



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J189/2012

In the matter between:

PUBLIC SERVANTS ASSOCIATION

First Applicant

and

DEPARTMENT OF HOME AFFAIRS

First Respondent

THE DIRECTOR GENERAL:

DEPARTMENT OF HOME AFFAIRS

Second Respondent

Delivered: 12 November 2015

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction

- [1] The Applicant approached the Court in terms of section 158 (1) (a) (iii), (iv) and 158 (1) (h) of the Labour Relations Act¹ to seek an order in the following terms;

¹ Act No 66 of 1995 as amended

- 1.1 That the decision taken by the Respondents to deduct performance bonus payments made to its members be declared unlawful and unfair;
 - 1.2 Ordering the Respondents to pay back to its members, all the performance bonus amounts it had deducted within 30 days of the court's order;
 - 1.3 Reviewing and setting aside the decision of the Respondents not to pay performance bonuses to employees who qualified for performance bonuses and ordering the Respondents to pay all its employees who qualified for performance bonuses for 2009/2010 within 30 days of the order.
- [2] The Respondents opposed the application and further sought condonation for the late filing of the answering affidavit. The application for condonation was not opposed, and having properly considered it, it is determined that good cause has been shown, and thus the late filing of the answering affidavit is condoned.
- Background:*
- [3] The First Respondent had developed and adopted its Integrated Performance Management and Development Policy for Employees Level 1 to 12 in November 2008 ('the Policy'). The purpose of the Policy is to *inter alia*, provide for the establishment of an integrated system for the management and development of performance, i.e., a system that enhances the linkage between the employees' performance and development with organisational performance in order to achieve the Department's vision, mission and strategic objectives. The Policy further provided for standards and procedures according to which employees should be managed, and provided that all performance and formal assessment and reviews shall be based on the respective employees' performance agreement and to be conducted on a quarterly basis.
- [4] The Policy also provided that all annual performance reports were to be moderated by the Moderating Committee, with its role being *inter alia* to monitor the performance assessment process by obtaining an overall sense

of whether or not standards are being applied realistically and consistently; to review overall assessment scores across sections/components/branches in the department; to determine the performance of the entire component and aligning that with the summary results based on individual performance, and to recommend and reward level and remedial action of performance and non-performance respectively.

- [5] In July 2010, performance assessments were conducted on employees and scores were allocated with regards to performance of each employee. The results were submitted to the Moderating Committee which then recommended reward levels for the employees. On 21 December 2010, the Second Respondent (Director-General) issued the Human Resources circular (Number D4 of 2010) addressed to staff, noting that whilst the Department was underperforming, a high number of employees had received above average performance ratings, and as a result thereof, it was going to conduct a review and ensure that due diligence was followed in the assessment for 2009/2010 financial year. Payment of performance bonuses in 2010 was postponed until the review process was finalised.
- [6] On 23 March 2011, another circular (B1 of 2011) was issued to staff members informing them that the performance review process was concluded, and that performance bonus or incentive for the financial year 2009/2010 would be allocated. Qualifying staff members were to be paid on three different dates on 28 and 31 March 2011, and 4 April 2011. Payments as promised were duly made on those dates.
- [7] Between June and July 2011 a number of employees including the Applicant's members received letters informing them that as a result of the review process, it was established that some of them were erroneously paid performance bonuses, and that in terms of section 38 of the Public Service Act² (the PSA), the affected employees that were overpaid would have those amounts deducted from their monthly salaries over a period of 12 months.

² Act 103 of 1994

[8] The Applicant's main contention is that the Respondents' action and/or decision to deduct the performance bonuses paid to its members was unlawful and/or unfair on the following grounds;

- a) The Respondents failed to observe the *audi alteram partem* rule before implementing the deductions. In this regard, it was contended that no consultations were held with the Applicant's members prior to the decision being taken by the Reviewing Committee to overturn the decision of the Moderating Committee.
- b) The Respondents were obliged to consult with the Applicant's members especially having regard to the fact that the process that led to the decision to pay them performance bonuses was inclusive and consultative. In this regard, it was further submitted that the Applicant's members and other employees had agreed with their immediate superiors on the scores to be allocated, which were then submitted to the Moderating Committee, and which had in turn assessed the scores and recommended rewards payable to employees.
- c) There was an obligation to consult with the affected employees prior to making the deductions as they had to know how the decision by the Moderating Committee was erroneous.
- d) The employees were not aware what the error was regarding the bonus payments, on which basis the decision of the Moderating Committee was erroneous, who had committed the error and whether such error should have resulted in them forfeiting their bonuses as a whole.
- e) The decision to deduct the incentive bonus payment was not consistent with the Respondents' Policy, was irrational, arbitrary and capricious.

[9] In opposing the application, the Respondents' contentions were that;

- a) The performance bonus payments were made to the affected employees in error. The nature of the error was based on the fact that

the authority to approve the performance assessment reports lies with the Second Respondent (Director-General). However in this case, the recommendations made by the local moderating committees were mistaken to be authority to process the payments to the employees. The correct status of the local moderating committees was to do the moderation and submit recommendations, and not approvals to the Director-General. However in this instance, the recommendations were submitted to the Deputy Director-General for 'approval' and were mistakenly approved.

- b) When the fifth report was submitted, it was discovered that the performance assessment reports received had performance ratings that were distorted in that the performance ratings were above the normal distribution curve of 25% and/or that the performance bonuses exceeded the 1.5% of the department's remuneration budget. The error was further attributed to the fact that the assessments reports were approved on a piece-meal basis and not on a cumulative basis.
- c) When the error was discovered, submissions were then made to the Executive Management Committee and it was decided that the assessment process should be reviewed in order to rectify the process and to ensure alignment between organisational and individual performance. A Departmental Moderating Review Committee (DMRC) was then established with a mandate to review the performance bonus allocation process. After the review process was approved, a circular was then sent to the employees on 21 December 2010 informing them of that process;
- d) Local moderating committees together with relevant supervisors and where possible, in consultation with the affected employees, reviewed the performance ratings to align them with the revised criteria. The revised ratings from the local Moderating Committees were then resubmitted to the DMRC, which had recommended to the Director General that the moderated performance assessment reports should be approved. The Director-General had then approved the revised

ratings as it was aligned to the departmental performance as well as meeting the target of 1.5% of the remuneration budget.

- e) The Director-General met with representatives from the Applicant and NEHAWU on 1 June 2011 and fully explained the process to them and informed them that where there had been bonus overpayments, these would be recovered. A letter was then sent to employees informing them of overpayments, and this was followed up with a letter on 15 July 2011 detailing the recoupment process.
- f) The Director-General as the Accounting Officer had a duty under the Public Service Act as well as the PFMA to recover monies erroneously paid so that it is not regarded as wasteful and unauthorised expenditure. This authority stems from the provisions of section 38 of the Public Service Act read with the Regulations, and also from section 38 of the PFMA.
- g) The Department was entitled to scale down the applicable percentages which meant that the amounts paid to employees could be reduced if the department exceeded the 1.5% remuneration budget allocated for performance bonuses.
- h) Performance bonuses are not a right to which employees are entitled to and are allocated to deserving employees at the discretion of the employer. Thus the overpayments are amounts to which employees cannot claim that they have a right to. Thus the employees do not have a right *ex contractu* or *ex lege* to performance bonuses or pay progression, and could not create an entitlement to benefits through arbitration. There was therefore no duty on the employer to consult with them.
- i) The Applicant had not made out a case on its papers for the relief sought, and further that the relief sought was inconsistent with the admission made that the review process was not challenged.

- j) Since the review process was not challenged, it was contended that the process was thus admitted to have been lawful and fair, and that on the Applicant's own version, the review process followed was correct and in line with the Policy;

The jurisdiction of the Court:

- [10] In further opposing the application, the First Respondent raised a preliminary point pertaining to the jurisdiction of the Court in the light of the relief sought and the alleged failure to utilise the internal and alternative remedies open to the Applicant. In this regard, it was submitted that the relief sought by the Applicant clearly fell within the discretion of the employer and within the definition of remuneration, and thus a dispute in that regard should have been referred to the General Public Service Sectoral Bargaining Council (GPSSBC) for conciliation.
- [11] It was submitted that Applicant had not referred a dispute to the relevant Bargaining Council in view of the dispute raised; and that no certificate of outcome was issued entitling the Applicant to refer this dispute before the Court. To this end, it was submitted that the since Applicant had not complied with the provisions of section 191 of the LRA, the court lacked jurisdiction to determine the matter in terms of section 157 (4) of the LRA, and that the mere mention of section 158 (1) (h) of the LRA did not make the application a review application. In the light of these factors, it was contended that the matter was premature and not ripe for hearing.
- [12] In response to the preliminary issues raised, the Applicant in its supplementary heads of argument submitted that the issue surrounding the applicability of the provisions of section 191 of the LRA was raised for the first time in the written heads of argument. It was nevertheless submitted that its case was not directed at the review of the performance ratings, and was not an attack on the decision to review the performance ratings, but on the decision to effect deductions after payments were made in terms of the outcome of the review process.

- [13] It was further submitted that the complaint was especially that the deductions were made without prior consultations with affected employees, and that the Director-General lacked authority to make the decision. In the light of these contentions, it was submitted that the fundamental issue in the dispute was primarily about the substantive validity of the impugned decision, which was sought to be reviewed as envisaged in section 158 (1) (h) of the LRA. It was further submitted that a decision which was unauthorised and otherwise inconsistent with the law was invalid and not merely unfair, and also offended against the constitutional principle of legality or the rule of law.
- [14] Reliance in regard to the above was placed on *Kaylor v Minister of Public Service & Administration*³, and the confirmation of the principles set out therein by Labour Appeal Court in the same matter⁴. In the light of these authorities, it was submitted that it was permissible for an aggrieved employee in the public service, whose rights are affected by an unlawful and invalid decision of an employer, to approach the Court directly in terms of section 158 (1) (h) of the LRA. To this end, it was further submitted that that both the failure to consult and the lack of the Director-General's authority to make the impugned decision rendered the decision invalid and unlawful, and thus liable to be reviewed and set aside.

Evaluation:

- [15] The Court takes notice of the fact that these preliminary issues were not raised in the Respondents' answering affidavit. Even if this was the case, the Court still has to satisfy itself that it has the requisite jurisdiction to determine the issues before it⁵. Thus the issue to be determined is whether the Court

³ (2013) 34 ILJ 639 (LC) at para 33 where the Labour Court held that;

"The applicant bases her grounds of review on the doctrine of legality. This court recently confirmed in *POPCRU v Minister of Correctional Services* that it has review jurisdiction in terms of s 158(1)(h) of the LRA on the basis of the doctrine of legality. That doctrine implies that public officials may only exercise such powers and perform such functions as are permissible and conferred upon them by law. In addition, not only must the exercise of such power be lawful, but it must also not be arbitrary, unreasonable or irrational; and it must be procedurally fair." (Citations omitted)

⁴ The *Minister for Public Service & Administration & another v Kaylor* (2013) 34 ILJ 3111 (LAC)

⁵ See *CUSA v Tao Ying Metal Industries and Others* at para 68 where it was held that;

"Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged *mero motu*, to raise the point of law and require the parties to deal therewith.

has the requisite jurisdiction to review the impugned decision under the provisions of section 158 (1) (h) of the LRA.

[16] The jurisdiction of the Labour Court is provided in section 157 of the LRA⁶. Jurisdiction generally means the power or competence of the Court to hear and determine a dispute between the parties⁷. In *Ekurhuleni Metropolitan Municipality v South African Municipality Workers Union*⁸ the Labour Appeal Court held that;

“It is trite that the jurisdiction of the Labour Court (and the CCMA or a council) to entertain a matter is determined from the pleadings in the matter. It is also an established principle that in application proceedings, the affidavits constitute the pleadings and the evidence. While the issues between parties

Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality.’

⁶ “157 Jurisdiction of Labour Court

- (1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.
- (2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from-
 - (a) employment and from labour relations;
 - (b) any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and
 - (c) the application of any law for the administration of which the Minister is responsible.
- (3) Any reference to the court in the Arbitration Act, 1965 (Act 42 of 1965), must be interpreted as referring to the Labour Court when an arbitration is conducted under that Act in respect of any dispute that may be referred to arbitration in terms of this Act.
- (4) (a) The Labour Court may refuse to determine any dispute, other than an appeal or review before the Court, if the Court is not satisfied that an attempt has been made to resolve the dispute through conciliation.
(b) A certificate issued by a commissioner or a council stating that a dispute remains unresolved is sufficient proof that an attempt has been made to resolve that dispute through conciliation.
- (5) Except as provided in section 158 (2), the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if this Act requires the dispute to be resolved through arbitration.

⁷ See *Gcaba v Minister of Safety and Security & Others* (2010) 31 ILJ 296 (CC) at para [74]; *Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board* 1950 (2) SA 420 (A) and *Mgijima v Eastern Cape Appropriate Technology Unit & another* (2000) 21 ILJ 291 (Tk) at 296E–H where it was held that;

‘Jurisdiction means ‘the power or competence of a Court to hear and determine an issue between parties, and limitations may be put upon such power in relation to territory, subject matter, amount in dispute, parties etc’

⁸ [2015] 1 BLLR 34 (LAC) at para [21]

generally emerge from the pleadings, it may not be readily possible to determine what the true nature of those issues are, or what the true nature of the dispute is, because of the manner in which the pleadings are drafted. Therefore, the true nature of the dispute is to be determined from an analysis of the facts and not from the parties' characterisation of the dispute."

[17] It follows from the above that the Court has a duty to determine the true nature of the issue in dispute between the parties, no matter how an applicant may choose to label or describe that dispute⁹. Furthermore, it is trite that the Court is not bound by the description of the dispute as may be articulated by an applicant¹⁰.

[18] In *MEC Department of Education Kwazulu-Natal v Khumalo and Another*¹¹, this Court held that;

"Section 158(1) (h) is available when no other process is available or special circumstances exist to review an act of the State as employer. It is not a safety net to process disputes in public employment that should have been channelled through some other prescribed provision. Nor is it a licence to bypass the prescribed conciliation, arbitration and review procedures when an applicant has missed the time limits"

[19] The same approach was essentially followed in *Hendricks v Overstrand Municipality and Another*¹², where the Labour Appeal Court held that;

"...The Constitution dictates that the common law be developed to confine the remedy of review in section 158(1)(h) to legitimate challenges where there is no other available remedy. If a cause of action meets the definitional requirements of an unfair labour practice or an unfair dismissal, the dictates of constitutional and judicial policy mandate that the dispute be processed by the system established by the LRA for their resolution"

⁹ See *MEC of the Western Cape Provincial Government Health Department v Coetzee and Others* (CA3/2011) [2015] ZALAC 35 (24 August 2015) at para [89], where the Labour Appeal Court held that "It is now trite that the jurisdiction of the Labour Court to resolve a dispute is determined from the pleadings. But the pleadings cannot be taken at face value. They need to be properly construed to ascertain what the legal basis of the applicant's claim is...."

¹⁰ See *National Union of Metalworkers of SA and Others v Bader Bop (Pty) Ltd and Another* (2003) 24 ILJ 305 (CC) at para [52] and *CUSA v Tao Ying Metal Industries and Others* 2009 (1) BCLR 1 (CC) at para [66]

¹¹ [2010] 11 BLLR 1174 (LC) at para [26]

¹² [2014] 12 BLLR 1170 (LAC)

- [20] Flowing from the decisions in *Chirwa* and *Gcaba v Minister of Safety and Security and Others*¹³, it is generally accepted that the conduct of the state in its capacity as an employer does not constitute an administrative action. Thus employment disputes between the state and its employees should ordinarily be dealt with in terms of the dispute resolution mechanisms created by the LRA or other relevant labour related legislation. There may however be instances where the Court may depart from the general rule. This would obviously be dependent on the nature of the decision sought to be impugned, the source upon which the decision was taken, and whether the power exercised was in terms of a contract or a statute¹⁴.
- [21] Applying the above principles to the facts of this case, the question to be determined is what is the legal nature of the Applicant's challenge to the impugned decisions. It is noted in this case that the Applicant chose not to frame its dispute as pertaining to an unfair labour practice disputes within the meaning contemplated in section 186 (2) (a) of the LRA¹⁵. The Applicant

¹³ (2010) 31 ILJ 296 (CC) where it was held at para [64] that;

"Generally, employment and labour relationship issues do not amount to administrative action within the meaning of PAJA. This is recognised by the Constitution. Section 23 regulates the employment relationship between employer and employee and guarantees the right to fair labour practices. The ordinary thrust of section 33 is to deal with the relationship between the State as bureaucracy and citizens and guarantees the right to lawful, reasonable and procedurally fair administrative action. Section 33 does not regulate the relationship between the State as employer and its workers. When a grievance is raised by an employee relating to the conduct of the State as employer and it has few or no direct implications or consequences for other citizens, it does not constitute administrative action." (Footnotes omitted)

¹⁴ See *De Villiers v Head of Department: Education, Western Cape Province* (2010) 31 ILJ 1377 (LC) at para [19] where Van Niekerk J held that;

"In summary: as a general rule, conduct by the state in its capacity as an employer will generally have no implications or consequences for other citizens, and it will therefore not constitute administrative action. Employment-related grievances by state employees must be dealt with in terms of the legislation that gives effect to the right to fair labour practices, or any applicable collective agreements concluded in terms of that legislation. Departures from the general rule are justified in appropriate cases. An assessment must be conducted on a case-by-case basis to determine whether such a departure is warranted. The relevant factors in this determination (following SARFU) are the source and nature of the power being exercised (this would ordinarily require a consideration of whether the conduct was rooted in contract or statute (see *Cape Metropolitan Council v Metro Inspection Services cc* 2001 (3) SA 1013 (SCA)), whether it involves the exercise of a public duty, how closely the power is related to the implementation of legislation (as opposed to a policy matter) and the subject matter of the power. I venture to suggest that the existence of any alternative remedies may also be a relevant consideration - this was a matter that clearly weighed with the Court in both *Chirwa* and *Gcaba*, who it will be recalled, were found to have had remedies available to them under the applicable labour legislation".

¹⁵ (2) Unfair labour practice means any unfair act or omission that arises between an employer and an employee involving-

further chose not to pursue the claim in terms of section 34 of the Basic Conditions of Employment Act¹⁶ (The BCEA). Its reasoning was that it does not seek to attack the review of the performance ratings or the decision to review the performance ratings. The attack is primarily against the *decision* to effect deductions after payments were made in terms of the review process. Thus the issue for the Applicant was the legality of the impugned decision.

[22] To the extent that it was contended on behalf of the Respondents that the nature of the dispute fell squarely within the meaning of an unfair labour practice as contemplated in section 186 (2) (a) of the LRA, the Labour Appeal Court (Per Musi AJA) in *Apollo Tyres South Africa (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others*¹⁷ held that;

“In *IMATU obo Venter v Umhlathuze Municipality*, the Labour Court followed the *Protekon* approach. It then concluded that:

‘The more plausible interpretation is that the term “benefits” was intended to refer to advantages conferred on employees which did not originate from contractual or statutory entitlements, but which have been granted at the employer’s discretion.’

It seems to me that the court in *IMATU* was concerned that if benefits include a statutory or contractual right or entitlement, the right to strike may be curtailed. As pointed out above employees will have an election to strike or go the arbitration/adjudication route in respect of many rights disputes. In my view, the better approach would be to interpret the term benefit to include a right or entitlement to which the employee is entitled (*ex contractu* or *ex lege* including rights judicially created) as well as an advantage or privilege which has been offered or granted to an employee in terms of a policy or practice subject to the employer’s discretion. In my

Unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;

¹⁶ Act 75 of 1997, which provides that;

“(1) An employer may not make any deductions from an employee’s remuneration unless –
a) subject to sub-section (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.

...

(5) An employer may not require or permit an employee to –
(a) repay any remuneration except for overpayments previously made by an employer resulting from an error in calculating the employee’s remuneration; or
(b) acknowledge receipt of an amount greater than the remuneration actually received.”

¹⁷ (2013) 34 ILJ 1120 (LAC)

judgment “benefit” in section 186 (2)(a) of the Act means existing advantages or privileges to which an employee is entitled as a right or granted in terms of a policy or practice subject to the employer’s discretion. In as far as *Hospersa*, *GS4 Security* and *Scheepers* postulate a different approach they are, with respect, wrong.”¹⁸

[23] Ordinarily in line with the above *dictum*, the Applicant’s dispute would fall squarely within the realm of section 186 (2) (a) of the LRA, as the subject of the dispute is payment in respect performance bonuses, which was an issue regulated and ‘granted’ in terms of the Policy. However, since on the Respondent’s version the decision to deduct the payments made or not to make payments was predicated on the provisions of section 38 of the PSA, and since further the impugned decision is not attacked on the basis of fairness, the legal basis for challenging the decision is that whilst the Director General was empowered to determine the amount of the instalments payable in respect of the deductions, the decision to effect those deductions and reverse the incorrect payments lay with the Minister, and further that in terms of the provisions of section 38 of the PSA, all affected persons should be afforded a fair hearing before a decision was made.

[24] It therefore follows that the legal nature of the Applicant’s challenge to the impugned decisions is one for judicial review under the principle of legality, which the Court has jurisdiction to determine under the provisions of section 158(1) (h). This is so in that it becomes irrelevant whether the decision sought to be impugned is administrative or not, as the principle of legality is applicable to all exercises of public power and not only to “administrative action” as defined in PAJA. It is thus required that all exercises of public power are, at a minimum, lawful and rational¹⁹. To the extent that the decision sought to be impugned has its source in legislation, regulations and the Policy of the Department, this Court therefore has the requisite jurisdiction and powers of review under the provisions of section 158 (1) (h) of the LRA.

[25] It is further trite that there are no prescribed time limit for the launching a review under section 158(1) (h) of the LRA. Whilst it is accepted that there is

¹⁸ At para [50]

¹⁹ See *Nkosinathi Lawrence Khumalo and another v MEC For Education, Kwa-Zulu Natal* 2014 (3) BCLR 333 (CC) at para [28]

a premium on expeditious resolution of disputes, despite time frames not being specified under these provisions, at the most, it is expected of such reviews to be launched within a reasonable period of time²⁰. As to what constitutes 'reasonable period', the Constitutional Court in *Khumalo*²¹ stated in regards to the facts of that case that;

"Nevertheless, it is a long-standing rule that a legality review must be initiated without undue delay and that courts have the power (as part of their inherent jurisdiction to regulate their own proceedings) to refuse a review application in the face of an undue delay in initiating proceedings or to overlook the delay. This discretion is not open-ended and must be informed by the values of the Constitution. However, because there are no express, legislated time periods in which the MEC was required to bring her application, there is no requirement that a formal application for condonation needs to have been brought". (Authorities omitted)

[26] In this case, the letters from the Director-General informing the employees of the intention to effect deductions of the payments erroneously made were issued at varying dates between March 2011 to June 2011. The application before the Court was launched on 27 January 2012. In my view, the delay can hardly be described as being inordinate. Accordingly, considerations of the interests of justice dictate that that the delay be overlooked.

Grounds of review:

(i) *Obligation to consult?*

[27] The power of the Department to deduct monies from state employees or civil servants to reverse situations of wrongly paid remuneration, is specifically

²⁰ See *Gqwetha v Transkei Development Corporation Ltd and Others* 2006 (2) SA 603 (SCA) at 612 E-F para [22] where it was held that;

"It is important for the efficient functioning of public bodies ... that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay. The rationale for that longstanding rule ... is twofold: First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, and in my view more importantly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions."

²¹ At para [46]

governed by legislation in the form of section 38 of the Public Service Act which provides that:

'38 Wrongly granted remuneration

- (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-
 - (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;
 - (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.

- (3) The accounting officer of the relevant department may remit the amount of an overpayment to be recovered in terms of subsection (2) (b) in whole or in part'

[28] The above provisions received attention in *Western Cape Education Department v General Public Service Sectoral Bargaining Council and Others*²², where Molemela JA stated 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..."

[29] From the construction of section 38 of the PSA, and as can further be gleaned from the above *dictum*, it should be accepted that it is the obligation of the relevant 'executive authority' to correct any incorrect and/or erroneous salary or reward awarded to an employee, and to do so reasonably. Any amount recoverable resulting from an overpayment shall be made by way of instalments as determined by the 'relevant accounting officer'. Furthermore, the amounts to be deducted should take account of the need to repay and the employee's ability to discharge the debt. In effecting the decision to recover incorrect amounts paid, it is expected of the accounting officer to act reasonably.

²² [2014] 10 BLLR 987 (LAC) at para [29]

- [30] Whether there was an obligation on the Respondents to consult with the Applicant prior to the deductions being effected has to be determined within the context of the provisions of section 38 of the PSA and the Policy itself. In this case, it can be accepted that bonuses are given annually to employees at the discretion of the employer. At most, this can be gleaned from Clause 1.4.2 of the Performance Management and Development policy Implementation Guidelines²³. Secondly, the Department may not exceed 1.5% of its remuneration budget for bonuses, and should the amount prove to be insufficient to award the maximum percentage cash bonus, the Moderating Committee may scale down the applicable percentage by allocating a lower percentage in the range to qualifying employees to ensure that the Department stays within the 1.5% limit²⁴. Furthermore, it was of importance that the performance ratings should not be distorted, and be within the normal distribution curve of 25%.
- [31] Unlike in instances where a claim is brought under section 34 of the BCEA, where an amount erroneously paid is recouped in terms of the provisions of section 38 of the PSA, and where such amounts do not constitute remuneration, an employer is not in my view obliged to get the consent of an employee before effecting the deductions. Even more significant, to the extent that the amounts erroneously paid to employees are not what they are ordinarily entitled to *ex lege* or *ex contractu*, no such obligation arises, and all that is required is of the accounting officer to exercise his or her discretion in effecting those deductions, and to act reasonably within the meaning of section 38 (2) (b) of the PSA. Thus intrinsic in those provisions is a discretion enjoyed by the accounting officer to determine what instalments should be made based on what employees can afford to repay, and such a discretion should be exercised reasonably.
- [32] It therefore follows that the proposition by the Applicant that there was such a duty to consult, and in reliance *Conjwa & others v Post Master-General*,

²³ Which provides that 'Employees are not entitled to rewards. Rewards shall only be given for significant outstanding and consistent performance that advances the Departmental goal, and should be tied to specific accomplishment(s)

²⁴ Clause 12 of the Policy

*Transkei & another*²⁵ is misplaced, as the facts in that case pertained to a reduction in salary, which was an existing right. The performance bonuses in this case did not give rise to such rights and there could therefore be no obligation on the Director-General to consult prior to effecting those deductions. The fact that the process that led to the decision to pay performance bonuses was inclusive and consultative does not give rise to concomitant obligation to consult when reductions were to be effected.

[33] The fact that no such duty to consult existed does not imply that the Director-General was at liberty to act in any manner that he or she deemed fit when deciding to effect the deductions. What the above conclusions therefore imply is that it was up to the Applicant to indicate in what material respects the decision to make the deductions as taken by the Director-General was unreasonable, irrational or arbitrary. Thus the Applicant further needed to show in what material respects the accounting officer had in exercising his or her discretion, done so capriciously. From the pleadings, no such case has been made by the Applicant other than to contend that its members (who remain unidentified) were never informed of the basis of the alleged error in the payment of the performance bonus. This however is belied by the first Circular issued on 21 December 2010 in which the basis of the review process was explained, followed by actual letters to affected employees in which the basis of seeking to effect reductions was explained.

[34] There are also fundamental difficulties with the Applicant's case to the extent that it had submitted that the employer, other than failing to establish whether overpayments were made, failed to take into account 'certain facts and information', and also failed to do so when determining the amount of instalments, or when arriving at the decision as to whether or not to remit an overpayment. The difficulties herein lie in the fact that the Applicant does not dispute that the performance bonuses had to fall within the 1.5% of the remuneration budget, The Department could not exceed 1.5% of its remuneration budget for bonuses, and should the amount prove to be insufficient to award the maximum percentage cash bonus, the Moderating

²⁵ [1998] 8 BLLR 718 (TK)

Committee could scale down the applicable percentage by allocating a lower percentage in the range to qualifying employees to ensure that the Department stays within the 1.5% limit²⁶. The Applicant however did not dispute the lawfulness or fairness of the review process, which process was intended to ensure that these performances bonuses were allocated within the confines of the allotted budget.

- [35] Furthermore, I did not understand it to be in dispute that it was of importance that the performance ratings should not be distorted, and be within the normal distribution curve of 25%. To the extent that the decision to effect the deductions were based on these considerations, there is no room for any argument to be made that the decision was irrational, unreasonable or had flouted the principles of legality.
- [36] Aligned to a further jurisdictional point raised by the Respondents was the issue surrounding the identity of the affected employees. The Applicant submitted that 'certain facts and information' was not taken into account when effecting the deductions or when determining the instalments payable. These submissions were nevertheless made in a vacuum as in the founding and replying affidavits, there was neither a list of individual applicants nor any form of identification or description of even who the individuals affected by the decision were. It therefore defies logic to make reference to a failure to take into account certain facts and circumstances pertaining to individuals when taking a decision to effect the deduction, when it is not known to whom those particular facts and circumstances applied to, or when it is not known in what respect the decision was unreasonable or capricious in respect of those unidentified affected employees.
- [37] It is accepted that in terms of the provisions of section 200 of the LRA, the Applicant (PSA) is entitled to bring this application in its own interests or on behalf of any of its members or in the interests of any of its members. The submissions made on behalf of the Applicant to the effect that the Union acted only on behalf of those of its members whose individual letters are attached to the founding affidavit as annexures however does assist its case. This is so in

²⁶ Clause 12 of the Policy

that the relief sought pertains to unknown individuals, and also involves unknown amounts either due to them or which should not have been deducted. Thus the failure to not only identify them in the notice of motion or by way of a scheduled list, and also to not indicate the particulars of their claim makes this defect fatal to their application. Effectively, the unknown affected employees are not properly parties to these proceedings. There was at the very least, an obligation on the Applicant to properly list the affected individual employees for the purposes of their individual claims.

(ii) *The decision as effected by the Director-General.*

[38] 'Accounting officer' as defined in the PSA means an accounting officer as defined in section 36 of the Public Finance Management Act²⁷. Section 36 of the PFMA (which falls under Chapter 5 (Departments and Constitutional Institutions. Part 1. Appointment of Accounting Officers)) provides that;

“36. Accounting officers-

(1) Every department and every constitutional institution must have an accounting officer.

(2) Subject to subsection 3

(a) the head of a department must be the accounting officer for the department; and

(b) the chief executive officer of a constitutional institution must be the accounting officer for that institution.

(3) The relevant treasury may, in exceptional circumstances, approve or instruct in writing that a person other than the person mentioned in subsection 2 be the accounting officer for—

(a) a department or a constitutional institution; or

(b) a trading entity within a department.

(4) The relevant treasury may at any time withdraw in writing an approval or instruction in terms of subsection 3.

²⁷ Act 1 of 1999

(5) The employment contract of an accounting officer for a department, trading entity or constitutional institution must be in writing and, where possible, include performance standards. The provisions of sections 38 to 42 as may be appropriate, are regarded as forming part of each such contract.”

[39] It was the Respondents’ contention that the decision to award performance bonuses does not lie with the employee and the supervisor/manager or the moderating committees, and that it was the Minister or her delegate that approved the performance assessments and the payments. The Applicant’s contention on the other hand was that the Director –General was only empowered to determine the amount of the instalments that should be deducted, and that the decision to effect the deduction and reverse the incorrect payment lay with the Minister.

[40] Section 38 of the PSA provides that the relevant executive authority shall correct any incorrect salary or reward. I did not understand from these provisions that the executive authority being the Minister of the Department, shall be expected to specifically attend to each individual case and make these corrections. It is not the duty of the Minister of a Department to attend to such mundane matters. There was nothing placed before the Court to gainsay the Respondents’ contention that the Director-General had the necessary delegated authority to effect the deductions. Even if there might be some merit in the Applicant’s contentions, by virtue of the provisions of section 38 (2) of the PSA, and as further confirmed in *Western Cape Education Department v General Public Service Sectoral Bargaining Council and Others*²⁸, the Director-General as the accounting officer is obliged to effect those overpayments.

[41] Furthermore, by virtue of the provisions of sections 38 to 40 of the PFMA (Which provisions outline, the general responsibilities of accounting officers; their responsibilities relating to budgetary control and reporting responsibilities) the accounting officer has a duty to recover monies paid

²⁸ At para [29]

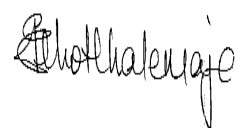
erroneously so that it cannot be regarded as fruitless, unauthorised and wasteful expenditure. In the light of these obligations and wide discretion enjoyed by the Director-General, it cannot be said that the decision to effect the deductions was unlawful purely on the basis that it was not taken by the Minister.

[42] The provisions of section 38 of the PSA cannot be read or interpreted in isolation from those of the PFMA in regards to the responsibilities of the Director-General. Thus where as in this case the department in allocating performance bonuses was restricted within the 1.5% of its remuneration budget, and had exceeded that budget, the Director-General as the accounting officer was within his legal obligations to act appropriately. There is therefore no basis to conclude that the decision to effect the deductions in instances where the performance bonuses were erroneously paid, should be set aside on the basis of legality. In effecting these deductions, the Director-General not only had the necessary delegated authority to do so, but also acted legally within the confines of section 38 of the PSA and as further obliged within the prescripts of the PFMA.

[43] In conclusion, I have had regard to the submissions made on behalf of the Respondents in regards to the issue of costs. However, having further taken into account considerations of law and fairness, I am of the view that a cost order in this case is not warranted.

Order:

- a) The Respondents' late filing of the answering affidavit is condoned.
- b) The Applicant's application is dismissed.
- c) There is no order as to costs.



Tlhotlhemaje, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

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Instructed by:

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For the Respondents:

Adv. WR Mokhari SC (Heads of
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Semenya SC and AL Platt)

Instructed by:

The State Attorney