IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Of interest to other judges

Case no: J2185/2016

In the matter between:

PUBLIC SERVANTS ASSOCIATION OF SOUTH AFRICA OBO OLUFUNMILAYO ITUNU OBOGU	**Applicant**

and

HEAD OF DEPARTMENT: DEPARTMENT OF HEALTH GAUTENG	**First Respondent**
MEMBER OF EXECUTIVE COUNCIL: DEPARTMENT OF HEALTH GAUTENG	**Second Respondent**
MINISTER OF PUBLIC SERVICE AND ADMINISTRATION	**Third Respondent**
MEMBER OF EXECUTIVE COUNCIL: FINANCE- GAUTENG	**Fourth Respondent**
THE MINISTER OF FINANCE	**Fifth Respondent**

Heard: **01 December 2016**

Delivered: **30 December 2016**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] The issue for determination before the Court is whether it is permissible in terms of the provisions of section 38 (2) (b) (i) of the Public Service Act (The PSA)[1] for the State as an employer, to recover monies wrongly paid to its employees directly from their salary or wages, in the absence of any due process or an agreement between the parties. These provisions give the State as an employer, the right to deduct any amount wrong paid to and owed by an employee wholly or in instalments from his or her salary.

[2] The Public Servants Association (Union), representing its member, Ubogu, challenges the power of the State to make such deductions, in the alternative, a declaratory order is sought to have the empowering provision declared unconstitutional. A further alternative order that the amount having been owed for more than three (3) years, if any, be declared as having prescribed within the meaning of the Prescription Act[2] was abandoned on the return date.

[3] The Applicants initially brought this application on urgent basis to this Court, and the matter came before Steenkamp J on 29 September 2016, who had issued *Rule Nisi* in the following terms;

> (1) *"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:*
>
> *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 s38(1) and (2) of the Public Service Act (Proclamation 103 of 1994), or at all;*
>
> *1.2 It is declared that the unilateral deduction by the First and 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*

[1] Act 103 of 1994 (Proclamation No. 103 of 1994 published in Government Gazette 15791 of 3 June 1994)
[2] Act 68 of 1969

provisions of s38(2)(b)(i) of the Public Service Act (Proclamation 103 of 1994) read together with s3(3) and 38(1)c)(i) of the Public Finance Management Act 1 of 1999, read together with Regulation 9.1.4 and Regulation 12 of the Treasury Regulations 2005 and the National Treasury Instructions issued in May 2014 regarding unauthorised, irregular and fruitless and wasteful expenditure;

1.3 In the alternative to paragraph 1.2 above, it is declared that s38(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 African 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 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 s38(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 this application the First and Second Respondents be and hereby interdicted from making any further deductions from Olufunmilayo Itunu Ubongu's remuneration (including but not limited to her monthly salary, annual bonus or performance awards) in recovery of the amounts erroneously overpaid to her."

[4] Only the orders in 1.2; 1.3 and 1.5 as above were pursued by the Applicants on the return date. The First and Second Respondents opposed the application.

Background*:*

[5] The facts in this matter are to a large extent common cause, safe for events pertaining to whether Ubogu was afforded an opportunity to make representations before deductions to her salary were made. It was also pointed out on behalf of the Applicant that pertinent to this application was not whether there was an amount owing or not. The issue was whether on the construction of the impugned provisions, the State was entitled to act in the manner it has always acted when dealing with wrongly granted remuneration. The facts may be summarised as follows:

5.1 Ubogu is currently employed by the Provincial Department of Health: Gauteng, as a Deputy Director: Therapeutic and Medical Support Services. She commenced her employment with the Department at the Tshwane District Hospital in Pretoria as Chief Executive Office during February 2006;

5.2 During the year of 2010, Ms Ubogu was laterally transferred to position of Clinical Manager: Allied, stationed at the Charlotte Maxeke Academic Hospital Johannesburg. She retained her then current remuneration at salary level 12;

5.3 In July 2010 the Department implemented the resolution or policies in respect of the Occupation Specific Dispensation (OSD). The result thereof of was that the position of Clinical Manager was translated into two (2) designations, being Clinical Manager: Medical and Clinical Manager: Allied. Ubogu as previously mentioned was attached to the position of Clinical Manager: Allied;

5.4 It is common cause that the designation of Clinical Manager: Medical was accorded a higher remunerative scale than that of Clinical Manager: Allied. The Applicants allege that during the implementation of the OSD, the Department in error translated Ubogu to the designation of Clinical Manager: Medical. Although the allegation is that the error occurred during July 2010, the purported correction and identification of the error only occurred on or about July 2015, almost five (5) years later;

5.5 During September 2015, after an inquiry by Ubogu, the Department through its Chief Executive Officer: Charlotte Maxeke Academic Hospital, Ms Bogoshi, sent a letter dated 10 September 2015 to Ubogu wherein the following was placed on record:

"2. According to Human Resource Management (HRM) Directorate records, you were formally informed by the Department on the 2nd March 2010 about your redeployment as Clinical Executive, to Charlotte Maxeke Johannesburg Academic Hospital as part of the Department's efforts to strengthen health care service delivery.

3. In the process of implementation of your said redeployment by HRM, you were instead, erroneously promoted with effect from 1st March 2010 as Clinical Manager (Medical) Grade 1, as opposed to Allied Clinical Manager.

4. Consequently, with the subsequent implementation of Resolution 2 of 2010 (in line with relevant provisions of the applicable Occupational Specific Dispensation measures-OSD) effective from the 1st July 2010, you should have been appropriately translated to Deputy Director: Therapeutic and Medical Support Services Grade 11, which represents the maximum grading level."

5.6 The letter continues to outline the salaries paid to Ubogu as opposed to what she was entitled to, and she was advised that the amount owing by her to the Department was R794 014-33;

5.7 As a consequence of the foresaid letter, Ubogu on 09 October 2015, and with the assistance of the Union referred an unfair labour practice dispute relating to a demotion to the Public Health and Social Development Sectoral Bargaining Council (PHSDSBC). That dispute was withdrawn at arbitration proceedings scheduled for 26 January 2016. The Applicants' contention is that the dispute was withdrawn pursuant to a waiver by the Department in respect of its right to recover the purported overpayment, and moreso since any deductions to her salary were ceased and repaid, and she was further placed back on salary level 12.

5.8 On 04 July 2016, the Assistant Director: Human Resource Management, Tshepo Moaji forwarded an email to Ubogu proposing a meeting to be held in respect of the purported overpayment. The said meeting was rescheduled for 14 July 2016 on account of Ubogu's request to have her union representative present at the meeting. On 13 July 2016, a day prior to the proposed meeting, Ubogu received her salary advice. Upon perusal of same, she discovered that the Department have proceeded to make deduction on her salary in satisfaction of the alleged debt, in an amount of R33 705.54 for that month.

5.9 Ubogu as assisted by the Union forwarded an e-mail to the Acting Director: Human Resource Management, Sizwe Mavathulana, to register a protest in respect of the deductions made, as it was their view that they were made without the knowledge and consent of Ubogu, and in direct contravention of the Regulations, the provisions of Public Service Act and/or of the Public Finance Management Act[3].

5.10 In a response via e-mail on dated 19 July 2016, the Department's Acting Director indicated that the Applicant and Ubogo were given an opportunity to meet with the Department to discuss the overpayment and an arrangement, if any, of the repayment of same. The Acting Director stated that Ubogu and her Union did not honour such an invitation on more than one occasion. The Union's reply was that the first meeting as arranged did not take place as it was unavailable, and that a further meeting scheduled for 14 July 2016 could not take place as the Department had already concluded that Ubogu was indebted to it, had decided on the manner in which the amount was to be recovered and had in fact already commenced with the deductions.

5.11 Following the above events, no further deductions were made to Ubogu's salary for the months of August and September 2016. On 13 September 2016, the Department informed Ubogu that her annual bonus for 2016, which was due to be paid on 15 October 2016 would not be paid to her. It appears that the non-payment of the bonus was *in lieu* of the instalments of Ubogu purported indebtedness to the Department. This had prompted the bringing of this application.

The relevant provisions:

[6] Section 38 of the of the PSA provides that:

*"**Wrongly granted remuneration***

(1) (a) If an incorrect salary, salary level, 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;

[3] *Act 29 of 1999*

(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-

(a) ……..

(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 head of department, with the approval of the Treasury, 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'

[7] To the extent that the Head of the Department is required to seek the approval of Treasury, the relevant prescripts are;

Section 3 (3) of the PMFA which provides that;

'In the event of any inconsistency between this Act and any other legislation, this Act prevails'

Section 38 (1) (c) of the PMFA which provides that —

'..The accounting officer for a department, trading entity or constitutional institution must take effective and appropriate steps to—

(i) collect all money due to the department, trading entity or constitutional institution;

(ii) prevent unauthorised, irregular and fruitless and wasteful expenditure and losses resulting from criminal conduct; and

(iii) manage available working capital efficiently and economically;

PFMA Regulations 9.1.4, which provides that;

'The recovery of losses or damages resulting from unauthorised, irregular or fruitless and wasteful expenditure must be dealt with in accordance with Regulation 12'.

PFMA Regulation 12.3-Claims by the state against other persons', which provides that;

'12.3.1 If the state suffers a loss or damage and the other person denies liability, the accounting officer must, if deemed economical, refer the matter to the State Attorney for legal action, including the recovery of the value of the loss or damage.'

[8] A further consideration in regards to the issues for determination is that to the extent that State employees[4] are covered by the provisions of the Basic Conditions of Employment Act, section 34 reads as follows:

'34 Deduction and other acts concerning remuneration –

(1) An employer may not make any deductions from an employee's remuneration unless-

(a) subject to subsection (2), the employee in writing agrees to the deduction in respect of a debt specified in the agreement; or

(b) the deduction is required or permitted in terms of a law, collective agreement, court order or arbitration award.

(2) A deduction in terms of subsection (1) (a) may be made to reimburse an employer for loss or damage only if –

(a) the loss or damage occurred in the course of employment and was due to the fault of the employee;

(b) the employer has followed a fair procedure and has given the employee a reasonable opportunity to show why the deduction should not be made;

(c) the total amount of the debt does not exceed the actual amount of the loss or damage; and

(d) the total deductions from the employee's remuneration in terms of this subsection do not exceed one-quarter of the employee's remuneration in money.

(3) A deduction in terms of subsection (1)(a) in respect of any goods purchased by the employee must specify the nature and quantity of the goods.

(4) An employer who deducts an amount from an employee's remuneration in terms of subsection (1) for payment to another person must pay the amount to the person in accordance with the time period and other requirements specified in the agreement, law, court order or arbitration award.

(5) An employer may not require or permit an employee to-

(a) repay any remuneration except for overpayments previously made by the employer resulting from an error in calculating the employee's remuneration; or

[4] Section 1 Definitions: An employee is defined as:
(a) 'Any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration';

(b) acknowledge receipt of an amount greater than the remuneration actually received'

The submissions:

[12] The following submissions were made on behalf of the Applicants;

12.1 The provisions of section 38 (2) (b) (i) of the PSA were interpreted and applied in a manner which conferred upon the State as an employer, the power to unilaterally act in the manner that is done without reference to, or subject to, the provisions of Regulation 9.1.4 and 12 of Treasury Regulations 2005, being agreement/repayment after demand, and failing agreement, institution of legal proceedings;

12.2 In its present formulation and as interpreted, the provisions were unconstitutional and fell to be declared and interpreted in such a manner for it to accord with section 31 (a) (ii) of the PSA, or to be declared as unconstitutional and struck down. In this regard, it was submitted that the provisions of section 38 (2) (b) (i) of the PSA, read together with those of section 34 of the BCEA violated public service employees' constitutional rights as enshrined in sections 34, 25 (1), 23 (1), 9 and 10 of the Constitution of the Republic;

12.3 The provisions of section 38 have sanctioned the unilateral determination by the state as to whether there was overpayment and how if so that should be recovered, even in circumstances where the *causa*, as well as the extent of the underlying indebtedness is *bona fide*, disputed by the employee;

12.4 There was no compelling reason why any recoveries in terms of section 38 should be dealt with differently from those governed by section 31 of the PSA, as its current interpretation has entrenched a system of *parate executie* on the part of the State as an employer, which ultimately required affected employees to undo the deductions through recourse to the Courts, and thus further placing a financial burden on them;

12.5 In its present formulation, the provisions of section 38 (2) (b) (i) of the PSA allowed possible incompetence or inefficiencies on the part of the State as an employer, to trump the rights of its employees to the same protection afforded outside the public service regarding deductions from remuneration;

12.6 The provisions facilitated arbitrariness, and denied affected employees access to courts and an opportunity to have disputes in regards to any deductions resolved by the application of the law, and be determined in a fair public hearing before a Court where appropriate, or an independent and impartial tribunal or forum;

12.7 Section 34 of the Basic Conditions of Employment Act[5] applies to state employees, but does not assist given the provisions of its section 34 (1) (b) which authorises deductions by the Employer where such deductions are permitted in terms of the law. Section 34 (2) of the BCEA was also unhelpful as it only dealt with recoveries for loss or damage caused due to the fault of the employee, but had no application in this matter, whilst section 34 (5) only related to claims for repayment by the Employer and not recovery of any alleged indebtedness by way of deductions from any remunerations after an instruction was given to the Employer to repay;

12.8 Even though the provisions of the Treasury Regulation 2005 prohibited the self-help sanctioned by section 38(2)(b)(ii) of the PSA, they did not circumscribe the plain meaning of section 38 (2) (b) (i), and the declaration of constitutional invalidity would still be necessary

The First and Second Respondents' submissions*:*

[13] The application is opposed on the following grounds;

13.1 The remuneration Ubogu received from July 2010 when she was incorrectly designated as Clinical manager: Medical, was not due to her as she did not perform those functions, but had only performed the tasks, duties and functions of a Clinical Manager: Allied. Thus, the amounts paid in excess of the salary she would have received for the position of Clinical manager: Allied constituted an overpayment, which the State was entitled to recover;

13.2 The provisions of section 38 (2) (b) (i) of the PSA were only invoked once Ubogo was dilatory and had made it difficult for the parties to enter into some

[5] Act 75 of 1997, Which provides that;

Deductions and other acts concerning remuneration:

34. (1) An employer may not make any deduction from an employee's remuneration unless—

(a) subject to subsection (2), the employee in writing agrees to the deduction in respect of a debt specified in the agreement; or

(b) the deduction is required or permitted in terms of a law, collective agreement, court order or arbitration award

form of agreement regarding the recovery of amounts of the overpayment, and therefore, the averment that the Department acted *ultra vires* was unsustainable;

13.3 Section 38 (2) (b) (i) of the PSA provides for the discretion to be exercised by the Accounting Officer in the implementation of effective and appropriate recovery mechanism as entrenched in section 38 (2) (b) (i) & (ii) of the PSA, read together with section 38 (1) of the PFMA, Regulations 9.1.4 and 12. These measures ensured that recovery mechanisms were instituted in an effective and appropriate manner in the collection of all monies due to the State

13.4 There was administrative justice in as far as the State's powers were concerned for the recovery of debts due to it, and such legislative measures were within the confines of the Constitution, and therefore, the provisions of section 38 (2) (b) (i) of the PSA could not be unconstitutional;

13.5 Even if the Department's conduct could be construed as *ultra vires*, that did not translate to the provisions of section 38 (2) (b) (i) being unconstitutional, and to the extent that the provisions of section 38 (2) (b) (i) of the PSA should be read in conjunction with the those of the PFMA and the National Treasury Regulations, there was no basis to conclude that in effecting the deductions in the manner it had done, the Department had acted *ultra vires*, or that there was a basis to conclude that those provisions were unconstitutional.

Evaluation*:*

[14] The very basis of the principle of legality is that it is a mechanism that ensures that the state, its organs and its officials, do not consider themselves to be above the law in the exercise of their functions, but remain subject to it[6]. The principle of legality derives from the provisions of section 1 (c) of the Constitution which provides that the Republic is one sovereign, democratic state founded on the value of *'supremacy of the constitution and the rule of law'.* In terms of section 2 of the Constitution, the supremacy of the Constitution means that '*law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'.* The components of legality relevant for the purposes of issues before the court are that in respect of conduct impugned;

[6] See Snyman CR Criminal Law (2008) at page 36.

a) The person whose act is under scrutiny must be authorised by law to take such action;

b) The action must be procedurally fair; and

c) The action must be rational, not arbitrary or capricious.

[15] In *Chief Lesapo v North West Agricultural Bank,* Mokgoro J held that the principle against self-help is an aspect of the rule of law. Thus, legislation that allowed self-help did not only contravene the right of access to court, but also violated "a deeper principle ... underlying our democratic order"[7].

[16] Section 39(2) of the Constitution provides that: *"When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."* Thus, when interpreting a statute, Judicial Officers must consider the language used as well as the purpose and context and must endeavour to interpret the statute in a manner that renders the statute constitutionally compliant[8].

[17] Having regard to the provisions of section 34 (1) (b) of the BCEA to the extent that they are relevant for our purpose, it is apparent that an employer may make deduction to an employee's salary in circumstances where there is an agreement in writing between the parties, or where the law or collective agreement permits, or where a court order or arbitration award was obtained. These provisions therefore in their construction and interpretation contain measures against self-help and arbitrariness on the part of employers. The provisions of section 34 (1) (b) of the BCEA on their own are however not helpful in circumstances where the State as an employer relies solely on those of section 38 (2) (b) (i) of the PSA in effecting deductions, as appears to be the case in this matter.

[18] From a reading of section 38 (2) (b) (i) of the PSA, it is apparent that the State is permitted to make deductions from a salary of an employee in circumstances where that employee has been wrongly paid, subject to the Head of the Department seeking

[7] 1999 12 BCLR 1420 (CC) at paragraphs 1. 11 and 16

[8] See Cool Ideas 1186 CC v Hubbard and Another [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 28. See also Makate v Vodacom (Pty) Ltd (2016 (6) BCLR 709 (CC) at para [88] where it was held that

> *'It is apparent from Fraser that section 39(2) introduced to our law a new rule in terms of which statutes must be construed. It also appears from the same statement that this new aid of interpretation is mandatory. This means that courts must at all times bear in mind the provisions of section 39(2) when interpreting legislation. If the provision under construction implicates or affects rights in the Bill of Rights, then the obligation in section 39(2) is activated. The court is duty-bound to promote the purport, spirit and objects of the Bill of Rights in the process of interpreting the provision in question.'*

the approval of the Treasury. Ordinarily, the State is entitled to recoup any monies unduly paid to undeserving recipients, including its own employees. This is irrespective of whether State officials had in erroneously making payments, exhibited extreme inefficiencies or incompetence. The issue however is whether on a proper construction, the impugned provisions allow untrammelled self-help on the part of the State in recovering public funds.

[19] It is my view that on their own proper interpretation or construction, or at the very least, on the interpretation and application as sought by the Respondents, the provisions of section 38 (2) (b) (i) of the PSA do not entail a mechanism against self-help, unless read and interpreted in conjunction with those of the PFMA and the National Regulations.

[20] Unlike the provisions of section 31 (1) (a) (i) of the PSA[9] which requires an agreement (including a collective agreement), or call for legal proceedings where an employee refuses to have the unauthorised remuneration recovered, on their own construction, the provisions of section 38 (2) (b) (i) of the PSA permit the Head of the Department to effect deductions from an employee's salary, with the approval of the Treasury, which in itself implies the exercise of a discretion. What that approval means or how it is obtained from Treasury remains unclear.

[21] A careful reading of section 38 (2) (b) (i) of the PSA reveals that it is effectively in two parts, *albeit* addressing the same issue of deductions. The first part is in respect of employees in the service of the State. With these, the Head of the Department, with the approval from Treasury can dictate whether an amount is due, how much and how it should be paid. The second part is in respect of persons not in the service of the State, and any recovery of amount owed by these may be made from any monies owing to the State *or* by way of legal proceedings.

[22] A plain reading of these provisions to the extent that they are impugned therefore reveals that without the prohibitive restrictions in the PMFA or National Treasury

[9] Which provide that;

*'31. **Unauthorised remuneration***

(1) (a) (i) If any remuneration, allowance or other reward is received by an officer or employee in connection with the performance of his or her work in the public service otherwise than in accordance with the provisions of this Act or a determination of the Minister, or is received contrary to the provisions of section 30 (b), that officer or employee shall, subject to the provisions of subparagraph (iii), pay into revenue an amount equal to the amount of any such remuneration, allowance or reward or, where it does not consist of money, the value thereof as determined by the head of the department in which he or she was employed, or in which he or she is regarded to have been employed by virtue of the provisions of section 1 (3), at the time of the receipt thereof, and if he or she does not do so, it shall be recovered from him or her by the said head by way of legal proceedings or in such other manner as the Treasury may approve, and be paid into revenue.'

Regulations, the State enjoys a discretion in respect of whether an amount was wrongly granted, how and when any such amounts should be recovered. However, that discretion must be exercised within the confines of legality, fairness, rationality and reasonableness[10].

[23] The difficulty however for the Respondents is that to the extent that they sought to rely on the provisions of the PMFA in contending that these measures ensured that recovery mechanisms were instituted in an effective and appropriate manner in the collection of all monies due to the State, its sections 3 (3) and 38 (1) (c) as read on their own are of a general nature, and cannot by any stretch of imagination be construed as being prohibitive and against self-help.

[24] A further difficulty faced by the Respondents is that it is trite that regulations, as made under a statute cannot aid in the interpretation of the statute. Nicholas J in *Hamilton-Brown v Chief Registrar of Deeds*[11] in this regard held that:

> *"It is not, however, legitimate to treat the Act and the regulations made thereunder as a single piece of legislation and to use the latter as an aid to the interpretation of the former. The section in the Act must be interpreted before the regulation is looked at and, if the regulation purports to vary the section as so interpreted, it is ultra vires and void. It cannot be used to cut down or enlarge the meaning of the section (see Clinch v Lieb, 1939 T.P.D. at p. 125)."*

[25] In view of the above principles, it follows that to the extent that the Department may have relied on the provisions of Regulation 9.1.4 and 12.3.1 of the National Treasury Regulations 2005 in contending that these restricted, varied or complemented the provisions of section 38 (2) (b) (i) of the PSA, these regulations are *ultra vires* and void.

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[10] See Western Cape Education Department v General Public Service Sectoral Bargaining Council and Others [2014] 10 BLLR 987 (LAC); (2014) 35 ILJ 3360 (LAC) at para [29] where it was held that;

> *"While section 38 of the Public Service Act, 1994, permits the recovery of any overpayment made to an employee and permits the accounting officer of the relevant government department to determine the instalments in terms of which the overpayment can be liquidated, the exercise of such a power must be effected reasonably. The need for the accounting officer to act reasonably is implicit in the purpose of the section read as a whole. Section 38(1) provides for the recovery of an overpayment of remuneration which, being money which has been improperly paid from public funds, must be recovered. However, section 38(2) (b) which empowers the accounting officer to recover the monies, expressly provides that he or she make a decision as to the quantum of the instalments to be paid by the employee to discharge the debt so owing. That power clearly envisages that the amounts to be deducted from the employee's salary should take account of the need to repay and the ability of the employee to discharge the debt as expeditiously as possible…"*

[11] 1968 (4) SA 735 (T) at 737D and as confirmed in Chief Registrar of Deeds v Hamilton-Brown 1969 (2) SA 543 (A) at 547H. See also Moodley and Others v Minister of Education and Culture, House of Delegates, and Another 1989 (3) SA 221 (A) at 233E-F as referred to with approval in University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others; Mavava Trading 279 (Pty) Ltd and Others v University of Stellenbosch Legal Aid Clinic and Others [2016] ZACC 32 at para 151

[26] In the light of the above conclusions, it follows that the provisions of section 38 (2) (b) (i) of the PSA as sought to be interpreted and applied by the Department gives it or the State, a wide discretion in determining at any stage whether an employee has received remuneration according to an incorrect salary, salary, salary scale or award. The State can therefore, absent an agreement between it and the concerned employee, or a collective agreement, or a court order, or an arbitration award, unilaterally decide on whether an overpayment has been made and if so, can decide on the method of recovery and the period over which such recoveries may be made. This interpretation as favoured by the Respondents is not in the spirit, purport and objects of the Bill of Rights, and is clearly not constitutionally compliant. Furthermore, in line with *Chief Lesapo v North West Agricultural Bank,* the current formulation of the first part of section 38 (2) (b) (i) allows untrammelled self-help by the State and can thus not be countenanced in a constitutional democracy.

[27] It is not clear as to the reason the drafters of section 38 (2) (b) (i) of the PSA did not deem it necessary to formulate it in the same manner as with section 31 (1) (a) (i) relating to *'Unauthorised remuneration'*, which on its plain reading prohibits self-help and is subject to judicial overview. However, to the extent that it has been found that the provisions of section 34 of the BCEA are not of assistance to the Applicants' case as it allows self-help insofar as it permits deductions to be made in accordance with any law, and further to the extent that the National Treasury Regulations are *ultra vires* as they cannot extent the meaning or interpretation of the impugned provisions, it follows that the only relief that can be granted in these circumstances is to confirm order 1.3 of the *rule nisi* as granted by Steenkamp J on 29 September 2016, which in my view would bring these provisions in line with the constitutional imperatives. Furthermore, it is deemed that for all practical purposes, no purpose would be served by making the declaration retrospective beyond 29 September 2016 when the *rule nisi* was granted.

[28] Further having had regard to the provisions of section 162 (1) of the LRA which obliges this Court to take into account the requirements of law and fairness when considering any cost order, I am of the view that having had regard to the circumstances of this case, fairness dictates that the Applicants should be entitled to their costs. Accordingly, the following order is made;

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 African Act 108 of 1996 in particular sections 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 employee, if he or she is in the service of the State, may agree, and failing agreement by way of legal proceedings, or if he or she is not so in service of the State, by way of deduction from any money owing to him or her by the State as the relevant accounting officer and former employee may agree, and failing agreement by way of legal proceedings, or partly in the former manner and partly in the latter;*

ii. The First and Second Respondent 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.

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Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Ms.CA Nel of Macgregor Erasmus Attorneys
For the First and Second Respondents:	Adv. K Nondwango
Instructed by:	Mncedisi Ndlovu & Sedumedi Incorporated