2), save where otherwise provided in section 101(3) and 6."

[79] *Naptosa v Minister of Education, Western Cape* 2001 (2) SA 112 (C); *Runeli v Minister of Home Affairs* (2000) (2) SA 314 (Tk); *Mgijima v Eastern Cape Appropriate Technology Unit* 2000 (2) SA 291 (Tk); and *Independent Municipal and Allied Trade Union v Northern Pretoria Metropolitan Substructure* 1999 (2) SA 234 (T).

[80] *Fredericks* above n 28 at paras 38-44.

> "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."[81]

[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.

[81] Id at para 43.

[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.[82] Under the interim Constitution, all claims on the invalidity of an Act of Parliament were referred to the Constitutional Court.[83] 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*.[84]

[82] *Zantsi v Council of State, Ciskei and Others* [1995] ZACC 9; 1995 (4) SA 615 (CC); 1995 (10) BCLR 1424 (CC). See also section 101(3)(c) of the interim Constitution.

[83] Section 102(8) of the interim Constitution.

[84] *Zantsi* above n 82 at paras 29-32.

[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.