THE LABOUR COURT OF SOUTH AFRICA

JOHANNESBURG

Not Reportable

Case No: JR2212/12

In the matter between:

THE PUBLIC SERVANTS ASSOCIATION OF SOUTH AFRICA obo A POTGIETER	**Applicant**
and	
THE DEPARTMENT OF TRADE AND INDUSTRY	**First Respondent**
THE PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL	**Second Respondent**
Dr M A CHICKTAY, *N.O.*	**Third Respondent**

Heard: **18 February 2015**

Judgment: **12 February 2016**

Summary: **Application to review and set aside an interim arbitration award in terms of s. 145 of the LRA; Parties agreeing to the award being set aside; Court obliged to make its own determination on the alleged**

defect in the arbitration proceedings; Award indeed reviewable; Substitution not appropriate; Matter remitted back with no order as to costs.

JUDGMENT

VOYI AJ.

Introduction

[1] The Applicant in this matter is the Public Servants Association of South Africa (hereinafter "*PSA*"). Acting on behalf of its member, namely Mr Andre Potgieter ("*Mr Potgieter*"), PSA seeks to review and set aside an interim arbitration award issued by the Third Respondent (hereinafter "*the Arbitrator*") on 17 May 2012 under case number PSCB 106-10/11.

[2] The application for review is launched in terms of section 145 of the Labour Relations Act.[1]

[3] It is only the First Respondent (hereinafter "*the DTI*") that is party to these review proceedings. In its answering affidavit, the DTI agrees to the award being set aside. The only issue in contention between the parties is whether there should be remittal or substitution.

[4] PSA contends that the award should be substituted in that all the evidence and material that was before the Arbitrator has been placed before this Court as part of the record on review.

[5] In contrast, the DTI's stance is that the matter ought to be remitted back to the Second Respondent (hereinafter "*the PSCBC*" or "*the Bargaining Council*") for

[1] Act No. 66 of 1995 ("*the LRA*").

the leading of medical evidence that would assist in the determination of the issues arising in the dispute between the parties.

[6] The DTI's answering affidavit was delivered out of time. There is an application for condonation of its late delivery. I am of the opinion a case has been made out for condonation of the late delivery of the answering affidavit. The explanation for the delay is sound. In addition, PSA did not oppose the condonation application.

Background

[7] On or about 27 May 2010, PSA referred a dispute to the PSCBC concerning the interpretation or application of a collective agreement, it being PSCBC Resolution 7 of 2000 as amended (hereinafter "*Resolution 7 of 2000*"). The dispute was lodged by PSA on behalf of Mr Potgieter, an employee of the DTI.

[8] The dispute was lodged as a direct result of the DTI having declined two separate and consecutive applications for temporary incapacity leave which were submitted by Mr Potgieter.

[9] The first application for temporary incapacity leave was submitted on or about 16 March 2009.[2] It was covering the period 09 March 2009 to 30 June 2009.[3] The second application was submitted in June 2009, and it covered the period 1 July 2009 to 31 December 2009.[4]

[10] The two applications for temporary incapacity leave were based, *inter alia*, on the provisions of clause 7.5.1 of Resolution 7 of 2000, which read as follows:

> '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 incapacity which is not permanent, may be granted sick leave on full pay provided that:

[2] Record, p. 101.
[3] *Ibid*, p. 21.
[4] *Ibid*, p. 107

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

ii) a relevant 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 duties, the degree of inability and the cause thereof. Investigations shall be in accordance with item 10(1) of Schedule 8 in the Labour Relations Act of 1995.

c) The employer shall specify the level of approval respect of applications for disability leave.'[5]

[11] Key and relevant to Mr Potgieter's applications for temporary incapacity leave are two policy documents.

[12] The first is the Determination on Leave of Absence in the Public Service (July 2009), made by the Minister of Public Service and Administration (hereinafter "*the Determination on Leave of Absence*").[6] The second is the Policy and Procedure on Incapacity Leave and ill-Health Retirement of April 2009 (herein after "*PILIR*").[7]

[13] Both the Determination on Leave of Absence and the PILIR give effect to, *inter alia*, the provisions of clause 7.5.1 of Resolution 7 of 2000.

[14] These two policy documents set out, *inter alia*, the procedural steps to be followed by both the employer and the employee respecting an application for temporary incapacity leave.

[15] Of importance to the present matter, there are timelines that are prescribed for both the employee and the employer. As far as this matter is concerned, the

[5] Record, pp. 286 & 287.
[6] *Ibid*, at pp. 450 - 488
[7] *Ibid*, at pp. 489 - 517.

relevant timelines are those under clause 15 of the Determination on Leave of Absence as well as those under clauses 7.1 and 7.3 of the PILIR.

[16] Amongst other things, these clauses require of an employer to conditionally grant an applicant employee a maximum of 30 consecutive working days as temporary incapacity leave with full pay. This has to be done within five (5) working days from the date of receipt of an employee's application for temporary incapacity leave.

[17] Quite pertinent to the matter, these clauses further prescribe a time limit within which the employer must approve or refuse the temporary incapacity leave which has been granted conditionally.

[18] Under both the Determination on Leave of Absence and the PILIR, the employer has a period of 30 working days within which to approve or refuse the temporary incapacity leave which has been granted conditionally.[8]

[19] It is common cause in the present matter that the 30 working days' time frame was never adhered to by the DTI.

[20] After Mr Potgieter's applications were declined, long after they had been submitted, a grievance was lodged and same culminated in a dispute being lodged by PSA with the PSCBC as mentioned hereinbefore.

[21] The dispute lodged was classified as being about the interpretation or application of a collective agreement, the latter being Resolution 7 of 2000. In giving a summary of the facts in dispute in the referral form, PSA recorded thus:

> 'Employer not complying with procedure of temporary incapacity leave. Member now having to pay for leave taken.'[9]

[22] The outcome required as per the dispute referral was for the temporary incapacity leave to be approved and leave without pay be revoked.[10] As a

[8] Clause 5.10 of the Determination on Leave of Absence and clause 7.3.5.1 (e) of the PILIR.
[9] Record, p. 3.

consequence of the DTI declining Mr Potgieter's two applications, the conditionally granted temporary incapacity leave was converted into unpaid leave.

[23] In dealing with the dispute, the parties agreed to exchange a statement of case and a response thereto. In the statement of case, PSA outlined the issues requiring determination as follows:

(i) Whether the DTI and/or the Health Risk Manager complied with the applicable procedures/discharged their obligations in terms of the relevant policies, determinations and legislation for temporary incapacity leave.

(ii) Whether the temporary incapacity leave applications should be approved.

(iii) Whether the unapproved temporary incapacity leave applications must be allocated as unpaid leave.

[24] Before the main dispute could be arbitrated, the parties decided to separate the issues. What had to be dealt with, as a preliminary matter, was the consequence or effect of the DTI not having complied with the 30 days' time frame within which to approve or refuse Mr Potgieter's applications for temporary incapacity leave.

[25] According to PSA, it was agreed that the Arbitrator would decide on the following preliminary aspects of the dispute, namely:

25.1 whether the DTI and/or the Health Risk Manager had complied with the applicable procedures / discharged their obligations in terms of the collective agreement, relevant policies, determinations and legislation for temporary incapacity leave; and

25.2 quite apart from whether Mr Potgieter's temporary incapacity leave applications should / should not have been approved, whether the unapproved incapacity leave should be allocated as unpaid leave.

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[10] *Ibid*.

[26] The DTI's own recordal of the preliminary issues that had to be dealt with by the Arbitrator differs from that of PSA as captured above. According to the DTI, the Arbitrator was required, for the moment, to decide in relation to procedure:

26.1 whether, in consequence of Mr Potgieter's applications for incapacity leave, the DTI complied with the requirements laid down in the PILIR; and

26.2 whether it is fair, in view of the alleged non-compliance with procedure, for the conditional incapacity leave granted to be converted to unpaid leave which Mr Potgieter should pay back.

[27] In the event that the Arbitrator did not find for PSA on the separated issues, it was agreed that the arbitration would be re-scheduled for the testimony of the parties' respective doctors.

<u>The arbitration award</u>

[28] The proceedings in relation to the preliminary issues that had to be dealt with by the Arbitrator were held on 2 March 2012. Following receipt of the parties' heads of argument and on 17 May 2012, the Arbitrator handed down his award.

[29] Quite noticeably, the award is laconic. It examines the evidence and argument in one paragraph which reads as follows:

> 'In my analyses of the evidence presented to me I find both parties liable. The [DTI] was required to respond within 30 d days (sic), which it failed to do. [Mr Potgieter] also has a responsibility to follow up with the [DTI]. He cannot sit idly especially after a few months had expired. He should have known the dire consequences that would follow if the application were denied. Since both parties are to blame the amount for unpaid leave for both periods should be apportioned equally between both parties.'

[30] Based on the above reasoning, the Arbitrator ruled that both parties are liable and thus the amount for unpaid leave should be apportioned equally between both parties.

Evaluation

[31] From a cursory point of view, the preliminary issues that had to be determined by the Arbitrator strike one as being rather undemanding. In the first place, the non-compliance with the Determination on Leave of Absence and the PILIR was conceded by the DTI. Secondly and on the face of the conceded non-compliance, one would hasten to conclude that it would be palpably unfair for the conditionally granted incapacity leave to be converted into unpaid leave which Mr Potgieter should pay back.

[32] To my mind, the issues are not that simple in view of, *inter alia*, the relief that was sought by PSA as part of the preliminary issues to be decided by the Arbitrator. Before the Arbitrator, PSA requested an order that the unapproved incapacity leave for the periods 26 March 2009 to 30 October 2009 and 01 December 2009 to 31 December 2009 cannot be allocated as unpaid leave.

[33] Both PSA and the DTI are not satisfied with the Arbitrator's award. As stated hereinbefore, there is consensus that the award should be reviewed and set aside.

[34] I hold the view that an arbitration award cannot simply be set aside on the mere say so of the parties.

[35] A case grounded on the provisions of s. 145 of the LRA must be made for an arbitration award to be set aside. After all, an arbitration award is final and binding in terms of s. 143(1) of the LRA.[11] In the present matter, both PSA and the DTI are bound by the Arbitrator's award.

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[11] *Librapac CC v FEDCRAW and others* (1999) 20 ILJ 1510 (LAC) at para 9; *Sidumo and another v Rustenburg Platinum Mines Ltd and others* 2008 (2) SA 24 (CC); (2007) 28 *ILJ* 2405 (CC) at para 84.

[36] It is trite that an arbitration award issued under the LRA is not appealable.[12] Whether or not such an award is incorrect, according to the parties, is not sufficient for it to be disregarded. The only available remedy is a *review*, which is a constricted remedy.

[37] Where both parties agree that an award should be set aside, that could be a manifestation that there exists a defect in the proceedings as contemplated by s. 145 of the LRA. This Court is, accordingly, not absolved from examining whether or not a case has been made out for the award to be set aside in terms of s. 145 of the LRA.

[38] Having thoroughly considered the grounds for review as advanced by PSA and also the Arbitrator's award itself, I am satisfied that a case has been made out for the award to be set aside.

[39] The Arbitrator did not appreciate what he was called to pronounce upon. The Arbitrator's reasoning is visibly detached from the identified issues he was called upon to determine. These preliminary issues required an examination of the prescripts in question, which the Arbitrator did not embark upon in the present matter.

[40] Had the Arbitrator done so, he would have appreciated that there was absolutely no basis for laying any blame at Mr Potgieter's doorstep. Nowhere in the Determination on Leave of Absence or even in the PILIR is there an obligation on the part of an employee to follow up with the employer.

[41] On the contrary, there are prescribed time lines for the employer to do certain things. It is not for the employee, as a matter of obligation, to either remind or follow up with the employer on what it must do in terms of the Determination on Leave of Absence and the PILIR.

[12] See: *National Union of Mineworkers and another v Samancor Ltd (Tubatse Ferrochrome) and others* (2011) 32 *ILJ* 1618 (SCA) at para 5; *Shoprite Checkers (Pty) Ltd v Commission for H Conciliation, Mediation and Arbitration and others* 2009 (3) SA 493 (SCA); (2009) 30 *ILJ* 829 (SCA) at para 26.

[42] Of crucial importance, a distinction ought to have been drawn by the Arbitrator between the 30 working days within which to approve or refuse an application for temporary incapacity leave which was granted conditionally and any time period thereafter.

[43] By way of demonstration, the first application for temporary incapacity leave by Mr Potgieter was delivered on 16 March 2009.[13] On 01 April 2009, the DTI issued a letter to Mr Potgieter advising *inter alia* that it conditionally approved his application for temporary incapacity leave from 9 March 2009 to 30 June 2009 with full pay.[14] The letter stated that the conditional approval was in terms of the authority vested according to the Determination on Leave of Absence.

[44] The Determination on Leave of Absence, however, does not vest the DTI with the power to grant a conditional temporary incapacity leave for such a long period. Clause 15.8.1 of the said Determination reads thus:

> 'The Head of Department, must within 5 working days from the receipt of the employee's application for temporary incapacity leave-
>
> 15.8.1 **<u>conditionally</u>** grant a maximum of 30 consecutive working days temporary incapacity leave with full pay subject to the outcome of his/her investigation into the nature and extent of the employee's illness/injury;'

[45] From the above it is apparent that the DTI could only have conditionally granted Mr Potgieter a maximum of 30 consecutive working days' temporary incapacity leave with full pay. To conditionally grant Mr Potgieter's application for temporary incapacity leave from 9 March 2009 to 30 June 2009 with full pay far exceeded the maximum of 30 consecutive working days denoted by clause 15.8.1 of the Determination on Leave of Absence.

[13] Record, p. 101.
[14] *Ibid*, pp. 103 and 104.

[46] On 30 October 2009 and after a period of over six (6) months, the DTI declined Mr Potgieter's first application for temporary incapacity leave. In terms of clause 15.10 of the Determination on Leave of Absence, the DTI had a period of 30 working days from the date of receipt of Mr Potgieter's first application (for temporary incapacity leave) within which to approve or refuse the temporary incapacity leave granted conditionally.

[47] The preliminary issues that had to be determined upon by the Arbitrator related to the period over the maximum of 30 working days within which a decision on Mr Potgieter's application had to be made. I say so as the period falling within the maximum of 30 consecutive working days denoted by clause 15.8.1 of the Determination on Leave of Absence is the subject of the main dispute. In this matter, the Arbitrator simply made a blanket determination that included the period falling within the temporary incapacity leave conditionally granted.

[48] As part of the main dispute, PSA is seeking a determination whether or not the temporary incapacity applications should be approved. If PSA is successful in this regard, the result would, *inter alia*, be the allocation of the days of absence as an approved temporary incapacity leave with full pay. In relation to the preliminary issues, PSA was specific in that the relief sought before the Arbitrator was 'quite apart from' whether or not Mr Potgieter's temporary incapacity leave applications ought to have been approved.

[49] It was not open to the Arbitrator to make a determination on an issue that was, at that moment, not before him. What the Arbitrator was seized with was a dispute pertaining to leave that was eventually allocated as unpaid leave in relation to the period falling outside that which could have been conditionally granted as temporary incapacity leave as per the Determination on Leave of Absence, read together with clause 7.3.3 of PILIR.

[50] The Arbitrator in this matter simply did not identify the dispute he was required to arbitrate as part of the preliminary issues. It is my finding that the Arbitrator did not consider the principal issue before him.

[51] In *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and others*,[15] it was held thus:

> 'In short: A review court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable.'

[52] I, therefore, do not hesitate to find that the Arbitrator's award stands to be set aside. The Arbitrator's award is one that falls outside the realm of reasonable decisions.

[53] In the present matter, the Arbitrator did not only make a decision that no other reasonable decision-maker could have reached, he undertook the enquiry in a wrong manner and that is a reviewable irregularity under s 145(2)(a)(ii) of the LRA.[16]

[54] It was equally not open to PSA to ask, as part of the preliminary issues to be decided, that the entire durations of the temporary incapacity leave should be converted to paid leave.

[55] The real issue forming the subject of the preliminary determination sought from the Arbitrator was the question of liability in respect to the durations post the maximum of 30 consecutive working days granted as conditional temporary incapacity leave.

[56] The provisions of both the Determination on Leave of Absence and the PILIR are crafted in such a way that a decision on an application for temporary incapacity leave has to be made within 30 working days.

[57] In order words, a decision on an employee's application for temporary incapacity leave must be made well within the same period as the conditionally granted maximum of 30 consecutive working days' temporary incapacity leave.

[15] (2014) 35 *ILJ* 943 (LAC) at para 16.
[16] See: *Herholdt v Nedbank Ltd (COSATU as Amicus Curiae)* (2013) 34 *ILJ* 2795 (SCA) at para 21.

[58] In the present matter, the decision was made way after the prescribed 30 working days. The issue at hand is, therefore, whether it is fair to financially burden Mr Potgieter with the DTI's own admitted failure to stick to its own prescribed time limits.

[59] PSA, on behalf of Mr Potgieter, contends that their member would have resumed duties earlier had he been informed of the DTI's decision at an earlier date. In this regard, the following was stated by PSA in its heads of argument before the Arbitrator:

> 'The fact of the matter is that the [DTI] should, in respect of the first application, have informed [Mr Potgieter] of its decision by no later than 28 April 2009 and, in respect of the second application have informed the application (sic) of its decision by no later than 6 August 2009. Had the [DTI] done so, it is reasonable to take it that [Mr Potgieter] would have returned to work on 29 April 2009.'

[60] The above submission, together with the conceded non-compliance with the provisions of the Determination on Leave of Absence and the PILIR, was advanced as the basis for seeking to hold the DTI liable for the leave days that were allocated as unpaid leave.

[61] These leave days would, according to me, be for the period after the prescribed maximum of 30 consecutive working days denoted by clause 15.8.1 of the Determination on Leave of Absence and by clause 7.3.3.2 of the PILIR.

[62] The revoked conditionally granted temporary incapacity leave will be the subject of the main dispute pertaining to whether or not Mr Potgieter's applications ought to have been granted.

[63] This brings me to the consideration of whether to substitute the award or to remit the matter back to the PSCBC for a fresh determination on the preliminary issues.

[64] At the hearing of the matter, it was PSA's case that the DTI ought to be held liable for the leave days that were allocated as unpaid leave. This was in respect to the period after that which ought to have been conditionally granted as temporary incapacity leave in terms of the policy documents referred to above.

[65] The basis for holding the DTI liable hinges on the supposition that it is reasonable to take it that Mr Potgieter would have returned to work had he been informed timeously of the outcome of his applications.

[66] If I am to substitute the award and make any pronouncement on the DTI's liability, I must be satisfied that indeed Mr Potgieter would have returned to work had he been informed of the outcome of his applications on time. This, to me, is not a foregone deduction.

[67] On the face of Dr JA Prinsloo's remark that Mr Potgieter's 'temporary total medical incapacity' was from 18 February 2009 to 30 June 2009, I have no basis to conclude that Mr Potgieter might have resumed his duties prior to 30 June 2009.

[68] I, accordingly, find myself in agreement with Advocate Makhubele SC, for the DTI, that some form of medical evidence would be necessary for a pronouncement on the issue. The evidence and material before this Court is wholly inadequate for me to make an informed decision on Mr Potgieter's possible return to work.

[69] One of the key requirements for substitution is that this Court 'is in as good a position' as the administrative tribunal to make the decision on the matter at hand.[17] Without any medical evidence on the possibility of Mr Potgieter having been in a position to return to work prior to 30 June 2009, it cannot be said that this Court is 'in as good a position' as the PSCBC to make a pronouncement on the key issue of Mr Potgieter's possible return to work.

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[17] See: *Palluci Home Depot (Pty) Ltd v Herskowitz and others* (2015) 36 *ILJ* 1511 (LAC) at 58; *Cape Clothing Association v De Kock No and others* (2014) 35 *ILJ* 465 (LC) at par 44.

[70] Under the circumstances, the appropriate course to follow is to remit the matter back to the PSCBC for fresh determination before another Arbitrator. In my considered view, it would be prudent to have the dispute arbitrated in its entirety as opposed to it being dealt with in a piecemeal fashion.

[71] In this matter no order for costs is warranted. Both parties were justifiably aggrieved by the Arbitrator's unreasonable decision. The DTI wisely and understandably did not contest the setting aside of the award. To my mind both parties were successful. PSA was successful in having the award set aside and the DTI was successful in having the matter remitted back to the PSCBC for arbitration *de novo*.

<u>Order</u>

[72] I, accordingly, make the following order:

72.1 The later delivery of the First Respondent's answering affidavit is condoned.

72.2 The arbitration award issued by the Third Respondent on 17 May 2012 under case number PSCB 106-10/11 is hereby reviewed and set aside.

72.3 The matter is remitted back to the Second Respondent for arbitration *de novo* in respect of the entire dispute between the parties, which arbitration is to be held before an arbitrator other than the Third Respondent.

72.4 There is no order as to costs.

NP Voyi

Acting Judge of the Labour Court of South Africa

<u>Appearance:</u>

For the Applicant:	Advocate Hitchings
Instructed by:	Martins Weir-Smith Inc.
For the First Respondent:	Advocate TAN Makhubele SC
Instructed by:	The State Attorney - Pretoria