CONSTITUTIONAL COURT OF SOUTH AFRICA

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

CCT 6/17
CCT 14/17

Date of hearing: 18 May 2017
Date of judgment: 7 December 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.

At 10h00 on 7 December 2017 the Constitutional Court handed down judgment in two consolidated applications, one for confirmation of a declaration of constitutional invalidity made by the Labour Court of South Africa, Johannesburg (Labour Court) in respect of section 38(2)(b)(i) of the Public Service Act 103 of 1994 (Act), and the other for leave to appeal against that order.

Ms Ubogu previously held the position of Clinical Manager: Allied, and was transferred in 2010 from the Chief Executive Office at the Tshwane District Hospital to Charlotte Maxeke Academic Hospital in Johannesburg. Thereafter, from July 2010 until July 2015, she received the remuneration at the rate applicable to the post of Clinical Manager: Medical. This was a distinct position from Clinical Manager: Allied and attracted a higher remuneration. In 2015, the state informed Ms Ubogu that she had erroneously received the higher salary and thus owed R794 014.33. It proceeded to make deductions from her salary. The Public Servants Association of South Africa (PSA) sought interim relief in the Labour Court on her behalf on the basis that it was unlawful for the state to unilaterally make salary deductions in order to recover alleged overpayments.

The issue was whether, on a proper construction, section 38(2)(b)(i) of the Act entitles the state to deduct from an employee's salary in respect of incorrect payment without due process or the employee's knowledge or an agreement between the parties. PSA contended that part of the state's putative claim had prescribed, that the deductions were

ultra vires the Act and that the impugned provision was unconstitutional. PSA further contended that the state should be directed to institute legal proceedings against Ms Ubogu so as to allow her to challenge the allegations of overpayment. In its opposition, the Head of the Department of Health and MEC for 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 deduction.

The Labour Court held that the deductions violated the spirit, purport and objects of the Bill of Rights and amounted to untrammelled self-help. Interpreting section 38(2)(b)(i) in the light of sections 23(1), 25(1) and 34 of the Constitution, the Labour Court granted a mixed remedy that included a declaration that the impugned provision is "unconstitutional as presently formulated".

The PSA applied to the Constitutional Court for confirmation of the declaration. This application was opposed on the grounds, amongst others, that the Labour Court's true finding was that section 38(2)(b)(i) is capable of an interpretation consistent with the Constitution and that, in the alternative, none of the grounds for constitutional invalidity have been established. With respect to remedy, it was argued that, if the order of invalidity is confirmed, the Constitutional Court ought to suspend that order to enable Parliament to remedy the defect. An appeal against the order of the Labour Court was also filed on the grounds that action taken under section 38(2)(b)(i) is not dispositive of any dispute and merely permits deductions by way of set-off at common law.

In the first judgment, Nkabinde ADCJ (Cameron J, Froneman J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J concurring) first considered that – on a purposive and contextual reading of sections 23(1), 34, 167 and 172 of the Constitution; sections 151, 157 and 158 of the Labour Relations Act 66 of 1995 (LRA); and section 15 of the Superior Courts Act 10 of 2013 – the Labour Court has jurisdiction to declare the impugned provision constitutionally invalid. She went on to find that the mixed order made by the Labour Court in substance amounted to a declaration of constitutional invalidity and that the proceedings were thus properly before the Constitutional Court.

Nkabinde ADCJ then held that section 38(2)(b)(i) does not pass constitutional muster as it permits unfettered self-help in violation of the legality principle in section 1(c) of the Constitution. She further held that this undermines the judicial process as protected under section 34 of the Constitution. The impugned provision was not only unfair, but also promoted strict liability on an employee for overpayments irrespective of whether the employee could afford to pay the arbitrarily determined instalments or was afforded an opportunity for legal redress before the deductions. She held that, in any event, none of the respondents suggested that the present limitation on the section 34 right was justifiable in an open and democratic society based on human dignity, equality, and freedom.

Nkabinde ADCJ also held that the impugned provision was not comparable to the common law right of set-off. She held, because the alleged debt was not fully due as it

had not been determined pursuant to the application of law in a fair hearing before a court, common law set-off could not be invoked to defeat employees' ongoing claims relating to their salaries.

Nkabinde ADCJ accordingly declared the impugned provision to be inconsistent with the Constitution and invalid and reformulated the Labour Court's order to give Ms Ubogu an effective remedy to obviate self-help and the arbitrary deductions from her salary. The interim interdict against deductions from Ms Ubogu's account, with effect from 29 September 2016, was to continue and the matter was remitted to the Labour Court for resolution of the disputes around the correctness of the recovery of amounts allegedly overpaid to Ms Ubogu. The Minister of Public Service and Administration was ordered to pay the applicant's costs.

Jafta J dissented on the basis that the Labour Court lacked jurisdiction to make a declaration of constitutional invalidity in this case. He held that under section 157(2) of the LRA the Labour Court shares constitutional jurisdiction with the High Court, but that section 157(1) seeks to exclude the High Court's jurisdiction in respect of certain matters. He held that, in the light of both the hierarchy of courts and section 169(1) of the Constitution, there is no constitutional provision that may be read as conferring the requisite jurisdiction upon the Labour Court.