REPUBLIC OF SOUTH AFRICA

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Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 510/2018

In the matter between:

IQRAM BUX	**Applicant**
and	
MINISTER OF DEFENCE AND MILITARY VETERANS	**First Respondent**
SECRETARY FOR DEFENCE AND MILITARY VETERANS	**Second Respondent**
SOUTH AFRICAN NATIONAL DEFENCE FORCE	**Third Respondent**
DEPARTMENT OF DEFENCE	**Fourth Respondent**

Heard: **12 June 2018**

Delivered: **15 June 2018**

Summary: Urgent application to cease deductions in terms of Public Service Act s 38(2)(b)(i). Constitutional Court judgment in *Ubogu* applied. Section unconstitutional and deductions unlawful. Interdict granted.

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant, Col Iqram Bux, is the Officer Commanding of 2 Military Hospital in Wynberg. The respondents (conveniently referred to collectively as the Department of Defence) claim that he has been incorrectly "translated" to a higher paying post and overpaid accordingly. It has been deducting the overpayments from his salary in accordance with s 38(2)(b)(ii) of the Public Service Act[1]. Col Bux seeks to interdict them from making any further deductions following a declaration of invalidity of the subsection by the Constitutional Court in *Ubogu*.[2]

Background facts

[2] Col Bux is a medical practitioner. He has been employed by the Department since 1999. In terms of an Occupational Specific Dispensation (OSD) he was "translated" – the Department says incorrectly – to the post of Clinical Manager in 2009 and to the post of Senior Clinical Manager (Grade 1) instead of Manager Medical Services (Grade 1) with effect from 1 February 2012. On 31 October 2017 the Chief Financial Officer of the Department sent him a letter telling him that the Secretary for Defence and Military Veterans had approved deductions to be made from his salary in order to recoup alleged overpayments to him. The Department deducted R20 397, 97 from his monthly salary starting in December 2017 and continues to do so. The next deduction is due to be made on 15 June 2018, hence the need to hand this judgment down by that date, two days after the hearing.

[3] Col Bux has not agreed to the deductions. The Department purports to deduct the money in terms of s 38 of the Public Service Act (PSA). He says that the deductions are unlawful and must stop.

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[1] Act 103 of 1994.

[2] *PSA obo Ubogu v Head, Department of Health, Gauteng* 2018 (2) SA 365 (CC); (2018) 39 *ILJ* 337 (CC); [2018] 2 BLLR 107 (CC).

Evaluation / Analysis

[4] Before I deal with the merits of the application, Ms *Botma* raised two points *in limine*, relating to urgency and jurisdiction. Although the matter was argued on Tuesday 12 June 2018 and the respondents had had more than ten days to deliver their answering affidavit, Ms *Botma* only sent her written submissions to the Court by email when it was about to close at 16:00 on Thursday 14 June, two days after the matter had been argued and a few hours before the judgment was due to be handed down at 10:00 on Friday 15 June 2018. I have nevertheless considered those submissions.

Urgency

[5] Ms *Botma* argued that the matter is not urgent, as the applicant has known since 2016 that deductions would be made and they have been made since December 2017.

[6] The short answer is that the harm is ongoing. Col Bux does not seek any relief with regard to past deductions; he only seeks to interdict any further deductions, the first of which is to take place today, Friday 15 June 2018. The respondents have taken ten court days to deliver an answering affidavit. There is no prejudice to them.

[7] I am satisfied that the matter must be dealt with on an urgent basis.

Jurisdiction

[8] The respondents take issue with the jurisdiction of this Court. It is not clear on what basis they do so. When the matter was argued, Ms *Botma* had not filed any heads of argument, and she did not pursue the point on jurisdiction with any vigour. She did not address it at all in her belated written submissions. The deponent to the answering affidavit, the Department's Chief Director: Human Resources, simply states that "it is specifically denied that this Honourable Court has jurisdiction to adjudicate this matter" and that "further legal argument as to the application of the Basic Conditions of Employment Act to this matter will be presented at the hearing hereof".

[9] The Basic Conditions of Employment Act[3] provides in s 3(1)(a):

> "This Act applies to all employees and employers except –
>
> (a) members of the National Intelligence Agency, the South African Secret Service and the South African National Academy of Intelligence."

[10] As the authors point out in *Labour Law through the Cases*[4], the amendment of the BCEA by the Intelligence Services Act[5], which removed the National Defence Force from the list of exclusions in s 3(1)(a) of the BCEA, was considered in *Bonga*.[6] Cele AJ rejected the argument that the failure to retain the SANDF in the list of exclusions was in error and held that the BCEA applies to members of the Defence Force.

[11] Col Bux is such a member. The BCEA applies to him. And this Court has jurisdiction over all matters in terms of the BCEA (such as s 34) and any matter concerning a contract of employment.[7] This Court may deal "with any matter necessary or incidental to performing its functions" in terms of the BCEA[8]. This Court does have jurisdiction to decide this application.

BCEA

[12] Section 34 of the BCEA prohibits deductions without an agreement, law, court order or arbitration award:

> "**Deductions and other acts concerning remuneration**
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> 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."

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[3] Act 75 of 1997 (BCEA).

[4] Du Toit et al, *Labour Law through the Cases* (LexisNexis Issue 26), BCEA-8.

[5] Act 65 of 2002.

[6] *Bonga v Minister of Defence* [2006] 3 BLLR 286 (LC); (20006) 27 *ILJ* 799 (LC).

[7] BCEA s 77.

[8] BCEA s 77A(g).

[13] The parties to this dispute are bound by the BCEA. And Col Bux has not agreed to the deductions. Neither are the deductions permissible in terms of any law, collective agreement, court order or arbitration award. The deductions are not permissible in terms of the BCEA.

[14] The only "law" that could come to the rescue of the Department is the Public Service Act.

Ubogu and the Public Service Act

[15] Section 38 of the PSA provides that:

> ""(1) (a) If an incorrect salary, salary level, salary scale or reward is awarded to an employee, the relevant executive authority shall correct it with effect from the date on which it commenced.
>
> (b) Paragraph (a) shall apply notwithstanding the fact that the employee concerned was unaware that an error had been made in the case where the correction amounts to a reduction of his or her salary.
>
> (2) If an employee contemplated in subsection (1) has in respect of his or her salary, including any portion of any allowance or other remuneration or any other benefit calculated on his or her basic salary or salary scale or awarded to him or her by reason of his or her basic salary—
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> (a) been underpaid, an amount equal to the amount of the underpayment shall be paid to him or her, and that other benefit which he or she did not receive, shall be awarded to him or her as from a current date; or
>
> (b) been overpaid or received any such other benefit not due to him or her—
>
> (i) an amount equal to the amount of the overpayment shall be recovered from him or her by way of the deduction from his or her salary of such instalments as the relevant accounting officer may determine if he or she is in the service of the State, or, if he or she is not so in service, by way of deduction from any moneys owing to him or her by the State, or by way of legal proceedings, or partly in the former manner and partly in the latter manner;
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> (ii) that other benefit shall be discontinued or withdrawn as from a current date, but the employee concerned shall have the right to be compensated

by the State for any patrimonial loss which he or she has suffered or will suffer as a result of that discontinuation or withdrawal."

[16] This is the section on which the Department relies for the deductions from Bux's salary. But the Constitutional Court has confirmed a decision of this Court that s 38(2)(b)(i) of the PSA is unconstitutional.

[17] In *Ubogu*[9] this Court issued a rule *nisi* calling upon the Minister of Public Service, the Finance MEC and the Finance Minister to show cause why: (i) it should not declare that the claim to recover the overpaid amounts [paid to Ms Ubogu] had prescribed; (ii) the unilateral deductions of monthly instalments were not ultra vires; alternatively, (iii) section 38(2)(b)(i) should not be declared unconstitutional and falls to be read in a manner consistent with the Constitution; (iv) section 38(2)(b)(i) should not be declared unconstitutional and struck down; and (v) the Head of the Department of Health and the MEC for Health should not be directed to pay the costs jointly and severally. Pending the outcome of the application, the Head of the Department of Health and the MEC for Health were interdicted from making any further deductions.

[18] On the return day, the Court ordered:[10]

"Order 1.3 as granted by Steenkamp J on 29 September 2016 is confirmed to read:

'It is declared that section 38(2)(b)(i) of the Public Service Act (Proclamation 103 of 1994) is unconstitutional as presently formulated, and accordingly falls to be interpreted in a manner which conforms with the provisions of the Constitution of the Republic of South Africa Act 108 of 1996 in particular sections 23(1), 25(1) and 34 thereof, to be read as follows:

'(b) been overpaid or received any such other benefit not due to him or her—

(i) an amount equal to the amount of such overpayment shall be recovered from him or her by way of deduction from his or her salary of such instalments as the relevant accounting officer and

[9] Above fn 2.

[10] *Public Servants Association of South Africa obo Ubogu v Head of Department: Department of Health, Gauteng* [2016] ZALCJHB 544.

> 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;"

[19] The applicant in that case launched a confirmation application in the Constitutional Court. It was heard on 18 May 2017. The Constitutional Court eventually handed down judgment on 7 December 2017. It declared s 38(2)(b)(i) of the PSA unconstitutional and held that the interim interdict issued by this Court on 29 September 2016 stands.

[20] The parties and this Court are bound by the judgment of the apex court. The continuing deductions from Col Bux's remuneration, purportedly in terms of s 38 of the PSA, are unlawful. And the Department's argument that the decision to deduct was taken before the Constitutional Court eventually handed down judgment in December last year (but after the judgment of this Court in September 2016), does not hold water. The Department continued to deduct after December 2017. And Col Bux only seeks a prospective interdict in this application, and no retrospective relief.

Set-off

[21] The respondents also sought to rely on the doctrine of set-off. But *Ubogu* dealt with that principle as well. Nkabinde ADCJ held:[11]

> "[69] Before I deal with the remedy, it is necessary to address the question whether the section 38(2)(b)(i) deductions regulate set-off. The appellants submit that section 38(2)(b)(i) regulates the right of set-off, which is not self-help, arbitrary or unfair. The underlying premise to the argument that common law set-off does not amount to a form of self-help, is not correct.
>
> [70] The doctrine of set-off is recognised under the common law. The Appellate Division, as the Supreme Court of Appeal was then known, pointed out in *Schierhout* that:

[11] *Ubogu* paras [69] – [72].

'When two parties are mutually indebted to each other, both debts being liquidated and fully due, then the doctrine of compensation comes into operation. The one debt extinguishes the other *pro tanto* [only to the extent of the debt] as effectually as if payment had been made".

[71] In *Harris*, Rosenow J remarked that the 'origin of the principle appears rather to have been a common-sense method of self-help'. In my view, the mechanisms in the impugned provision are not comparable to set-off under the common law. The doctrine of set-off does not operate *ex lege* (as a matter of law). Besides, there are no mutual debts. Here, the deductions in terms of section 38(2)(b)(i) are made from an employee's salary. The dispute regarding whether the translation of her position as Clinical Manager: Medical affected her starting package on the new position remains unresolved. Therefore, the parties cannot be said to be mutually indebted to each other. It is arguable that the alleged debt can, in the circumstance, be said to be fully due.

[72] The doctrine cannot be invoked to defeat the employee's claim in relation to her salary. Particularly, where a dispute surrounding the translation of her position that, allegedly, did not affect her starting package, had not been resolved by the application of law in a fair hearing before a court. At the risk of repetition, the mechanism in the impugned provision constitutes self-help. As the Labour Appeal Court correctly observed in *Western Cape Education Department*,[12] the state has an obligation to exercise its power under section 38(2)(b)(i) reasonably and with regard to procedural fairness. Indeed, the notions of fairness and justice inform public policy − which takes into account the necessity to do simple justice between individuals. The contention that a deduction under section 38(2)(b)(i) regulates the right of set-off is, in the circumstance, flawed. However, this should not be understood to suggest that there can never be instances in which the doctrine of set off, especially where there are mutual debts in existence, may be invoked."

[22] In this case, Col Bux does not admit to any "mutual debts". The doctrine of set-off cannot be invoked.

[12] *Western Cape Education Department v GPSSBC* [2014] ZALAC 34; [2014] 10 BLLR 987 (LAC); (2014) 35 *ILJ* 3360 (LAC) par 29. [Dismissing the appeal from the Labour Court in *Western Cape Education Department v General Public Service Sectoral Bargaining Council and Others* (C 360/2012) [2013] ZALCCT 5; [2013] 8 BLLR 834 (LC); (2013) 34 *ILJ* 2960 (LC)].

Conclusion

[23] The applicant is entitled to the relief he seeks.

Costs

[24] Despite the clear authority in *Ubogu*, the respondents persisted in opposing the relief sought. The Constitutional Court in that case simply ordered that the successful party is entitled to costs. But this Court has to take into account the requirements of law and fairness. In law, the successful applicant is entitled to his costs. In fairness, there is no reason to deprive him of those costs. Given the clear authority of the apex court on which he relied from the outset, it is difficult to fathom why the respondents persisted with their opposition and incurred further costs for the fiscus.

Order

[25] I therefore make the following order:

25.1 The application is heard as an urgent application.

25.2 The respondents are interdicted from unilaterally making any further deductions from the applicant's remuneration or pension fund pay-out.

25.3 The respondents are ordered to pay the costs of this application jointly and severally, the one paying, the other to be absolved.

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Steenkamp J

APPEARANCES

APPLICANT:	A Coetzee Instructed by Herold Gie.
RESPONDENTS:	M Botma Instructed by the State Attorney.