REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no JR 2829/09

In the matter of between:

LENIZE LIEBENBERG	**Applicant**
and	
PEARL MBEKWA	**First Respondent**
PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL	**Second Respondent**
MINISTER OF SAFETY AND SECURITY	**Third Respondent**
SOUTH AFRICAN POLICE SERVICE (NATIONAL COMMISSIONER)	**Fourth Respondent**

Heard: **10 March 2014**

Delivered: **9 October 2014**

Summary: **Police officer- dispute about the interpretation of a Collective Agreement in terms of Section 24(2) of the LRA- Temporary incapacity leave- Permanent incapacity leave- Resolution 7 of 2000 of the Public Service Coordinating Bargaining Council(PSCBC) applied in conjunction with National**

Instruction 2 of 2004 of the South African Police Service Act 68 of 1995- interpretation of temporary and permanent incapacity leave due to PTSD- determining the commencement of incapacity leave a factual question- determined by experts, medical practitioners- End date of incapacity leave similarly determined- Management Policy and Procedures on Incapacity Leave: South African Police Services, discussed.

JUDGMENT

FOUCHÉ, AJ.

Introduction

[1] This is an application in terms of Section 145 of the Labour Relations Act("LRA") 66 of 1995, for the review and setting aside of an award under case number PSCB 363-08/09, subsequent to the referral to mediation. The First Respondent (Commissioner Pearl Mbekwa) found that the Applicant was not entitled to salary effective from April 2008 to date, as it was unclear whether the Applicant who applied for temporary incapacity leave (hereinafter "TIL"), was not able to work at all.

[2] The award was issued on 15 June 2009. The Applicant was during the arbitration hearing represented by Mr J. Gouws. The present application for review was noted on 11 November 2009, thus not within 6 weeks as required by Section 145(1) of the Labour Relations Act 66 of 1995. The Applicant lodged a condonation application. In the condonation application for the late noting of the Review Application, the Applicant submitted that she signed the application for review on 27 October 2009, but due to a lack of funds, the application was filed on 11 November 2009. The six weeks for the noting of the review, lapsed on or before 31 July 2009. The applicant submitted in the application for condonation that the Respondent suffered no prejudice due to the late filing of the Application for review.

[3] The Respondent noted the opposition on 7 November 2009 and filed the answering affidavit on 7 May 2010, thus nearly six months late. In the Respondent's condonation application, it was submitted that the late filing was due to the time spent procuring counsel to draft the application. The parties submitted in Court that by agreement each party condones the other's late filing and noting. Condonation was after hearing these submissions, granted to both parties.

Grounds of review

[4] In the Applicant's heads of argument, the following grounds of review are reflected:-

4.1 the Applicant submitted that the findings made in the award in respect of Resolution 7 of 2000, are irregular;

4.2 the Applicant submitted that the purpose of National Instruction 2 of 2004 is to regulate Resolution 7 of 2000 in respect of the management and administration of incapacity leave within the SAPS members[1], and that it must be read together;

4.3 the First Respondent held in the award that the Applicant is only entitled to sick leave with full remuneration if she suffers from an occupational disease and she is unable to work;

4.4 The First Respondent ignored the provisions of National Instruction 2 of 2004 which as per clause 4(6)(a) requires that full salary is to be paid to a sufferer of an occupational injury from the time she became unable to work until she could resume her work or is discharged from the service[2];

[1] See *Spies v National Commissioner of SAPS and Others* [2008] JOL 21525(LC) at para [18]. See also: *Van Rensburg and Others v Minister of Safety and Security* [2009] 4 BLLR 400 (LC).
[2] It was stated in *De Beer v Minister of Safety and Security and Others* (2011) 32 ILJ 2506 (LC) at para [44] that the procedure for ill-health retirement involves applying for temporary incapacity leave (TIL) during the subsistence of the employment agreement and not after the termination thereof.

4.5 The non-compliance with paragraph [4.4] *infra*, constitutes an irregularity in the proceedings;

4.6 The non-compliance with the application of Resolution 7 of 2000 in conjunction with national Instruction 2 of 2004 constitutes a further irregularity.

Relief sought

[5] The relief sought in the Notice of Motion is:-

1. That the arbitration award dated 15 June 2009 be reviewed and set aside;

2. That the Applicant is entitled to the reinstatement of her salary contrary to the determination in the arbitration award, and that she is entitled to sick leave with full pay for the duration of period of absence due to the illness.

3. Alternatively to paragraph 2 above, that the dispute which is the subject of the arbitration award be referred to the second respondent for arbitration afresh by an arbitrator other than the first respondent.

4. That the costs of this application be paid by any of the respondents who oppose this application.

5. That the applicant is granted such further and/or alternative relief that the Court deems appropriate.

Relevant facts of the matter

[6] The Applicant commenced employment at the South African Police Service on 20 November 1990. The Applicant submitted that she experienced personal problems since her training, mainly interpersonal conflict and unfair treatment. Her general practitioner has treated her for stress since 1991. In November

2002, shortly after her transfer to SANAB, the Applicant was diagnosed with post-traumatic stress disorder (PTSD).

[7] The Applicant applied for periods of leave of absence since 4 November 2002. She submitted that she suffers from Post Traumatic Stress Disorder (PTSD), which is an occupational disease in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993. She alleges that it arose from her duties as a police officer.

[8] It was submitted by the Respondent that the office of the National Commissioner has the discretion to approve or disapprove the periods of absence applied for. The Applicant's request for periods of leave from 4 November 2002 to 10 November 2003 was not approved; the period from 11 November 2003 to 7 December 2004 was not approved. The period of 8 December 2004 to 17 May 2005 was approved. The period 18 May 2006 to 16 August 2007 was not approved.

[9] On 17 March 2006, Dr Jordaan of Thandile Health Risk Management (HRM) evaluated the condition of the Applicant and recommended that the Applicant receive an additional period between three to six months for treatment, whereafter the Applicant should resume official duties. The HRM considered reports of eight doctors, which includes two psychiatrists, two psychologists, and Dr Grobler, whom the Respondent appointed as an independent psychiatrist[3]. In May 2006 the HRM and the independent psychiatrist recommended that the Applicant's condition was permanent as she required further optimal treatment. The recommended period of recuperation lapsed on 17 September 2006, but on 9 May 2006, the office of the National Commissioner decided in respect of the Applicant, and I quote, to:

> 'Retain services in low stress environment.'

[3] See paginated page 359.

[10] On 23 and 24 May 2006, the Applicant, at the Respondent's Board insistence, the Applicant, at the Respondent's Board insistence, had an interview and career discussion with employees of the Respondent's Employee Assistance Services (EAS) to facilitate her resuming duties in an alternative low stress position.

[11] The Applicant subsequently received a notification to report for duty not later than 31 May 2006.The Applicant states in Annexure "LL4" to her founding affidavit that she resumed duty for light services/duties on 31 May 2006. The same day, Senior Superintendent Gopal interviewed her and found that she was not in an emotionally stable condition to perform services at the Area Evaluation services, Area Head, Inspectorate or any other duty. The Applicant had an anxiety attack and Senior Superintendent Gopal thus informed Superintendent Behr that the Applicant was not able to cope in the working environment and must return home. This resulted in the applicant being booked off sick again. Superintendent Behr's letter dated 5 June 2008, (which was annexed to Annexure "LLR" and appears on page 109 of the paginated bundle reads as follows:

> '5. Inspector Liebenberg resumed duty on 2006-05-31 and was placed in an alternative post at Area Evaluation Services.
>
> 6. The member was taken to S/Supt Gopel, Area Head, Inspectorate.
>
> 7. During the same day, S/Supt Gopel informed this office that Insp. Liebenberg is not in an emotional stable condition to perform any duty. She had an anxiety attack and was not able to cope in the working environment.
>
> 8. The member was booked off sick again'.

The Applicant resumed duties on 31 May 2006 and the above letter was written by Superintendent Behr on 5 June 2008.

[12] The Respondent communicated with the Applicant by letters dated 30 November 2006, 19 December 2006, 4 June 2007 and 7 August 2007, notifying her that she had exhausted the 36 working days sick leave in the three year cycle, and

requested her to resume duties in an alternative position. The Applicant lodged representations on 6 February 2006, 2 January 2007, 11 June 2007 in person, and per Attorney Botha on 22 October 2007. After 6 February 2008, deductions were made for sick days off work.

[13] Applicant made applications for temporary incapacity leave (TIL) and for ill-health retirement were made until 15 March 2007.

[14] On 4 June 2007, the Station Commander of the Sunnyside Police Station, caused the Applicant to be served with a document titled “notice to Report for duty”. The notice invited the Applicant to report for duty in seven days or to furnish representations why her absence should not be regarded as leave without pay. The Applicant responded that she was undergoing psychiatric treatment and attached her sick leave note from the psychiatrist, Dr Dawie Cloete.

[15] Attorney Botha, the Applicant’s former Attorney, sent a letter dated 24 August 2007 to the Divisional Commissioner stating that the Applicant’s matter is an occupational injury which thus falls under Compensation for Occupational Injuries and Diseases Act, 130 of 1993 (hereinafter referred to as COIDA).Written reasons for the refusal to pay the Applicant’s salary, was requested under Section 5 of the Promotion of Administrative Justice Act 3 of 2000. The letter also requests the Respondent to follow Instruction 2 of 2004, the directive on incapacity leave in the SAPS. It lastly states that failure to furnish the Applicant in 30 days with full written reasons, may lead to her exercising the Right of Appeal in accordance with Regulation 68 of the South African Police Service Regulations. As stated in paragraph 15.9 of Annexure “LL4”, to the founding Affidavit, the Station Commander of Sunnyside, responded that the matter was referred to the Provincial Commissioner for consideration. The Respondent’s response was outside of the required 30 days. According to the papers no further response was received from the Respondents.

[16] On 8 April 2008, the Applicant again received a letter notifying that her salary would be suspended as she had exhausted the 36 sick leave cycle as per Resolution 7 of 2000. The Applicant was advised that she is fit to be employed in a less stressful environment, pending the Regulation 64 Board final determination on her fitness to remain in the Respondent's service.

[17] On 24 April 2008, the Applicant instructed the present attorneys of record. Johan Gouws Attorneys referred the dispute to the Safety and Security Bargaining Council for adjudication and requested that the suspension of the Applicant's salary be stayed, pending the outcome of the referral to the bargaining council (the SSSBC). After receiving a notice of an *in limine* jurisdictional point from the Director PJ De Kock on the Respondent's behalf, the parties by agreement referred the dispute to the Public Service Coordinating Bargaining Council (PSCBC) on 12 May 2008.

[18] The PSCBC notified the Applicant's attorney a few days after the above noting, that all internal grievance procedures must be exhausted before referring the matter to the PSCBC. Applicant's attorneys thus sought an agreement from the Respondent that all internal procedure were indeed finalized. Without an agreement of the exhaustion of all internal grievance procedures, the referral to the PSCBC could not be entertained. The Respondent refused. To exhaust all internal remedies, the Applicant lodged a grievance on 1 July 2008. The due date for response by the Respondent was 7 July 2008. The Respondent responded out of time on 16 July 2008. This culminated in the issue of a Mediation certificate on 30 July 2008.

[19] The Applicant recorded at the arbitration that the following relief is sought:-

> 'An Award that shall give effect to the implementation and application of the collective agreement (and that shall determine whether the applicant was/is) entitled to sick leave with full pay and reinstatement of her salary as a result thereof.'

[20] Applicant in her founding affidavit, made serious allegations against the Respondent. She states that the Respondent acted wilfully by failing to report the injury she sustained on duty, to the Compensation Commissioner in accordance with Section 39 of COIDA. This she argues has resulted in the application of 36 days sick leave cycle over a three year period, set out in paragraph 7.4 Resolution 5 of 2001. It culminated in the Applicant receiving no income since April 2008. Applicant made further serious allegations, against the Sunnyside Police Station, being that her personal file was lost by them and no applications either for temporary (TIL) or ill health retirement could be processed. She submitted that Resolution 7 of 2000 was contravened. Lastly, she states that she believes the refusal to pay salary to her, contravenes Resolution 7 of 2000 read with National Instruction 2/2004.

Submissions made by the litigants

[21] The Applicant submitted that according to clause 7.5 of Resolution 7 of 2000, an employee who cannot work, shall be entitled to leave for the duration of the illness. The applicant stated that her absence from work was due to her contracting an occupational disease or injury at the place of employment. The latter was argued falls under COIDA read with Section 24 of the Basic Condition of Employment Act 75 of 1997. The normal sick leave cycle expressed in Resolution 7 of 2000, does not apply to occupational injuries.

[22] The Applicant argued that in accordance with Section 39 of COIDA, the Respondent was obligated to report the occupational disease which the Applicant contracted. As a result of the application with the latter Act, the Applicant is not subject to normal sick leave and the 36 days cycle over a period of three years as set out in Clause 7(4) (a) of Resolution 7 of 2000 under National Instruction 2 of 2004. If the Fourth Respondent requested the Applicant to resume duties, the Section 34 Board of inquiry must first be held. The Applicant's medical practitioners were of the view that she was not fit to return to work.

[23] Applicant further submitted that it was determined that when the employee suffers from an occupational disease, the employer is in accordance with clause 4(6)(a) of National Instruction 2 of 2004, entitled to disability leave. The Collective agreement as per Section 24(2) of the LRA is contained in Resolution 7 of 2000.

[24] The Applicant argued that the National Instruction 2 of 2004 stipulates that when an occupational disease was sustained, the employee is entitled to leave with full pay from the time she become unable to work until she could resume work or until she is discharged from service subsequent to the Section 34 inquiry.

[25] It was common cause that the Applicant had applied for temporary disability leave (TIL) since 11 November 2002 and was paid an income up to April 2008.The reasons for the termination of the salary was the exhausting of the 36 days incapacity leave as per Resolution 7 of 2000. It was argued that the arbitrator failed to apply National Instruction 2 of 2004. The Collective Agreement sets out that Resolution 7 of 2000 must be applied in conjunction with National Instruction 2 of 2004. It was argued that under National Instruction 2 of 2004, the salary of the employees suffering from an occupational disease, should not be suspended as per the criteria of clause 4(6)(a) of the National Instruction.

[26] The Respondent submitted that Resolution 7 of 2000 does not entitle the Applicant to incapacity leave with full salary during the period of absence as it was not clear that the Applicant could resume duties. Respondent submitted it is in dispute if the arbitrator acted irregularly by interpreting the collective agreement in accordance with Section 24(2) of the LRA when interpreting Resolution 7 of 2000.The crux of the Respondent's submissions are that the Respondent has a discretion to refuse or grant incapacity leave with or without full salary and to elect to interpret only Resolution 7 of 2000 as per the dispute referral form[4]. The ambit of the referral form reads as follows:

> 'interpretation/application of a collection agreement (Resolution 7 of 2000)'.

[4] Page 53 Bundle A.

[27] The Respondent averred that in the Health Risk Manager's report dated 17 March 2006, it was stated that the Applicant should be able to perform duties after she had received optimal treatment. Flowing from this recommendation, the National Commissioner decided on 9 May 2006, that the Applicant must resume duties in an alternative, suitable, low stress position. The Applicant was on 31 May 2006 placed in an alternative position at the Area Evaluation Services, but was according to Senior Superintendent Gopal unable to function adequately and she was sent home. Respondent submitted that Senior Superintendent Gopal is not a psychiatrist and was not in a position to express an opinion on the Applicant's ability to cope in the working environment.

[28] The Respondent contended that the wording contained in Sections 7.5.1; 7.5.2 and 7.6 of Resolution 7 of 2000, must be given a literal meaning. Three steps must be followed during this process:

28.1 it must be determined if the employee was temporarily or permanently disabled

28.2 if the employee sustained a permanent disability, the question is if the employee could be placed elsewhere;

28.3 if no placement could be effected, the matter should be referred to a Section 34 Board of inquiry.

[29] Respondent pointed out that the Arbitrator indeed found that:-

> 'Grieved employee indicates that she is not willing at all to be alternatively placed.'

The Respondent therefore submitted that the Applicant is fit to resume her duties and is able to work.

[30] The Third and Fourth Respondents submit in their opposing affidavit that the arbitrator's award is reasonable and that a reasonable arbitrator in the position of

the First Respondent, would have issued the same awards on the facts at hand, and that the award should be upheld.

The relevant requirements relating to sick leave -

[31] Sick leave is defined in Resolution 7 of 2000[5], as follows:-

31.1 *Clause 7(4) Normal sick leave*

'(a) Employees shall be granted 36 working days sick leave with full pay in a three year cycle.

(b) the employer shall require a medical certificate from a registered medical practitioner if three or more consecutive days are taken as sick leave'.

31.2 *Clause 7(5) Disability management leave*

7.5.1 Temporary disability leave:

'(a) An employee whose normal sick leave credits in a cycle have been exhausted and who, according to the relevant practitioner, requires to be absent from work due to disability which is not permanent, may be granted sick leave provided that:

(i) her or his supervisor is informed that the employee is ill; and

(ii) a relevant registered medical and/or dental practitioner has duly certified such a condition in advance as temporary disability except where conditions do not allow.

(b) the employer shall, during 30 working days, investigate the extent of inability to perform normal official duties, the degree of inability and the cause thereof. Investigations shall be in accordance with Item 10(1) of Schedule 8 of the Labour Relations Act of 1995

[5] The Section 24(2) LRA collective agreement recorded as Resolution 7 of 2000, Public Service Co-ordinating Bargaining Council (PSCBC) pages 4-5.

(c) the employer shall specify the level of approval in respect of applications for disability leave.'

7.5.2 Permanent disability leave:

'a) Employees whose degree of disability has been certified as permanent shall, with the approval of the employer, be granted a maximum of 30 working days paid sick leave, or such additional number of days required by the employer to finalise the process set out in (b) and (c) below

(b) The employer shall within 30 working days ascertain the feasibility of

i) alternative employment; or

ii) adapting duties or work circumstances to accommodate the disability.'

31.3 Clause 7(6) Leave for occupational injuries and diseases

'(a) Employees who, as a result of their work, suffer occupational injuries or contract occupational diseases shall be granted occupational injury and disease leave for the period they cannot work'.

[32] The operation of sick leave as per the collective agreement, is given effect to by National Instruction 2 of 2004, of which clause 4(6)(a) reads as follows:-

'An employee who sustains an occupational disease or injury is entitled to occupational injury and disease leave with full pay from the time he/she becomes unable to work-

(i) until he or she can resume his or her work or
(ii) until he or she is discharged from the Service after an enquiry as contemplated in Section 34 of the Act.'

[33] The National Instruction 2 of 2004,refers to the Police Service Act[6]. Section 34 (1) (a) of the South African Police Service Act reads as follows:-

[6] South African Police Services Act 68 of 1995.

> 'The National Commissioner may designate a member, a category of members or any other person or category of persons who may, in general or in a specific case inquire into the fitness of a member to remain in the Service on account of indisposition, disease or injury".

[34] Section 34(1) (f) of the Police Service Act applies the inquiry into:-

> '….a disease or indisposition alleged to have been contracted in the course of his/her duty….'

[35] The administrative inquiry of the indisposition of injured employees should be held in accordance with Regulation 68 to the Police Service Act. Regulation 68 reads as follows:-

'Administrative inquiries

68(1) the commissioner may, for administrative purposes, convene a board to inquire into:-

(a) an injury alleged to have been sustained by a member or any other person in the service of this Department, in an accident arising out of or in the course of the execution of his functions, or a disease or indisposition alleged to have been contracted in the course and as a result of the execution of his functions….'

Interpretation of the provisions of clause 7.5.2 of Resolution 7 of 2002 and the National Instruction 2 of 2004

[36] In *Chellew v National Commission of the South African Police Service and Others*[7] Moloto J, states *obiter*[8], that Resolution 7 of 2000 and the National Instruction 2 of 2004 are of a discretionary nature. Section 24 of the Labour Relations Act[9] excludes the High Court's jurisdiction from interpreting and

[7] (2006) 27 *ILJ* 765 (T).
[8] Paras 9-11 of the judgment.
[9] 66 of 1995.

applying collective agreements, unless the claim is founded on a breach of a constitutional right[10].

[37] In the unreported judgment of *Kapp at al v The National Commissioner of South African Police Services and; the Provincial Commissioner of the South African Police Services*[11], Van Der Byl AJ (as he then was) refers in paragraph 20 of the judgment to paragraph 9 of the *'Management Policy and Procedures on Incapacity Leave and Ill health Retirement for Public Service Employee: South African Police Service'* of 5 August 2003[12], read with Resolution 7 of 2000 and the National Instruction 2/2004. The *Management Policy and Procedure*[13], records the procedure to be followed in respect of applications for incapacity leave.

[38.1] The procedure set for applications for incapacity leave is as follows:-

[38.1a] The management policy:-

A In the case of the periods of incapacity leave longer than 30 days (thus cases envisaged in clauses 7.5.1 and 7.5.2 of Resolution 7), the submission of:-

(i) for long leave "*Appendix B"*, attached to the Management Policy, duly signed by both the employee and the supervisor;

(ii) a medical certificate reflecting the starting and ending dates of the period of absence, the nature and the extent of the medical condition;

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[10] See:*Fredericks and Others v MEC for Education and Training, Eastern Cape and Others* 2002 (2) SA 693 (CC); (2002) 23 *ILJ* 81 (CC).

[11] Case number 609/2005, date of judgment March 2006. The *Kapp* case differs from the facts before this court as it also dealt with the Cape Province Provincial Order 1/2004(issued on 2 March 2004).

[12] This Court ordered the litigants on 10 March 2014 to furnish the Court with a copy of this management policy for the purposes of this judgment. Neither of the litigants managed to furnish the copy of the management policy to the Court. The Court's librarian's and Judges Associate, Mr A Kruger searched for this policy document. After a diligent search the document was traced to the SAPS INTRANET. The web address where the management policy was found is http://www.jags/proceduremanual (date accessed 10 July 2014). This accordingly explains why this judgment could not be handed down sooner.

[13] Paragraphs 21-23.

(iii) an application form (the SAP 26) for leave of absence signed by the employee and the National Commissioner, if approved;

B. In the case of applications for ill-health retirement (thus 7.5.2 and 7.6 of Resolution 7) the submission of:

(i) form "*Appendix C"* to the Management policy, signed by the employee and the supervisor;

(ii) a statement of the medical practitioner treating the condition;

(iii) form *"Appendix D"* completed after the application ("*Appendix B"*) for long period of incapacity was considered and retirement recommended

[38.1b] Resolution 7 of 2000

(i) Clause 7.5.1 deals with applications for temporary disability leave, where the 36 days sick leave cycle over the period of three years was exhausted. In such a case temporary disability leave may be granted if:-

a) the supervisor is informed the employee is ill;

b) the medical practitioner or dental practitioner must certify such a condition in advance as a temporary disability, except where conditions require otherwise

(ii) Clause 7.5.2 deals with applications of permanent disability leave, where the employee's disability was certified as permanent, with the employer's approval, and a maximum amount of 30 working days paid sick leave shall be granted to the employee except in respect of the additional 30 days for the finalization of the process to ascertain the feasibility of alternative employment.

[38.1c] The National Instruction 2 of 2004

(i) Clause 4(6)(b) requires that an application for sick leave on account of an occupational injury or disease, must be submitted on the first day the member resumes duty after being absent. Clause 4(6)(c) requires that the application for incapacity leave must as far as practical be submitted before the commencement of the incapacity leave, but not later than five days after the first day of the absence.

(ii) SAPS members applying for temporary incapacity leave may in accordance with clauses 4(7)(3)(a) and (e) not automatically assume that their application was approved.

(iii) in accordance with clause 4 (6)(a) an employee who sustains an occupational injury or contracts an occupational disease, is entitled to occupational injury and disease leave with full salary from the time he or she became unable to work-until he/she is discharged from the service after the section 34 inquiry.

(iii) the wording of clause 4(6)(a) for occupational diseases and occupational injuries is unclear. It states that occupational injury and disease leave shall be granted to the applicant for the duration of the period that he/she cannot work. The period commences from the time of the application until he/she can resume work or is discharged from the service subsequent to the Section 34 inquiry.

(a) The date of commencement of such leave is a factual question, which is determinable by medical practitioners, diagnosing the applicant with an occupational disease.

(b) The end date is a factual question determined by medical practitioners.

(c) The employee is entitled to paid leave until he/she become able to resume work, alternatively, until a Section 34 enquiry (under the Police Service Act) takes place and the employee is either discharged or another outcome is reached, such as alternative employment. An employee refusing to fill the alternative position, which the medical practitioner believe he/she should fill, could be dismissed.

Evaluation of the award

[39] The grounds for review set out in Section 145 of the Labour Relations Act("LRA")[14] are:-

> '(1) any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award-
>
> (a) within six weeks of the date that the award was served on the applicant
>
> (2) a defect referred to in subsection (1) means-
>
> (a) that the commissioner-
>
> (i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
>
> (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
>
> (iii) exceeded the commissioner's powers; or
>
> (b) that an award had been improperly obtained'.

[40] The Applicant's Notice of Motion to this application does not contain the grounds of review[15]. The founding affidavit[16] states that the Arbitrator's findings were irrational and unjustifiable and the First Respondent exceeded her powers by not

[14] Act 66 of 1995.
[15] Notice of Motion Paginated Bundle pages 1-3.
[16] The Applicant's Heads of Arguments, records the grounds of review.

applying the National Instruction 2 of 2004 together with Resolution 7 of 2000[17]. Furthermore, it states the Respondent violated the fundamental rights of the Applicant, by not following the correct procedure, alternatively, a speedy and prompt procedure[18].

[41] In *Carephone (Pty) Ltd v Marcus NO and Others*[19], which was decided before the advent of PAJA, the Court enunciated the test for Section 145 Labour Court reviews as:

> '….is there a rational objective basis for justifying the connection made by the administrative decision maker between the material property available to him and the conclusion he or she eventually arrived at?'

[42] In *Nampak Corrugated Wadeville v Khoza*[20], the Labour Appeal Court held that:-

> '…this discretion must be exercised fairly. A court should, therefore, not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the court would have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable...'

[43] In *Rustenburg Platinum Mines Ltd (Rustenburg section) v Commissioner for Conciliation, Mediation & Arbitration and Others,*[21] the Labour Appeal Court stated that Section 33 of the Constitution extended the scope of review and introduced a requirement of rationality in the outcome of decisions. Section 33 of the Constitution states that:-

> '(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair'.

[17] Founding Affidavit Paginated Bundle pages 13-20.
[18] Founding Affidavit Paginated Bundle page 19.
[19] 1999 (3) SA 304 (LAC);(1998) 19 *ILJ* 1425 (LAC);[1998] 11 BLLR 1093 (LAC).
[20] (1999) 20 *ILJ* 578 (LAC);[1999] 2 BLLR 108 (LAC) at para 33.
[21] 2007 (1) SA 576 (SCA); (2006) 27 *ILJ* 2076 (SCA); [2006]11 BLLR 1021 (SCA).

[44] An objective inquiry must take place during the arbitration proceedings and be reflected in the Arbitrator's award[22]. The award must be rationally connected to the information before the Arbitrator and the reasons entered on the record. It must be established if the Arbitrator properly exercised the powers given to him in compliance with Section 3 of the Labour Relations Act and the Constitution. The rational objective test set out in *Carephone infra*, must thus be applied.

[45] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[23] Navsa AJ held that a Commissioner conducting a CCMA arbitration performs an administrative function and that the Promotion of Administrative Justice Act does not apply to arbitration matters in terms of the Labour Relations Act.

[46] In *Herholdt v Nedbank Ltd*[24] the Court found that the test applicable to Section 145 LRA reviews recognizes that dialectical and substantive reasonableness is intrinsically interlinked and that latent process irregularities carry the inherent risk of causing a possible unreasonable outcome. The Court must scrutinize the Commissioner's reasons to determine whether a latent irregularity occurred, being an irregularity in the mind of the Commissioner, which is only ascertainable from the Commissioner's reasons. On page 1802 Murphy AJA in paragraph 39 states:-

> 'There is no requirement that the commissioner must have deprived the aggrieved party of a fair trial by misconceiving the whole nature of the inquiry. The threshold for interference is lower than that; it being sufficient that the commissioner has failed to apply his mind to certain of the material facts or issues before him, with such having potential for prejudice and the possibility that the result may have been different'.

[22] See: *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004(4) SA 490 (CC); 2004 (7) BCLR 687(CC) at para 25.
[23]2008 (2) SA 24 (CC);(2007) 28 *ILJ* 2405 (CC).
[24](2012) 33 *ILJ* 1789 (LAC).

[47] The First Respondent recorded the Applicant's submissions, on the paginated pages 26 and 28[25] of the award, as follows:-

Page 26:

> '…..employee sufferers "shall be granted" leave for the duration of the period they cannot work'
>
> 'The Resolution, the National Instruction (the instruction) and the Basic Conditions of Employment Act 75 of 1997 in section 24, stipulate that occupational disease leave is not normal sick leave. The cycle can therefore not be exhausted'

Page 28:

> 'She was at some stage diagnosed as suffering from PSTD, the basis for submitting applications of incapacity leave and ill-health retirement'.

[48] The First Respondent stated on page 28 of the award that the Applicant's dispute deals with the interpretation and application of Resolution 7 of 2000 (the collective agreement) and seeks an award giving effect to the reinstatement of her salary since March 2008.

[49] The First Respondent stated on page 28 that in the pre-arbitration minutes the facts in dispute were recorded as follows:-

> '-Whether the applicant is entitled to sick leave with full (pay) in terms of the collective agreement when suffering an occupational disease;
>
> -Whether the applicant's salary was correctly suspended by the respondent in terms of the collective agreement;
>
> -Whether the applicant is entitled to her salary in the collective agreement is correctly applied'.

[25] Annexure "LL1" Bundle A pages 22-35.

[50] The First Respondent ignored material evidence relating to the deliberate conduct of the Third and Fourth Respondents. These include not speedily dealing with the Applicant's application for permanent ill health; not supplying the Applicant with a copy of the Management Policy and Procedures applicable to disability leave; not finalizing the COIDA processes and; not holding the Section 64 investigations timeously. The First Respondent interpreted Resolution 7 of 2000 without reference to National Instruction 2 of 2004[26].

[51] All CCMA actions must be lawful, reasonable and procedurally fair. The Third and Fourth Respondents erred by not submitting a copy of the *Management Policy and Procedures on Incapacity Leave infra,* to the Applicant and the First Respondent for the arbitration proceedings, which contributed to unreasonable award made by the Arbitrator.

[52] It is clear that when weighing all the evidence, the arbitrator was not impartial and objective in evaluating the documentary evidence produced by the parties. The medical letters submitted by the Applicant contained commencement dates of the illness, but were not considered during the award. It is furthermore clear that there had been no fair trial and no fair processes during the arbitration. These resulted in a gross irregularity during the conduct of the arbitration as envisaged by Section 145 of the Labour Relations Act. A Reasonable Commissioner would not have made these findings. The award should accordingly not be upheld.

[26] See: Issues to be decided lines 1-4 page 24, Bundle 1.

Conclusion

[53] As concerning costs, I am of the view that there are merits in the complaint of the Applicant. The matter was unnecessary dragged out by the Fourth Respondent. The overriding consideration in the determination of costs is that the costs should follow the suit[27].

[54] The Applicant submitted that the matter should be finally determined as opposed to remitting it back to the CCMA for a fresh hearing. It is trite law that this Court and the LAC have held they should correct a decision rather than remitting it back to the CCMA for a hearing *de novo*, in the following circumstances:-

(i) Where the end result is a foregone conclusion and it would be a waste of time to order the CCMA to reconsider the matter;

(ii) where a further delay would cause unjustified prejudice to the parties;

(iii) where the CCMA has exhibited such bias or incompetence that it would be unfair to require the applicant to submit to the same jurisdiction again;

(iv) where the Court is in as a good position as the CCMA to make the decision.

In the present matter, factors (i); (ii) ; and portions of (iii) and (iv) were present.

[27] Section 16(2) of the Labour Relations Act(LRA); *Lamprecht v Pienaar Bros (Pty) Ltd* (1998) BLLR 608 (LC) 612; *Sibisi v Ganpath* (2003)24 ILJ 857(LC); *NUM v East Rand Gold and Uranium Co* Ltd (1991) 12 ILJ 1221 (A) at para 1241J-1243B.

Order

[55] For these reasons I order that:-

(i) The Arbitrator's award dated 15 June 2009 be reviewed and set aside;

(ii) The applicant's salary be reinstated from 8 April 2008;

(iii) The Fourth Respondent is directed to hold a Section 34 inquiry in this matter before the end of February 2015;

(iv) Costs of review on a party and party scale, which shall be taxed within 90 days from the date of this order.

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Fouché, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Johan Gouws Attorneys

For the Third and Fourth Respondents: State Attorney, Pretoria