CONSTITUTIONAL COURT OF SOUTH AFRICA

PSA obo Olufunmilayi Itunu Ubogu v Head of Department of Health Gauteng and Others

CCT 6/17
CCT 14/17

Date of hearing: 18 May 2017

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 18 May 2017 at 10h00 the Constitutional Court will hear a consolidated application for confirmation of an order of constitutional invalidity made by the Labour Court of South Africa, Johannesburg, together with an application for leave to appeal against that order. The Labour Court order had declared section 38(2)(b)(i) of the Public Service Act (PS Act) unconstitutional.

The issue is whether, a proper construction of section 38(2)(b)(i) entitled the State to make a deduction from an employee's salary without notification of prior incorrect payments, due process, or an agreement between the parties.

The Public Servants Association (PSA), acting on behalf of one of its members, Ms Olufunmilayi Itunu Ubogu (Ms Ubogu), had filed an application for interim relief in the Labour Court, disputing unilateral salary deductions from Ms Ubogu's salary to recover alleged overpayments (of about R794 014.33) at Charlotte Maxeke Academic Hospital in Johannesburg. Shortly after assuming her post there as Clinical Manager: Allied, staff under the Clinical Manager: Medical category received a salary increase. Ms Ubogu was erroneously paid according to this second category. In 2015, the state employer informed Ms Ubogu of the error, and imposed salary deductions to her salary to compensate.

Ms Ubogu challenged the deductions as compensation for the overpayment on the grounds that if there was overpayment, part of the claim for the amount for deduction had

prescribed, and that section 38(2)(b)(i) of the PS Act was unconstitutional. Initially, the Labour Court had issued a rule *nisi* calling upon the Head of Department of Health, the MEC of Health, the Minister of Public Service and Administration, the MEC of Finance and the Minister of Finance to show cause why it should not grant an order to the effect that all amounts overpaid more than three years before the institution of any legal proceedings against Ms Ubogu have prescribed; that the unilateral deductions of monthly instalments were *ultra vires*; alternatively, that section 38(2)(b)(i) is declared unconstitutional and must now be read in a manner consistent with the Constitution; alternatively, that section 38(2)(b)(i) is declared unconstitutional and struck down; and that the Head of the Department and MEC should pay costs jointly and severally. Pending the outcome of the application, the Head of Department of Health and MEC of Health were interdicted from making any further deductions.

On the return date, the applicant argued that section 38(2)(b)(i) should be declared unconstitutional, and that the Head of the Department of Health and the MEC of Health should be directed to pay costs. The PSA maintained that section 38(2)(b)(i) entitled the State to sit on its hands for extensive periods while still recovering amounts which would otherwise have prescribed, and that the Department should be directed to institute legal proceedings against Ms Ubogu to allow her to challenge the basis of the alleged overpayments.

In its opposition, the Head of the Department of Health and MEC of Health contended that Ms Ubogu could not claim benefits consonant with a position of Clinical Manager: Medical and that she did not challenge the basis of the overpayment.

The Labour Court held that the deductions in terms of section 38(2)(b)(i) violated the spirit, purport and objects of the Bill of Rights and amounted to untrammelled self-help. Interpreting section 38(2)(b)(i) based on sections 23(1), 25(1) and 34 of the Constitution, the Court declared the impugned provision unconstitutional. The PSA now applies for a confirmation of the declaration of constitutional invalidity.

The Head of Department of Health and MEC of Health oppose this confirmation, and further seek leave to appeal the order of the Labour Court. They submit that action taken under section 38(2)(b)(i) is not dispositive of any dispute, and that the employee remains at liberty to pursue the claim in a court or other independent tribunal, where applicable.

The Department of Public Service and Administration (DPSA)—acting on behalf of the Minister of Public Service and Administration as the third respondent—also opposes the Labour Court's declaration of invalidity. DPSA contends that the Labour Court did not in fact declare section 38(2)(b)(i) invalid, but had actually applied its interpretive power to read the provision in line with the Constitution. Hence, the correct procedure should have been for the applicant to lodge an appeal with the Labour Appeal Court before approaching this Court. Alternatively, DPSA submits that none of the grounds for constitutional invalidity have been established. It contends that the special mechanisms to resolve labour disputes—bargaining councils, arbitration and the Labour Court—grant sufficient protection to state employees.