

APPLICATION OF AUDI ALTERAM PARTEM RULE ON SALARY DEDUCTION & BENEFITS

Hlako Choma^{*}, Tshegofatso Kgarabjang^{**}

^{*} Corresponding author University of Venda, South Africa

Contact details: University of Venda, Private bag X5050, Thohoyandou, 0950 Limpopo Province South Africa

^{**} Director of Legal Services, Department of Communications, South Africa



Abstract

How to cite this paper: Choma, H., & Kgarabjang, T. (2018). Application of audi alteram partem rule on salary deduction & benefits. *Risk Governance and Control: Financial Markets & Institutions*, 8(3), 61-69. <http://doi.org/10.22495/rgcv8i3p4>

Copyright © 2018 The Authors

This work is licensed under the Creative Commons Attribution-NonCommercial 4.0 International License (CC BY-NC 4.0). <http://creativecommons.org/licenses/by-nc/4.0/>

ISSN Online: 2077-4303

ISSN Print: 2077-429X

Received: 20.09.2018

Accepted: 09.11.2018

JEL Classification: H83, J3, K4, G28

DOI: 10.22495/rgcv8i3p4

In the case of Public Servants Association obo Olufunmilayi Itunu Ubogu v Head of Department of Health, Gauteng and Others (2018) the Constitutional Court found that the provisions of the Public Service Act of 1994 which empowered the state to unilaterally deduct moneys that was onerously paid to the salaries of employees was unconstitutional. The state was empowered by section 38(2)(b)(i) of the Public Services Act of 1994 which does not require a consent of employees as and when the employer is deducting some money from the salary of the employee. The Constitutional Court held that section 38(2)(b)(i) gives the state unrestrained power to determine instalment without an agreement with an employee. The court also found that section 38(2)(b)(i) permits the state takes law into its own hands and become a judge of its own case. On this basis, this section did not pass constitutional muster.

This article will critically analyse the decision in Public Servants Association obo Olufunmilayi Itunu Ubogu v Head of Department of Health, Gauteng and Others in view of the application and interpretation of the principle *audi alteram partem* rule on salary deduction and benefits of public servants.

Keywords: Remuneration, Salary Deduction, Benefits, Section 38(2)(b)(i), Audi Alteram Partem Rule, Consent, Employee, Chief Executive Officer, Public Servants, Administrative Action

1. INTRODUCTION

In terms of the principle of *audi alteram partem* rule, the affected person must be afforded a reasonable chance or opportunity to answer to the charges or allegations against him/her and put forward his case. In other words, a party who is affected by the outcomes of an administrative decision should be heard or afforded an opportunity to state his/her version before the decision is taken. The affected person is entitled to be heard due to the negative impact of the decision (Walele v City of Cape Town and others (2008) para 27).

The employees of the state are appointed in terms of Public Service Act 104 of 1994. Section 38(2)(b)(i) of Public Service Act provides that "if an employee has been overpaid or received any such other benefit, not due to him or her 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". According to section 38(2)(b)(i) a consent of the employee is not required as and when the state is deducting the money that was overpaid. If the employee concerned is no longer working for the state, the amount that was overpaid should be recovered by way of legal proceedings (section 38(2)(b)(i)). Section 38(2)(b)(i) empowers the state to unilaterally reclaim the money that was onerously paid to the salary or wages of an employee without following due process or obtaining consent of the employee. In the case of Public Servants Association obo Olufunmilayi Itunu Ubogu v Head of Department of Health, Gauteng and Others the Constitutional Court was required decide on the constitutionality of section 38(2)(b)(i). The crisp issue before the court was whether the deductions in terms of section 38(2)(b)(i) constitute "unfettered self-help" by the state in violation of

South African Constitution Act 108 of 1996 or the deductions are set-off under common law.

The purpose of this article is to critically analyse the decision in Public Servants Association obo Olufunmilayi Itunu Ubogu v Head of Department of Health, Gauteng and Others in view of the application and interpretation of the principle *audi alteram partem* rule on salary deduction and benefits of public servants by the state.

2. LITERATURE REVIEW

The article considers the sources on the principle of *audi alteram partem* rule since they are relevant and significant in achieving the purpose of the research. The sources on *audi alteram partem* rule emphasise compliance with the requirement for procedural fairness. The sources on procedural fairness will be considered and analysed and those sources are amongst others, Hoexter, C. (2016) on the principle of *audi alteram partem* rule to the right to procedurally fair administrative action, as well as Currie, I., & De Waal, J. (2013) and De Ville, J. R. (2003). These sources are critical on the aspect of procedural fairness and they aid in the application and interpretation of the principle *audi alteram partem* rule. The article also makes reference to the cases of Masetlha v President of the Republic of South Africa and Another (2007), Minister of the Interior v Bechler and Others; Beier v Minister of the Interior and Others (1948) in which they deal with procedural fairness.

The article analysis and makes reference to the case law that emphasise on, amongst others, the lawfulness in the exercise of public power and the case law considered are Bel Porto School Governing Body and others v Premier of the Western Cape Province and Another (2002), Pharmaceutical Manufacturers Association of SA and Others; In Re Ex Parte Application of President of the RSA and Others (2000).

The article considers the literature on access of justice. This is imperative as the court emphasised that the Labour Court has the power to declare an Act of Parliament invalid and this will according to the court will moderate delays, High Court costs and judicial resources will be saved. In regard, reference is made to Bekink, B. (2016), Vawda, Y. A. (2005) and also Brümmer v Minister for Social Development and Others (2009).

3. RESEARCH METHODOLOGY

A critical analysis will be made to the case of Public Servants Association obo Olufunmilayi Itunu Ubogu v Head of Department of Health, Gauteng and Others on the process in recovering money owed to the state through salary deduction. The analytical approach will be employed to evaluate the fundamental principle of natural justice *audi alteram partem* rule with respect to the deductions and benefits of employees. A comparative approach will be made to the existing sources dealing with procedural fairness. Lastly, in order to achieve the purpose of this research, reference will be made to journal articles, case law, statutes and textbooks.

4. DISCUSSION

4.1. The facts

The applicant is Public Servants Association of South Africa (PSA), duly registered trade union acting on behalf of its member Ms. Olufunmilayi Itunu Ubogu. Ms. Ubogu is employed as Clinical Manager: Allied at the Charlotte Maxeke Johannesburg Academic Hospital. The respondents are Head of Department of Health (Gauteng), Member of the Executive Council for Health (Gauteng) who is the employer of Ms. Ubogu, the Minister of Public Service and Administration who is responsible for the administration of the Public Service Act and its regulations, the Member of the Executive Council for Finance (Gauteng) and the Minister of Finance, Gauteng (para 4)

Ms. Ubogu was appointed in 2006 as the Chief Executive Officer of a hospital in Tshwane under the Gauteng Provincial Department of Health. In 2010 she was transferred to Charlotte Maxeke on the position of Clinical Manager: Allied and this position is equal in terms of remuneration to the position of Clinical Manager: Medical. Consequent to the coming into operation of Occupational Specific Dispensation (OSD) the post of Clinical Manager: Medical was on level 12 and the Clinical Manager: Allied was on level 11. Therefore from July 2010 until July 2015 Ms. Obogu received her salary at level 12 (Clinical Manager: Medical) (para 4, 5).

On 10 September 2015 which is after five years in the employment, the Provincial Department of Health (Gauteng) informed Ms. Ubogu that in the process of redeployment the department has erroneously translated her into Grade 12 position of Clinical Manager: Medical instead of Grade 11 of the position of Clinical Manager: Allied and as a result she owes the department an amount of R794 014.33.

On September 2015 the department unilaterally deducted a sum of money from her salary for overpayment. Ms. Obogu, on the other hand, maintained that the department does not have a right to unilaterally deduct money from her salary. As the dispute arose, Ms. Obogu referred the matter to Public Health and Social Development Sectoral Bargaining Council. The matter was withdrawn before the arbitration proceedings and deductions were paid and consequently, Ms. Obogu was placed back to Grade 12. On July 2016 the department once again deducted part of her salary and this precipitated Ms. Obogu to institute urgent proceedings for interim relief in the Labour Court as she was not offered the opportunity to state her case before the department could deduct part of her salary.

4.2. Labour court

The applicant (PSA) challenged the legality of deductions on the ground that there was no overpayment on salary and if there was an overpayment, the money overpaid has prescribed and secondly on the ground that the section 38(2)(b)(i) is unconstitutional (para 10).

The applicant argued "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” (para 12 of Labour Court Judgment). Notably, section 34 provides for the right to access to courts whereby a person has a right to have the disputes resolved by the way of application of the law. Section 25 provides that “no one may be deprived of property except in terms of the law of general application, and no law may permit arbitrary deprivation of property”. Section 23 guarantees a right to fair labour practices. Section 9 guarantees a right to equality and equal protection of law while section 10 provides for a right to dignity which should be respected and protected.

The respondents argued that the remuneration that Ms. Obugu received was not due to her because she was paid as Clinical Manager: Medical in level 12 instead of Clinical Manager: Allied at level 11 and she performed the duties and responsibilities of Clinical Manager: Allied. According to the respondents, this constituted an overpayment and as such the state was permitted to recover it (para 13 of Labour Court judgment).

The respondents also submitted that “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” (para 13 of Labour Court Judgment). Section 38(1) of the PFMA and Regulations 9.1.4 as well as 12 provides for recovery mechanism by the state for the collection of all monies owed to the state in an effective and appropriate manner such as “unauthorised, irregular or fruitless and wasteful expenditure”.

The Labour Court per Steenkamp J considered whether the deductions in terms of section 38(2)(b)(i) amounted to “untrammelled self-help” as prohibited by section 1 of the Constitution. In other words, whether section 38(2)(b)(i) is not unilaterally deprived of freedom on the affected employee. Section 1(c) of the Constitution provides that “the Republic of South Africa is one, sovereign, democratic state founded” on amongst others “the values of supremacy of the constitution and the rule of law”. The Labour Court considered section 34 of Basic Conditions of employment Act 75 of 1997. As indicated above section 34 affords protection to the employee as it states that employers cannot make deductions from an employee’s salary to pay for past overpayments without the consent of employee or court order. The Labour Court held that the protection afforded by section 34 is not applicable to section 38(2)(b)(i) because section 34 exempt deductions that effected in terms of the law. The Labour Court stated that section 38(2)(b)(i) gives the state “a wide discretion in determining at any stage whether an employee has received remuneration according to an incorrect salary, salary scale or award. The State can, therefore, absent an agreement between it and the concerned employee, or a collective agreement, or a court order, or an arbitration award, unilaterally decide on whether an overpayment has been made and if so, can decide on the method of recovery and the period over which such recoveries may be made” (para 26 of Labour

Court judgment Public Servants Association of South Africa obo Obugu v Head of Department: Department of Health Gauteng, 2016).

The Labour Court remarked that section 38(2)(b)(i) make distinction for employees who are in service and the employee who are not in service because the state could unilaterally deduct salary for employees who are in service whereas legal proceedings should be instituted against employees who are not in service (para 21 of Labour Court Judgment). The Labour Court concluded that section 38(2)(b)(i) is unconstitutional as the deductions in terms of this section violated the “spirit, purport and objects of the Bill of Rights” and amounted to untrammelled self-help (para 28 of Labour Court Judgment).

4.3. Constitutional court

Consequent to the decision by the Labour Court the appellants (Head of the Department of Health (Gauteng) and Member of the Executive for Health in Gauteng) filed a notice of appeal to the Constitutional Court according to section 172(2)(d) of the Constitution on the grounds that the Labour Court erred in finding, among other things, that section 38(2)(b)(i) violated the principle of legality, allowed untrammelled self-help and violated sections 9(1), 23(1), 25(1) and 34 of the Constitution. The appellants submitted that the Labour Court ought to have found that the section 38(2)(b)(i) regulated the right of set-off, which is neither self-help, arbitrary, unfair, a deprivation of property nor even an inhibition to access to a “court or other independent and impartial tribunal” (para 17).

The respondents on the other hand argue amongst others that section 38(2)(b)(i) sanctions self-help because it permits deductions while the state is the arbiter on remuneration that is wrongly paid as well as appropriate means to recover that money and this violates sections 9(1), 23(1), 25(1) and 34 of the Constitution. The respondents argue that section 34(5) of BCEC does not entitle the employer to unilaterally effect deductions. They argue that a distinction between section 31 and 34 is not justifiable (par 19).

The appellants (HoD and MEC) reject the decision by Labour Court in holding that the deduction in terms of section 38(2)(b)(i) is arbitrary self-help and thus violate the principle of legality. They argue that section 38(2)(b)(i) is consistent with the Constitution and Public Service Act read with BCEC does not sanction self-help. They argued that section 25 of the Constitution which deals with deprivation of property does not apply because the property in question (money) belongs to the state and if such property belongs to the employee the deprivation is sanctioned by law and it cannot be arbitrary. They argued that in view of the decision in *Chirwa v Transnet Ltd* (2007) and *Gcaba v Minister for Safety and Security* (2009) actions taken in the context of “employment relationship between the state and its employees” falls within the province of private law and “does not constitute administrative action”. They argue that the principle of legality applies in the sphere of public law and deductions cannot be regarded as arbitrary because they are based on statute. They submitted that the differentiation between private and the public law does not violate section 9 of the constitution which

provides that everyone has a right to equality and protection before the law. The appellants also raised the issue of jurisdiction arguing that the PSA failed to demonstrate that it should be permitted to bypass the Labour Appeal Court. This is because this matter was not heard by the Labour Appeal Court. The appellants also raised the issue on whether the Labour Court had jurisdiction to strike down a separate legislation in which it does not expressly have jurisdiction to do so. They request the Constitutional Court to dismiss this matter with costs (para 20, 22, 23, 26 and 27).

The Constitutional Court was required to decide whether the Labour Court has jurisdiction to declare an Act of Parliament unconstitutional and invalid and if so which remedy should be granted by the Constitutional Court. The court had to also decide whether the deduction in terms section 38(2)(b)(i) constitutes “unfettered self-help” in violation of section 1 of the Constitution and self-off under common law (para 29). The court had to also “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” (para 30).

On the jurisdictional challenge, the Constitutional Court referred to section 166, 167(5) and 172 of the Constitution (par 32, 34). Section 166 lists the number of courts such as Constitutional Court etc. section 166 provides that “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*” is a court in terms of section 166. Section 167(5) stipulates that “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 similar status, before that order has any force”. Section 172 deals with the powers of the court in constitutional matters. It provides the court with declaratory powers when faced with constitutional matter to invalidate any law or conduct inconsistent with the Constitution.

The court also referred to section 151 and 157 of the LRA (par 32, 36 and 3). The Labour Court is established in terms of Section 151 of LRA which stipulates that “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”. Section 157(2) provides that Labour Court has concurrent jurisdiction with Labour Court for any alleged violation of the rights entrenched in the Bill of Rights arising amongst other on employment or labour relations. The court also referred to section 15(1) which 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 to the order of constitutional invalidity to the Constitutional Court for confirmation” (para 41).

The court stated that the powers of the courts in constitutional matters as stated in section 167(5) and 172 should be read together (par 37). The court remarked that this matter was brought before Labour Court as it falls within its jurisdiction, it

involves unfair labour practice under section 23(1) of the Constitution and Ms. Ubogu relies on section 9 and 34 of the Constitution. The court indicated that this matter fell within the jurisdiction of Labour Court or High Court (par 42). The court stated that the powers of Labour Court to make declaratory order are not expressly listed in terms of section 158(1)(a)(iv) read with section 157(2) as such may lead to absurdity. However the court referred to the decision in *Minister of Health v New Clicks South Africa (Pty) Ltd* (2005) at para 232, where the former Chief Justice Chaskalson, C. J. held that the court may “depart from the clear language of a statute where that would otherwise lead ‘to absurdity so glaring that it could never have been contemplated by the Legislature, or where it would lead to a result contrary to the intention of the Legislature, as shown by the context or by such other considerations as the Court is justified in taking into account”.

The court per Nkabinde, A. D. C. J. referred to the dissenting judgment of Jafta, J., wherein he concluded that the Labour Court lacked jurisdiction to declare section 38(2)(b)(i) invalid. Nkabinde, A. D. C. J. stated that if the Labour court did not have jurisdiction this would translate to the fact that Ms. Ubogu would have to approach the Labour Court to review the decision of the state and the High Court for a declaration of constitutional invalidity on the same matter. According to Nkabinde, this matter would not be capable of a speedy resolution and the costs in this litigation for Ms. Ubogu would have increased as well as judicial resources would have been unnecessarily doubled for the same matter. On a proper reading of LRA Nkabinde, A. D. C. J. stated that the Labour Court has the power to declare an Act of Parliament invalid and this will moderate delays, High Court costs and judicial resources will be saved. Nkabinde A. D. C. J. concluded that Labour Court is a court of similar status as the High Court and has the power to make an order on the constitutional validity of an Act of Parliament (par 45, 46).

The Minister argued that the confirmatory proceedings are not properly before the Constitutional Court because the Labour Court concluded that section 38(2)(b)(i) is unconstitutional but did not issue an order of invalidity. However, the Constitutional Court ruled that the Labour Court in substance declared section 38(2)(b)(i) unconstitutional and the order was competent and the confirmation of proceedings was properly before the Constitutional Court (par 58).

On the question as to whether the order of constitutional invalidity by Labour Court should be confirmed, the Constitutional Court with reference to authorities emphasizes that the right to fair hearing necessitate a “procedures ... which, in any particular situation or set of circumstances, are right and just and fair” (para 62) (*Stopforth Swanepoel & Brewis Inc v Royal Anthem (Pty) Ltd* (2014) at para 19. See also *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus* (2016) at para 23). According to the Constitutional Court section 38(2)(b)(i) gives the state free reign to deduct any amount of money that is allegedly wrongly paid to the employee and the effect of this impugned provision is that it impose strict liability on an employee. The court stated that it gives the accounting officer unrestrained power to unilaterally

determine instalments without the consent of employee (para 64, 65). The court held that as a result thereof section 38(2)(b)(i) constitute self-help whereby the state takes law into its own hands and becomes the judge of its own case which is a violation of section 1(c) of the Constitution (para 66). The court said by aiding self-help, section 38(2)(1)(b) allows the state to undermine the judicial process envisaged in section 34 of the Constitution which requires disputes to be resolved by application of law (para 67). The court concluded that section 38(2)(b)(i) promotes self-help and imposes strict liability irrespective of whether the employee can afford the arbitrarily determined instalments and on those basis section 38(2)(b)(i) does not pass constitutional muster (par 67, 68). However, the court said the declaration of invalidity as was fashioned cannot be confirmed and it should be reformulated. The court held that in light of its decision it deem it unnecessary to determine whether section 38(2)(b)(i) limits section 9(1), 23(1) and 25(1) of Constitution and whether limitation of those right is reasonable and justifiable in terms of section 36 of the Constitution.

On the question as to whether the deductions in terms of section 38(2)(b)(i) regulate set-off, the court. The court with referral to the case of *Schierhout v Union Government (Minister of Justice)* 1926 AD 286 at 289 indicated that a doctrine of set-off applies where both parties are mutually indebted in which one debt extinguish the other as if payment was made (para 70). The court remarked that a doctrine of set-off does not operate ex lege (as a matter of law) and in this matter, there are no mutual debts. The deduction in terms of section 38(2)(b)(i) is done in terms from the salary of the employee (para 71). The court also referred to the case of the Western Cape Education Department v General Public Service Sectoral Bargaining Council (2014) at para 29 where it was held that the state has an obligation to exercise its power under the impugned section 38(2)(b)(i) reasonably and with regard to procedural fairness (para 72). The court concluded that the deduction in terms of section 38(2)(b)(i) does not regulate set-off (para 72).

As Ms. Obogu obtained interim remedy from 29 September 2016 in which no deductions were made because of interdict the court deemed it fit to remit the matter back to the Labour Court and this according to court will make it possible for the disputes between the parties to be resolved by way of application of law in terms of section 34 of Constitution in a fair public hearing. This will include correctness of the recovery of the amounts allegedly overpaid to Ms. Ubogu and whether the translation of her position as Clinical Manager: Medical affected the starting package on her new position of Clinical Manager: Allied (para 77).

As the court declared the deductions in terms of section 38(2)(b)(i) unconstitutional it indicated that section 34(1) of the BCEA may be a point of reference when the defect in the impugned legislation is remedied (para 78, 80). The appeal was dismissed and the Minister was ordered to pay the costs of PSA (para 79, 80).

Jafta, J. delivered the minority judgment. Jafta, J. disagrees that appeal should fail and that the declaration of invalidity by the Labour Court must be confirmed and this is based jurisdiction of Labour Court to declare an Act of Parliament invalid

(para 81). Jafta, J. is of the view that section 167(5) of the Constitution cannot be read to confer the Labour Court jurisdiction to invalidate the Act of Parliament because according to him, the provision of 167 “does not confer jurisdiction on court of a status similar to the High Court” (para 83). Jafta, J. is of the view that section 157(2) of the LRA does not confer exclusive constitutional jurisdiction on the Labour Court. He referred to the decision in *Fredericks v MEC for Education and Training, Eastern Cape* (2001) at para 38-44 wherein O’Regan, J. stated that “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”. According to Jafta J, the constitutional jurisdiction of Labour Court is conferred by section 157(2) alone (para 93). He further stated that power of the Labour Court on the declaration of unconstitutionality is contained in section 157(2)(b) and is limited “to the constitutionality of executive acts, administrative acts, and conduct or a threat to commit these acts”. Jafta, J. stated that a list in section 157(2)(b) does not include constitutionality of Acts of Parliament (para 98). Jafta, J. stated that the concurrent jurisdiction of Labour Court limited to claims on violation of fundamental rights from the three instances stated in section 157(2) and does not include the validity of an Act of Parliament (para 100). Jafta, J. concluded that Labour Court lacked jurisdiction of declaring the impugned provision unconstitutional and the order of Labour Court may not be confirmed. Jafta, J. stated that in view of the reasons mentioned above he would uphold appeal and decline to confirm declaration of invalidity mane by Labour Court (para 101, 102).

4.4. Results

The case of *Public Servants Association obo Olufunmilayi Itunu Ubogu v Head of Department of Health, Gauteng and Others* deals with two fundamental issues namely the jurisdiction of the Labour Court to declare an Act of Parliament unconstitutional and secondly whether the unilateral deduction by the employer in terms of section 38(2)(b)(i) is unconstitutional. In other words, whether the deduction in terms section 38(2)(b)(i) constitutes “unfettered self-help” in violation of section 1 of the Constitution and self-off under common law.

On the jurisdictional challenge as to whether the Labour Court can strike off the Act of Parliament, the Constitutional Court stated that the powers of Labour Court to make declaratory order are not expressly listed in terms of section 158(1)(a)(iv) read with section 157(2) of the Labour Court as such may lead to absurdity. However the court referred to the decision in *Minister of Health v New Clicks South Africa (Pty) Ltd* (2005) at para 232 where the former Chief Justice Chaskalson, C. J. held that the 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”.

Jafta, J. in minority judgment stated that the Labour Court lacked jurisdiction to declare section 38(2)(b)(i) invalid. Jafta, J. is of the view that section 167(5) of the Constitution cannot be read to confer the Labour Court jurisdiction to invalidate the Act of Parliament because according to him, the provision of 167 “does not confer jurisdiction on court of a status similar to the High Court” (para 83). Jafta, J. is of the view that section 157(2) of the LRA does not confer exclusive constitutional jurisdiction on the Labour Court. He referred to the decision in *Fredericks v MEC for Education and Training, Eastern Cape* (2001) at para 38-44 wherein O’Regan, J. stated that “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”. According to Jafta, J. the constitutional jurisdiction of Labour Court is conferred by section 157(2) alone (para 93). He further stated that power of the Labour Court on the declaration of unconstitutionality is contained in section 157(2)(b) and is limited “to the constitutionality of executive acts, administrative acts and conduct or a threat to commit these acts”.

Nkabinde, A. D. C. J. delivered majority judgment. In response to the minority judgment by Jafta, J., Nkabinde, A. D. C. J. stated that if the Labour court did not have jurisdiction this would translate to the fact that Ms. Ubogu would have to approach the Labour Court to review the decision of the state and the High Court for a “declaration of constitutional invalidity” on the same matter. According to Nkabinde, A. D. C. J. this matter would not be capable for a speedy resolution and the costs in this litigation for Ms. Ubogu would have increased as well as judicial resources would have been unnecessarily doubled for the same matter. It is submitted that this will accord with the principle of access to justice. The process of justice should eliminate any procedural barriers that may hinder the free exercise of right (Vawda, Y. A. (2005); *Brümmer v Minister for Social Development and Others* (2009); De Ville, J. R. (2003)) for discussion on procedural fairness.

On a proper reading of LRA Nkabinde, A. D. C. J. stated that the Labour Court has the power to declare an Act of Parliament invalid and this will moderate delays, High Court costs and judicial resources will be saved. Nkabinde, A. D. C. J. concluded that Labour Court is a court of similar status like the High Court and has the authority and power to make an order on the constitutional validity of an Act of Parliament (par 45, 46).

Pertaining to the issue as to whether the deduction in terms section 38(2)(b)(i) constitutes “unfettered self-help” in violation of section 1 of the Constitution and self-off under common law, the principle of *audi alteram partem* rule becomes relevant and significant in respect of the processes of salary deductions and benefits.

In terms of the principle of *audi alteram partem* rule, the affected person must be afforded a reasonable chance or opportunity to answer to the charges or allegations against him/her and put forward his case. In other words, a party who is affected by an administrative decision should be heard or be afforded the opportunity to state his/her version before the decision is taken. The affected person as an employee of the state in this

matter has a right to be heard due to the negative impact embedded on the outcomes of the decision (*Walele v City of Cape Town and Others* (CCT 64/07) (2008) para 27). As stated by the Constitutional Court in *Masetlha v President of the Republic of South Africa and Another* (2007) at para 187: “the procedural aspect of the rule of law is generally expressed in the maxim *audi alteram partem*” (see also *Minister of the Interior v Bechler and Others*; *Beier v Minister of the Interior and others* (1948) at 451). In *Chirwa v Transnet Limited and Others* (2007) para 42, the Constitutional Court also confirmed that the LRA is premised on the principle of natural justice. The application of *audi alteram partem* rule minimises arbitrariness, *Masetlha v President of the Republic of South Africa and Another* (2008); De Vos et al. (2015).

The Labour Court in deciding whether the deductions in terms of section 38(2)(b)(i) amounted to “untrammelled self-help” it considered section 34 of Basic Conditions of employment Act 75 of 1997. As indicated above section 34 affords protection to the employee as it states that employers cannot make deductions from an employee’s salary to pay for past overpayments without the consent of employee or court order. The Labour Court noted that the protection afforded by section 34 is not applicable to section 38(2)(b)(i) because section 34 exempt deductions that effected in terms of the law. The Labour Court stated that section 38(2)(b)(i) gives the state “a wide discretion in determining at any stage whether an employee has received remuneration according to an incorrect salary, salary scale or award”.

The Labour Court remarked that section 38(2)(b)(i) make distinction for employees who are in service and the employee who are not in service because the state could unilaterally deduct salary for employees who are in service whereas legal proceedings should be instituted against employees who are not in service (para 21 of Labour Court Judgment). The Labour Court concluded that section 38(2)(b)(i) is unconstitutional as the deductions in terms of this section violated the spirit, purport and objects of the Bill of Rights and amounted to untrammelled self-help (para 28 of Labour Court Judgment).

In dealing with the issues as to whether the order of constitutional invalidity by Labour Court should be confirmed, the Constitutional Court with reference to authorities emphasizes that the right to fair hearing necessitate a “procedures... which, in any particular situation or set of circumstances, are right and just and fair” (para 62) (*Stopforth Swanepoel & Brewis Inc v Royal Anthem (Pty) Ltd* (2014) at para 19. (see also *Van Huyssteen and Others NNO v Minister of Environmental Affairs and Tourism and Others* (1996); *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus* (2016) at para 23). According to the Constitutional Court section 38(2)(b)(i) gives the state free reign to deduct any amount of money that is allegedly wrongly paid to the employee and the effect of this impugned provision is that it impose strict liability on an employee. The court stated that it gives the accounting officer unrestrained power to unilaterally determine instalments without the consent of employee (para 64, 65). The court held that as a result thereof section 38(2)(b)(i) constitute self-help whereby the state takes law into its own

hands and becomes the judge of its own case which is a violation of section 1(c) of the Constitution (para 66). The court said by aiding self-help, section 38(2)(1)(b) allows the state to undermine the judicial process envisaged in section 34 of the Constitution which requires disputes to be resolved by application of law (para 67). The court concluded that section 38(2)(b)(i) promotes self-help and imposes strict liability irrespective of whether the employee can afford the arbitrarily determined instalments and on those basis section 38(2)(b)(i) does not pass constitutional muster (par 67, 68).

On the question as to whether the deductions in terms of section 38(2)(b)(i) regulate set-off, the court. The court with referral to the case of *Schierhout v Union Government (Minister of Justice)* (1926) AD 286 at 289 indicated that a doctrine of set-off applies where both parties are mutually indebted in which one debt extinguish the other as if payment was made (para 70). The court remarked that a doctrine of set-off does not operate ex-lege (as a matter of law) and in this matter, there are no mutual debts. The deduction in terms of section 38(2)(b)(i) is done in terms from the salary of the employee (para 71).

As the court declared the deductions in terms of section 38(2)(b)(i) unconstitutional it indicated that section 34(1) of the BCEA may be a point of reference when the defect in the impugned legislation is remedied (para 78, 80).

This judgment clearly suggests that the state as an employer should also apply *audi alteram partem* before implementing deductions on leave without pay because it is an administrative decision and such decision has a negative impact on the employee. The application of *audi alteram partem* rule will minimise arbitrariness, *Masetlha v President of the Republic of South Africa and another* (2007) (para 184). The rule of law is entrenched in Section 1 of the Constitution Act 108 of 1996. In *Bel Porto School Governing Body and Others v Premier of the Western Cape Province and another* (2002) (para 40) it was stated that "all exercises of public power have to have a rational basis" (*Pharmaceutical Manufacturers Association of SA and Others; In Re Ex Parte Application of President of the RSA and Others* (2000) (paras 85, 90) and "this is one of the foundations of legality, or lawfulness as required by section 33(a)" See also *Rautenbach, I. M.* (2012). for discussion on duties of those bound by the right and also for non-compliance with the rights and *De Vos et al.* (2015). for the discussion on principle of legality. In *Janse van Rensburg and Another v Minister of Trade and Industry and Another* (2000) the court said "...observance of the rules of procedural fairness ensures that an administrative functionary has an open mind and a complete picture of the facts and circumstances within which the administrative action is to be taken. In that way, the functionary is more likely to apply his or her mind to the matter in a fair and regular manner". In *De Lange v Smuts N. O. and Others* (1998) at para 131 the court stated that "...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". See also *Hoexter, C.* (2016) for discussion on the principle of *audi alteram partem* rule to the right to procedurally fair administrative action as stated in Section 3 of Promotion of Access to Justice Act 3 of 2000, see also *Currie, I., & De Waal, J.* (2013); *Botha N. O. v The Governing Body of the Eljada Institute & Another* (2016) para 39-40, *Matebesi v Director of Immigration & Others* (1998) at 7-8; *De Ville, J. R.* (2003).

In *Pharmaceutical Manufacturers Association of SA and Others; In Re Ex Parte Application of President of the RSA and Others* (2000) at para 85 it was held that "it is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement". The court in para 90 further held that "rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries. The action that fails to pass this threshold is inconsistent with the requirements of our Constitution, and therefore unlawful" (see *Quinot, G.* (2015) for the discussion of the case and *Quinot, G., Corder, H., Maree, P., Murcott, M., Kidd, M., Webber, E., Bleazard, J., & Budlender, S.* (2015) for the discussion on procedural fairness).

5. CONCLUSION

The case of *Public Servants Association obo Olufunmilayi Itunu Ubogu v Head of Department of Health, Gauteng and Others* clarifies the application of principles on the jurisdiction of the Labour Court to declare an Act of Parliament unconstitutional and the constitutionality of unilateral deduction of money by the state. The Labour Court is vested with jurisdiction to declare an Act of Parliament unconstitutional. As the court reasoned if litigant should approach the court twice, the judicial resources would have been unnecessarily doubled for the same matter, the case would not be capable for speedy resolution and cost of litigation would have been increased. The view by the Constitutional Court also accords with the decision in *Mohlomi v Minister of Defence* (1997) para 11 wherein the court held that "inordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs" (see *Bekink, B.* (2016) for the discussion on the concept of justice).

The decision in *Public Servants Association obo Olufunmilayi Itunu Ubogu v Head of Department of Health, Gauteng and Others* is important in the legal system because it illustrates the importance of complying with the principle of natural justice *audi alteram partem* rule. This decision also restores the fundamental principle of natural justice in the system of the state when deducting money that was onerously paid to employees. This decision affords protection to the employee of the state as the employees must be afforded reasonable opportunity to state their case and grant the necessary consent where the state has onerously paid money to employees. The state, on the other hand, must ensure that the principle of *audi alteram partem* rule is observed as and when enforcing recovery

mechanism for the collection of all monies owed to the state as determined by the Public Finance Management Act 1 of 1999, Treasury Regulations and other applicable laws.

It is submitted that the judgment in Public Servants Association obo Olufunmilayi Itunu Ubogu v Head of Department of Health, Gauteng and Others clearly suggest that the state as an employer should also apply *audi alteram partem* rule before implementing deductions on leave without pay because it is an administrative decision which has a negative impact on the employees. Failure do so and where the public power is exercised irrationally, "a court has the power to intervene and set aside the irrational decision" Pharmaceutical Manufacturers Association of SA and others; In Re Ex Parte Application of President of the RSA and others (2000) at para 90.

The case of Public Servants Association obo Olufunmilayi Itunu Ubogu v Head of Department of Health, Gauteng and Others is relevant and significant on the jurisprudence of *audi alteram partem* rule in the context of the exercise of public power which as indicated above, must be exercised rationally.

It is envisaged that the article will contribute in the knowledge and research relating to the provisions on deductions to monies that was onerously paid to employees as it provides insightful analysis on the application of *audi alteram partem* rule and also provides robust investigation on the deduction.

It is, therefore, submitted that public office bearers must ensure that they comply with the prescribed procedure with regard to deductions of monies that was onerously paid by the state to employees.

REFERENCES

1. Bekink, B. (2016). *Principles of South African constitutional law*. (2nd ed.). South Africa: Lexis Nexis
2. Corder, H., Maree, P., Murcott, M., Kidd, M., Webber, E., Bleazard, J., & Budlender, S. (2015). *Administrative justice*. In G. Quinot (Ed.). UK: Oxford
3. De Ville, J. R. (2003). *Judicial review of administrative law in South Africa*. South Africa: LexisNexis.
4. De Vos, P., Brand, D., Gevers, C., Govender, K., Lenaghan, P., Mailula, D., Ntlama, N., & Sibanda, S. (2015). *South African constitutional law in context*. In P. de Vos, W. Freedman (Eds.). Oxford. Southern Africa: OUP
5. Government Gazette (1996, December 18). *The Constitution of the Republic of South Africa Act 108 of 1996*.
6. Government Gazette (2002, March 18). *Treasury Regulations issued for departments, trading entities, constitutional institutions and public entities in terms of Public Finance Management Act 1 of 1999*. Retrieved from: http://www.treasury.gov.za/legislation/pfma/regulations/gazette_23246.pdf
7. Green Gazette (1994). *Public service act 103 of 1994*. Retrieved from: https://www.greengazette.co.za/acts/public-service-act_1994-103
8. Currie, I., & De Waal, J. (2013). *The Bill of rights handbook*. (6th ed.). South Africa: Juta
9. Hoexter, C. (2016). *Administrative law in South Africa*. (2nd ed.). South Africa: Juta
10. *Labour Relations Act 66 of 1995*. Retrieved from: <http://www.wipo.int/edocs/lexdocs/laws/en/za/za091en.pdf>
11. *Promotion of Access to Justice Act 3 of 2000*. (2000, November 30). Retrieved from: <http://www.justice.gov.za/legislation/acts/2000-003.pdf>
12. Pocket Law (1998). *Matebesi v Director of Immigration & Others JOL 4099 (Les A) [1998] LSCA 83*. Retrieved from: <https://pocketlaw.africanlii.org/judgment/court-appeal/1998/83.html>
13. Public Finance Management Act 1 of 1999. (1999, March 2). Retrieved from: <http://www.dod.mil.za/documents/acts/public%20finance%20management%20act.pdf>
14. Quinot, G. (2015). *Administrative law: Cases & material*. South Africa: Juta
15. Rautenbach, I. M. (2012). *Constitutional law*. (6th ed.). South Africa: LexisNexis
16. .Republic of South Africa Government Gazette (1997, December 5). *Basic conditions of employment act 75 of 1997*. Retrieved from: <https://www.gov.za/>
17. SAFLII (2009, August 13). *Brümmer v Minister for Social Development and Others (2009) 6 SA 323 (CC); (2009) 11 BCLR 1075 (CC)*. Retrieved from: <http://www.saflii.org/za/cases/ZACC/2009/21.html>
18. SAFLII (2001, 4 December). *Fredericks v MEC for education and training, Eastern Cape (2001) ZACC 6; (2002) 2 SA 693 (CC); (2002) 2 BCLR 113 (CC)*. Retrieved from: <http://www.saflii.org/za/cases/ZACC/2001/6.html>
19. SAFLII (2016, December 15). *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus (2016) ZACC 49; (2017) 38 ILJ 527 (CC); (2017) 4 BCLR 473 (CC)*. Retrieved from: <http://www.saflii.org/za/cases/ZACC/2016/49.html>
20. SAFLII (30 December 2016). *Public Servants Association of South Africa obo Obogu v Head of Department: Department of Health Gauteng [2016] ZALCJHB 544 (Labour Court Judgment)*. Retrieved from: <http://www.saflii.org/za/cases/ZALCJHB/2016/544.html>
21. SAFLII (2017, December 7). *Public Servants Association obo Olufunmilayi Itunu Ubogu v Head of Department of Health, Gauteng and Others CCT6/17, CCT14/17 (2017) ZACC 45; (2018) 2 BCLR 184 (CC); (2018) 39 ILJ 337 (CC); (2018) 2 BLLR 107 (CC); (2018) 2 SA 365 (CC)*. Retrieved from: <http://www.saflii.org/za/cases/ZACC/2017/45.html>
22. SAFLII (2002, February 21). *Bel Porto School Governing Body and Others V Premier of the Western Cape Province and Another (CCT58/00) (2002) ZACC 2; (2002) 3 SA 265; (2002) 9 BCLR 891*. Retrieved form: <http://www.saflii.org/za/cases/ZACC/2002/2.html>
23. SAFLII (2000, February 25). *Pharmaceutical Manufacturers Association of SA and Others; in Re Ex Parte Application of President of the RSA and Others (2000) 2 SA 674 (CC); (2000) 3 BCLR 241 (CC)*. Retrieved from: <http://www.saflii.org/za/cases/ZACC/2000/1.html>
24. SAFLII (2008, June 13). *Walele v City of Cape Town and Others (CCT 64/07) (2008) ZACC 11; 2008 (6) SA 129 (CC); 2008 (11) BCLR 1067 (CC) (13 June 2008)*. Retrieved from: <http://www.saflii.org/za/cases/ZACC/2008/11.html>

25. SAFLII (2014, June 26). *Western Cape Education Department v General Public Service Sectoral Bargaining Council* (2014) ZALAC 34; (2014) 10 BLLR 987 (LAC). Retrieved from: <http://www.saflii.org/za/ZALAC/2014/34.html>
26. SAFLII (2016, March 24). *Botha NO v the Governing Body of the Eljada Institute & Another* (20530/2014) (2016) ZASCA 36. Retrieved from: <http://www.saflii.org/za/cases/ZASCA/2016/36.html>
27. SAFLII (2007, November 28). *Chirwa v Transnet Limited and Others* (CCT 78/06) (2007) ZACC 23; (2008) 4 SA 367 (CC); (2008) 3 BCLR 251 (CC); (2008) 2 BLLR 97 (CC); (2008) 29 ILJ 73 (CC). Retrieved from: <http://www.saflii.org/za/cases/ZACC/2007/23.html>
28. SAFLII (2009, October 7). *Gcaba v Minister for Safety and Security* (2009) ZACC 26; (2010) 1 SA 238 (CC); (2010) 1 BCLR 35 (CC). Retrieved from: <http://www.saflii.org/za/cases/ZACC/2009/26.html>
29. SAFLII (2007, 3 October). *Masetlha v President of the Republic of South Africa and Another* (2007) ZACC 20; (2008) 1 SA 566 (CC); (2008) 1 BCLR 1 (CC). Retrieved from: <http://www.saflii.org/za/cases/ZACC/2007/20.html>
30. SAFLII (2014, October 2). *Stopforth Swanepoel & Brewis Inc v Royal Anthem (Pty) Ltd* (2014) ZACC 26; (2015) 2 SA 539 (CC); (2014) 12 BCLR 1465 (CC). Retrieved from: <http://www.saflii.org/za/cases/ZACC/2014/39.html>
31. SAFLII (2000, September 29). *Janse van Rensburg and Another v Minister of Trade and Industry and Another* (CCT13/99) (2000) ZACC 18; (2001) 1 SA 29; (2000) 11 BCLR 1235 (CC). Retrieved from: <http://www.saflii.org/za/cases/ZACC/2000/18.html>
32. SAFLII (30 September 2005). *Minister of Health v New Clicks South Africa (Pty) Ltd* (2005) ZACC 14; (2006) 2 SA 311 (CC); (2006) 1 BCLR 1 (CC). Retrieved from: <http://www.saflii.org/za/cases/ZACC/2005/14.html>
33. *Minister of the Interior v Bechler and Others; Beier v Minister of the Interior and Others* (1948) 3 SA 409 (A)
34. SAFLII (1996, September 26). *Mohlomi v Minister of Defence* (1997) 1 SA 124 (CC). Retrieved from: <http://www.saflii.org/za/cases/ZACC/1996/20.html>
35. The Constitutional Court of South Africa (1998, May 28). *De Lange v Smuts NO and others* (CCT26/97) (1998) ZACC 6; (1998) 3 SA 785; (1998) 7 BCLR 779. Retrieved from: <https://collections.concourt.org.za/handle/20.500.12144/2044>
36. *Schierhout v Union Government (Minister of Justice)* (1926) AD 286.
37. Vawda, Y. A. (2005). Access to justice: From legal representation to the promotion of equality and social justice - addressing the legal isolation of the poor. *Obiter*, 234-247.