THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J1677/23

In the matter between:

WISH BHEKI NKOSI	**Applicant**
and	
MEC OF DEPARTMENT OF HEALTH LIMPOPO PROVINCE	**First Respondent**
HEAD OF THE DEPARTMENT OF HEALTH LIMPOPO PROVINCE	**Second Respondent**

Heard: 11 March 2025

Delivered: 29 July 2025

JUDGMENT

MAFA-CHALI, AJ

Introduction

[1] The Applicant, Wish Bheki Nkosi, has brought an application to seek a *mandamus* and declaratory order against the First Respondent, the Department of Health, Limpopo Province and the Second Respondent, the Head of Department Limpopo Province relating to withholding and/or suspension and freezing and/or deductions made from the Applicant's salary for the months of May 2023, June 2023, August 2023 and November 2023.

[2] The Applicant also seeks payment of interest at the prescribed compounded interest rate per annum on all the amounts deducted from his salary and/or monies withheld and/or frozen from the date the monies were deducted/withheld or frozen up to the date of payment.

[3] The Applicant also prayed for costs on attorney and own client's costs against the Respondents.

[4] The application is opposed by the Respondents.

Background facts

[5] The Applicant is a former employee of the First Respondent. He was employed as Deputy Director: Human Resources Management since 01 October 2005 at Pietersburg Hospital, Limpopo Province.

[6] He was appointed as a public servant in terms of the Public Service Act (PSA)[1]. His conditions of service were governed by the PSA, Public Service Regulations[2] (PSA Regulations) and the PSCBC Collective Agreement[3] (the Resolution).

[1] Act 103 of 1994.
[2] Gazette Notice 39960 of 2016.
[3] Resolution 1 of 2003.

[7] On 14 April 2023, Dr Masipa, the Acting Chief Executive Officer (Acting CEO) of the hospital, issued the Applicant with a letter informing him that he was relieved of other responsibilities of supervising and managing human resource management and development at the hospital with immediate effect. The Applicant was told to start report at the office of the Acting CEO where he was to be assigned new responsibilities in the hospital with effect from 17 April 2023.

[8] According to the Applicant, on 2 May 2023, the Acting CEO, called him to the meeting in his office and advised him that he was placing him in Finance Management Division because he did not have a post for him in his office, and a letter was issued to him in that respect. The Applicant wrote a letter to the Acting CEO on 3 May 2023 indicating his dissatisfaction to the internal transfers and showing that he did not agree with the transfers as it was arbitrary, unilateral, irrational and unjustifiable.

[9] The Applicant was not paid his salary for May 2023 on the basis of the reason that he had absconded. He was called to a meeting in order to account for his absence, and he ultimately lodged his resignation letter on 23 May 2023, which he submitted that it was against his will and he resigned out of frustration because of the administrative functionaries of the First Respondent, which were hell-bent on making his conditions of employment unbearable and intolerable.

[10] On 24 May 2023, the First Respondent issued the Applicant a precautionary suspension letter and on 24 May 2023, he was issued with a notice to attend the disciplinary hearing on various charges of misconduct for unauthorised access to personal information of employees in violation of departmental policies, which information was used to compile a document titled maladministration Part 1; serious allegations of corruption by the Acting CEO and management as well as posting pictures of the Acting CEO in the document, which was circulated on social media, to trade unions, to Dr Masipa, to Dr Dombo; unlawful entry into Acting CEO's office; violation of departmental security and access policy; theft of official hospital files and records; unauthorised absence; unacceptable behaviour and bringing the name of the First Respondent into disrepute.

[11] The First Respondent viewed the alleged conduct of the Applicant as violation of the Protection of Personal Information Act[4] (POPIA). Due to the misconduct allegations the Applicant was then transferred back by the Acting CEO to his initial unit in Financial Management of the hospital. He was called by management to the office on 23 May 2023 and required to write a statement on allegations of his absence from work from 3 January 2023 to May 2023.

[12] The Applicant submitted his resignation with immediate effect on 23 May 2023. However, the First Respondent deemed his resignation as invalid and in violation of Regulation 69(1) of the PSA Regulations, and section 37 of the Basic Conditions of Employment Act (BCEA)[5]. On 24 May 2023, the Applicant was placed on precautionary suspension; and on 25 My 2023, he was charged and issued with the notice to appear at the disciplinary hearing to be held on 29 May 2023. It is common cause that the Applicant was given a shorter notice of the hearing against the provisions of clause 7.1 (a) of the Resolution which requires that the employee must be given at least five days before the date of the hearing.

[13] The Applicant did not attend the disciplinary hearing as he sent an email to the First Respondent on 29 May at 5h38AM, indicating to the First Respondent he has resigned with immediate effect on 23 May 2023 and has lost the status of an employee of the First Respondent on 24 May 2023, and therefore there was no need for him to attend the hearing. The hearing proceeded in his absence and he was found guilty of all seven charges and subsequently issued with a dismissal letter on 22 June 2023. He then lodged an appeal against his dismissal on 25 June 2023. On 5 December 2023, the MEC for health confirmed his dismissal effective 5 December 2023.

[14] The Applicant lodged a dispute with the Bargaining Council for Public Health and Social Development Bargaining Council under case number PSHS 883/23/24 against his dismissal but has withdrawn the dispute and filed a review application under case number JR971/24 before this Court on 7 June 2024.

[4] Act No 4 of 2013.
[5] Act No 75 of 1997, as amended.

[15] The First Respondent paid the Applicant his salary pending the appeal for July, August, September and October 2023. The Applicant lodged dispute with the Bargaining Council PSHS 883/23/24 against his dismissal but has abandoned it and filed a review application under case number JR971/24 before this Court on 07 June 2024. It is apparent that the review application is also still pending before this Court.

<u>Submissions</u>

[16] In the notice of motion, the Applicant submitted that the First Respondent failed to pay him salary for May 2023 in the amount of R65 835.88; R 27 468.19 was deducted/withheld from his salary in June 2023 and in July 2023 a deduction of R44 427.02 was again deducted/withheld. In August 2023, R10 818.49 deduction was made/withheld, and no salary was paid to him for R65 835.88 in November 2023. He also claimed interest on the amounts at 10.75% for May and June 2023, and interest for 11.25% for July, August and November 2023 respectively, with the total amount of R214.485.46 plus interest. The Applicant has however changed the total original figure to R311 855.46 plus interest of 19 months for R44 439.40 and to the total amount of R356 294.86 in his heads of arguments.

[17] It was further argued that the Applicant was not accused of any misconduct nor subjected to a disciplinary hearing to be heard in terms of which a sanction was issued wherefore the First Respondents wrongfully and unlawfully withheld or froze his salary and also made deductions from his salaries. The *audi alteram partem* rule principle of natural justice was not applied by the First Respondent. Therefore, the Applicant has satisfied the requirement for *mandamus* and a declaratory order as he has established a clear right to be paid his full salary and an irreparable harm is presumed, excusing the Applicant form establishing the absence of an effective alternative remedy.

[18] The Applicant disputed the Respondents' contention that the Applicant's salaries were deducted in terms of section 16B(2)(a) read with section 38(2)(b)(i) of the PSA, but that the First Respondents' action was a contravention of sections 25

and 34 of the Constitution of the Republic of South Africa (the Constitution)[6] and Promotion of Administrative Justice Act[7]. It was argued that the First Respondent's actions amount to self-help without recourse to a court of law. He has since been without remuneration, has a home loan with Nedbank for R6 300.00 per month, has motor vehicle instalment sale agreements with MFC bank attached to his salary, has four school going children who are still minors and wholly dependent on him for their educational fees, welfare and social wellbeing. As a result of loss of income his credit facilities have been threatened to be withdrawn and to be listed as a defaulter in credit bureaux. He is suffering depression as a result of the conduct of the Respondents.

[19] The Applicant further submitted and argued that the withholding of the Applicant's salary the deductions made on his salary and/or the freezing of his salary was an exercise of public power and therefore the principles of legality are applicable. This exercise of power must conform to minimum standards of lawfulness and non-arbitrariness.

[20] The Respondents submitted that there were several allegations of misconduct, including unauthorised access to personal information of other employees and using it to compile an unlawful expose document titled 'Maladministration Part 1', which led to investigations, and while the investigations were still pending against him, the Applicant resigned on 23 May 2023 with immediate effect. However, the Respondents deemed his resignation as invalid as he did not give the required notice, relying on Regulation 69 (1) and (2) of the PSA and section 37 of the Basic Conditions of Employment Act[8].

[21] The Applicant was then served with a precautionary suspension notice and the charges on 25 May 2023, but he failed to attend the disciplinary hearing stating that he was no longer an employee and was not obliged to attend the hearing. The disciplinary hearing continued and was finalised in the Applicant's absence, finding him guilty of seven charges of misconduct and a sanction of dismissal was imposed.

[6] Act No 108 of 1996.
[7] Act No 3 of 2000.
[8] Act 75 of 1997, as amended.

On 25 June 2025, the Applicant lodged an appeal to the sanction to the Executive Officer in terms of Resolution 1 of 2003 who confirmed the dismissal sanction on 5 December 2023.

[22] It was argued by the Respondents that although it was admitted that the notice of the disciplinary hearing was less than 5 days, this does not justify non – attendance as the Applicant could have attended the hearing and request a postponement to allow him adequate time for preparation, as opposed to his ill-advised position that he was no longer an employee of the Respondents and therefore he does not need to attend the disciplinary hearing.

[23] The Respondents argued that the Applicant is a serial litigant, as after his dismissal he lodged a dispute with the Public Health Social Development Sectoral Bargaining Council under case no PSHS883-23/24 challenging his dismissal in terms of section 188(1) of the Labour Relations Act[9] (LRA); and furthermore after having failed to obtain the recusal of the Commissioner in the matter, then lodged a review application before the same Court to set aside the disciplinary hearing proceedings and review the decision of the arbitrator to refuse to recuse himself.

[24] It was further the arguments of the Respondents that since around April 2023 when the Applicant was transferred to Financial Management Unit, the Applicant absented himself from work without leave, hence he was not paid the May 2023 salary. However, the Respondents paid the Applicant's salary for May and unfroze his June 2023 salary in compliance with Circular 49 of 2020 to reconcile and audit his 2022/2023 attendance register. The Applicant had been absent from work without leave from 14 April 2023 until 24 May 2023 when he resigned. The Applicant has contravened several clauses of the 2021 Departmental Circular[10], namely clauses 1.6, 1.7, 1.9. 1.11. The Respondents dealt with the Applicant in terms of section 28.3 and 28. 4 of 2021 Determination and Directive on Leave of Absence in the Public Service[11]. The Respondents' audit trail for leave without pay established that the non-payments of the salaries amounts left the Applicant with a liability which

[9] Act 66 of 1995, as amended.
[10] Circular 49 of 2020.
[11] 2021 Determination Directive.

he acknowledged and consented GEPF to deduct from his pension benefits in the amount of R 15151.40 and the outstanding liability for departmental laptop in the amount of R24 186.69.

[25] On 11 December 2023, the Applicant signed an acknowledgement of debt with the Government Employee Pension Fund (GEPF) for R154 151.40 overpayment stating that he knew that he was not entitled to his salaries for which he was not at work for the period June 2023 to October 2023. The Applicant has also conceded that he is still in possession of the First Respondent's laptop, and it is apparent that he is keeping it until he gets paid the monies he has claimed. There was no reason for the Applicant not to be at work from 14 April 2023 after his transfer to Financial Management Unit and he also did not sign the attendance registers; as it was just a temporary arrangement for him to work in the boardroom whilst arrangements were made for his office and this indebtedness is on line with clause 8.8 of the PSCBC Resolution[12], which states that:

> 'Departments must finalise appeals within 30 days, failing which, in cases where the employee is on precautionary suspension, he/she must resume duties immediately and await the outcome of the appeal while on duty'.

[26] Given the meaning of clause 8.8 PSCBC Resolution, the precautionary suspension is automatically uplifted by operation of law and the employee must immediately return to work at the expiry of 30 days and wait for the outcome of the appeal while on duty, but the Applicant failed to return to work on 22 July 2023, the date when the 30-day period expired despite the fact that he was in the role of Human Resources.

[27] It was the Respondents' understanding that the Applicant's May 2023 salary was initially not paid but later released except that it was used to recover his leave without pay. Although the Respondents conceded that it could be indebted to the Applicant for the period between 22 June 2023 and 22 July 2023, the period of 30 days in which the suspension was still valid pending appeal, his salary for June 2023 could still not be paid to him because of the leave without pay.

[12] Resolution No 1 of 2003.

[28] It was denied that the Applicant has satisfied the requirements of *mandamus*, as the Applicant has also not a grievance regarding the deductions on his salary as prescribed by paragraph D, clause 3 of PSCBC Resolution 14 of 2002[13], thereby not exhausting the internal processes.

<u>Evaluation and legal principles</u>

[29] This Court has the power in terms of section 158(1)(a)(v) of the LRA to make declaratory orders. In the case of *National Employers' Association of South Africa v Minister of Labour*[14] (*National Employers' Association*) Van Niekerk J stated as follows:

> '[17] Section 158(1)(a)(v) empowers this Court to make declaratory orders. Neither the LRA nor the Rules of this Court prescribe the circumstances in which an order may be made. Section 19(1)(a)(iii) of the Supreme Court Act 59 of 1959, entitles the High Court, in its discretion, and at the instance of an interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential on the termination. The granting of a declaratory order is dependent on the judicial exercise by the Court of its discretion, with due regard to the circumstances of the matter before it.[15] Section 19(1) of the Supreme Court Act establishes a two-stage approach - the first leg of the enquiry is concerned with whether the applicant has an interest in an existing, future or a contingent right or obligation; the second is whether or not the order should be granted.
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> [18] Harms, in Civil Procedure in the Superior Courts referring to *Director of Public Prosecutions v Mohammed N.O.* 2003 4 SA 1 (CC), suggests that a declaratory order is not appropriate if there are other specific statutory remedies available (at A26). In the present instance, the powers conferred on this Court by Section 158(1) (g) afford the applicants a right of recourse. Whether the existence of an alternative statutory remedy is necessarily fatal

[13] Resolution 14 of 2002.
[14] [2012] 2 BLLR 198 (LC) at paras 17-18.
[15] See Farlam, Fickhardt and Van Loggenberg, Erasmus Superior Court Practice (Juta) at A1-34.

to an application for a declaratory order appears to be open to some doubt. Herbstein and Van Winsen observe that the fact that remedies other than a declaration of rights are available is a consideration that the Court must take into account in exercising a discretion as to whether or not to make a declaration of rights (see page 1437). On either account, it is clear that the availability of alternative remedies ought properly to be taken into account in the exercise of the discretion as to whether or not to grant a declaratory order [*Trinity Asset Management (Pty) Ltd v Investec Bank Limited* 2009 4 SA 89 (SCA) at para [40] [also reported at [2009] All SA 449 (SCA - ed).'

[30] The question remains though, whether the declaratory relief sought by the applicant ought to be granted. The court has a discretion to grant declaratory orders, a discretion that must be exercised judicially and with reference to all of the relevant facts. A court will not ordinarily grant a declaratory order or make a declaration of rights when there is no real or live issue before the court.

[31] The question of whether or not an employee is entitled to a salary relies on section 77 of the Basic Conditions of Employment Act. The first aspect of the enquiry is to consider is whether the applicant has demonstrated an interest in an existing, future or contingent right or obligation. As I understand it, it is the applicant's contention the Respondents wrongfully and unlawfully withheld or froze his salary and also made deductions from his salaries and the *audi alteram partem* rule principle of natural justice was not applied by Respondents, contravening of sections 25 and 34 of the Constitution and Promotion of Administrative Justice Act. It was also argued that the Respondents' actions amount to self-help without recourse to a court of law. I have however observed that there is no specific clause alleged by the Applicant to be contravened by the Respondents in the Promotion of Administrative Justice Act.

[32] *In De Klerk v Cape Union Mart International (Pty) Ltd*,[16] Steenkamp J, when faced with an application who relied directly on the right to fair labour practices in Section 23 of the Constitution, said the following:

[16] (2012) 33 ILJ 2887 (LC) at paras 23 - 27.

> ‘As set out above, the applicant relies directly on the right to fair labour practices enshrined in Section 23 of the Constitution.

As the applicant herself acknowledges, national legislation - specifically the LRA - has been enacted to regulate and to give effect to the right to fair labour practices. Where legislation has been enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging the legislation in question.

[33] It is common cause that the Applicant was transferred from his position to the Acting CEO’s office on 14 April 2023, and later to Finance Management on 2 May 2024. He submitted that he has been rendering his services until his resignation on 23 May 2024, which version the Respondent strongly contested that the Applicant was not reporting for duty and not signing the attendance registers hence he was declared as absconded when he was supposed to be paid his May 2023 salary. The Applicant denied that he was not reporting for duty and disputed proof of attendance registers submitted by the First Respondent showing his absence from work that they were forged. However, the Applicant has also not submitted any proof of real attendance registers showing that he was at work as claimed that he was at work.

[34] BCEA defines remuneration as:

> ‘any payment in money or in kind, or both money and in kind, made or owing to any person in return for that person working for any other person, including the State.’

The Applicant falls within the category of an employee who worked for the state and received remuneration in return for his work.

[35] In this instance, the Applicant was not paid at all or paid less that what he would ordinarily be paid on his monthly salaries because the Respondents implemented the Departmental Circular 49 of 2020 (clauses 1.6, 1.7, 1.9 and 1.11). These clauses require employees to apply for annul leave in advance to be remunerated; and when in attendance employees are required to sign the attendance registers during the normal performance of normal work to enable the employer to remunerate them. Should there be any periods not accounted for in the attendance registers, it is treated as absence without notice and there would be no

remuneration for such unaccounted period. The Department in essence recoup the monies for unpaid leave. This cannot be regarded as a salary deduction. In essence, the Applicant was only paid for work done and not paid for work not done or not paid at all if he did not get a salary for the month.

[36] Section 28.3 of 2021 Determination and Directive on Leave of Absence in the Public Service, provides that unpaid leave should be regarded as calendar days. This is leave without pay for MMS employees, including the Applicant on an all-inclusive package.

[37] *In Mazibuko and Another v City of Johannesburg and Others*[17] at para 73, the Constitutional Court discussed the principle of constitutional subsidiarity and reiterated that:

> 'This Court has repeatedly held that where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution.'

[38] It is common cause that the Applicant was subsequently dismissed on a following a disciplinary hearing that was held in his absence. The Applicant was issued with a dismissal letter on 15 June 2023, and he also lodged an appeal against his dismissal. The Applicant's application is also questionable as he claimed that he had resigned and was not obliged to attend the disciplinary hearing instituted by the Respondents as he was no longer an employee of the Respondents; and he also lodged a dismissal dispute with the Council challenging his dismissal. On the same breath he furthermore claims payment of unpaid salaries even for the period that he was not rendering services to the Respondents, which would be the period after he resigned. The Applicant is certainly playing double cards here.

[39] The Respondent paid the Applicant his salary pending the appeal for July, August, September and October 2023. This is so on the basis that clause 8.8 of Resolution 1 of 2008 provides that the First Respondent should have finalised the

[17] 2010 (3) BCLR 239 (CC).

appeal within 30 days but it failed to do so. The First Respondent is therefore indebted to the Applicant for the salaries on that basis. Ordinarily the Applicant would have presented himself for work as his precautionary suspension would have automatically lapsed after the 30 days of the appeal, but it is clear that he did not do so.

[40] The Respondents paid the Applicant's salaries for May, unfroze his June 2023 salary in compliance with Circular 49 of 2020 to reconcile and audit his 2022/2023 attendance registers. The Respondents have been able to establish that the audit revealed that the Applicant had been absent from work without leave and was not entitled to be remunerated when he did not render any services to the First Respondent. The Applicant has contravened several clauses of the 2021 Departmental Circular, namely clauses 1.6, 1.7, 1.9 and 1.11. It is clear that the Respondents dealt with the Applicant in terms of section 28.3, 28. 4 of the Determination Directive on Leave of Absence in the Public Service according to the breakdown of the calculation of leave of absence and his departmental liability. The case of *PSA obo Ubogu v Head of Department of Health, Gauteng & Others*[18] is very distinguishable from the facts of this case as the case relate to unilateral deduction of monies erroneously paid to salaries of employees declared unconstitutional.

[41] The arguments by the Applicant are misconceived as it was submitted that the First Respondent made deductions in reliance on section 16B(2)(a) read with section 38(2)(b)(i) of the PSA. These provisions deal with the process of imposing sanctions on employees found guilty of misconduct and the correction of incorrectly granted remuneration to employees. It is common cause that the First Respondent did not pay the Applicant for services not rendered on absence without leave or unpaid leave principle not as a result of sanction emanating for guilty finding in a disciplinary process.

[42] There is a record that the Applicant signed an acknowledgement of debt with GEPF for R154 151.40 for salary overpayments stating that he knew that he was not entitled to his salaries for which he was not at work for the period June 2023 to

[18] (2018) (2) SA 365 (CC).

October 2023. The Applicant's submissions that he signed a blank acknowledgement of debt which is a general form signed by all employees who exit government services whether you have a debt or not, and that the hospital fills in the amounts long after the employee is gone does not make sense. this as an afterthought argument.

[43] The Applicant wants to have the second bite of a cake after acknowledging overpayments of his salaries as the debt owed to the First Respondent and consenting to the deduction of the debt from his pension funds; and afterwards he then makes a turn around to indirectly claim back the monies deducted with his consent.

[44] It is correct therefore that under the circumstances the Respondents have no legal basis to pay the Applicant salaries as claimed, other than what has been paid to him. It is furthermore so that the Applicant has not satisfied the requirements of *mandamus*, as he has not at any stage lodged a grievance regarding the deductions on his salary as prescribed by paragraph D, clause 3 of Resolution 14 of 2002[19], thereby not exhausting the internal processes.

[45] As the Applicant is not able to show that he was on duty for the period as claimed, he cannot claim an entitlement of salary, as salary is paid to an employee who has rendered his or her services to the employer. The applicant has not shown any existing right arising from the BCEA in which he has an interest. The Applicant's arguments that the First Respondent did not apply the *audi alteram partem* rule was not applied by the Respondent is in contradiction to his concession that he was called to the office by management and requested to give a written statement for his absence from work. Instead of giving his written statement, he opted to submit his resignation letter resigning with immediate effect. He was given the notice to attend the disciplinary hearing, and one of the charges was unauthorised absence from work, and again instead of attending the disciplinary hearing so that his side can be heard on the unauthorised absence from work allegations, he chose not to attend the

[19] Resolution 14 of 2002.

disciplinary hearing as he believed that he was no longer an employee of the First Respondent. He therefore waived his right of be heard.

[46] If the applicant is of the view that he is entitled to be paid his salaries, for whatever reason, other alternative remedies are open to him to claim them in terms of the relevant provisions of unfair dismissal dispute in terms of section 188(1) of the LRA, which he had already initiated and withdrew for his own reasons, read with the relevant BCEA provisions for consolidation of claims rather than a declaratory order. The existence of alternative remedies, although not fatal to the granting of declaratory relief, is a factor to be taken into account for the exercise of the discretion as stated in *National Employers Association.*

[47] In my view, based on the above, the Applicant has failed to demonstrate an interest in an existing, future or a contingent right or obligation. Even if I am wrong in coming to the conclusion that the Applicant has failed to meet the first hurdle of the requirements, I am in any event disinclined to grant the declaratory relief in light of all the facts and circumstances of the case and for the reasons stated above.

<u>Costs</u>

[48] This Court has a wide discretion on the issue of costs, in consideration of the requirements of law and fairness and the terms of section 162 (1) of the LRA.

[49] Under the circumstances, fairness dictates that no cost order should be made.

[50] In the premises, I make the following order:

<u>Order</u>

1.The application is dismissed.

2.No order as to costs.

G. Mafa-Chali

Acting Judge of the Labour Court of South Africa

<u>Appearances:</u>

For the Applicant:	Kgao Mahlase of Sekukuni Attorneys
For the First & Second Respondents:	E C Chabalala
Instructed by:	State Attorney