



ARBITRATION AWARD

Panelist: John Cheere Robertson
Case No.: PSCB384-17/18
Date of Award: 4 July 2018

In the Matter between:

PSA obo N Mtembu-Tala

(Union / Applicant)

and

National Prosecuting Authority EC

(Respondent)

Union / Applicant's representative: Mr A Kilian (PSA)

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DETAILS OF HEARING AND REPRESENTATION

- 1 The dispute was set down for arbitration in terms of Section 24(5) of the Labour Relations Act 66 of 1995 (LRA). The hearing was held at the National Prosecuting Authority offices in Graaff-Reinet on 31 May 2018. Mr A Kilian (PSA), represented Ms Ntombesizwe Mtembu-Tala (applicant). Mr B Mnyimba, represented the National Prosecuting Authority (respondent). The parties' representatives submitted written closing arguments by 15 June 2018 and I requested an extension within which to submit my award.

ISSUE IN DISPUTE

- 2 This dispute concerns the interpretation or application of PSCBC Collective Agreement 7 of 2000. I am required to determine whether the Collective Agreement, as interpreted, applies to the applicant's dispute, and dependent thereon appropriate relief.

BACKGROUND AND ANALYSIS OF EVIDENCE AND ARGUMENT

- 3 The parties agreed on the facts of the dispute, which sets out the background and dispute as follows:
 1. *This dispute concerns the applicant's application for TIL, set out in the table below*
 2. *Employees are entitled to 36 working days sick leave on full pay within a cycle of 3 years. (Para 7.4 PSCBC R7/2000, DLA 3.1)*
 3. *The annual leave cycle of 12 months commences on 01 January of each year*
 4. *At the time the applicant applied for TIL:*
 - o *She had exhausted her sick leave entitlement (to 36 days in the 3 year cycle ending 31 December 2018), as at end February 2017*
 - o *She had no capped leave to her credit*
 - o *She had vacation leave credits due to her of approximately 5 to 10 days.*
 5. *The applicant submitted her application for TIL for the period 01 03 2017-26 04 2017 on 15 March 2017 (A11-A26)*
 6. *With regard to the submission of her application for TIL on 15 03 2017 (A24). The applicant a prosecutor in Graaff Reinet, on her return from seeing Dr I Taylor on 01 03 2017 (A27) completed an application form for sick leave Z1, which she submitted, together with Part C completed by Dr I Taylor and handed to her on 01 03 2017 (R13), the next day for the period 01 03 2017 to 26 04 2017. Her supervisor Ms R Schuen, the control prosecutor informed the applicant on or about 12 03 2017 that she had exhausted her entitlement to sick leave and was required to apply for TIL and arranged that a colleague deliver to her a blank TIL application form for completion. The applicant completed the TIL application forms (A11-A26) and personally handed them to Ms M Le Roux (Chief Admin Clerk, Graaff Reinet) on 15 03 2017, who then emailed the completed TIL application to the HR Section in Grahamstown, which HR Section services the area including Graaff Reinet (R13). The TIL application forms given the applicant were sans R11 and accordingly not completed by the applicant or submitted by her on 15 03 2017, see above. The HR Section, Grahamstown then forwarded a blank page, R11, to Ms M Le Roux (Chief Admin Clerk, Graaff Reinet) for completion and return by the applicant on 30 03 2017 (R10). The applicant completed the blank page (A21/R17) which was then faxed back the HR Section in Grahamstown on 03 04 2017 (R17).*
 7. *It is not disputed that the applicant complied with the factual requirements as are envisaged in clause 7.5.1 (a)(i) & (ii) R 7/2000 in respect of the application for TIL.*
 8. *The respondent declined the applicant's application for TIL on 15 May 2017 (A32-A33).*

9. The applicant lodged a grievance (17 May 2017, A34-A38) which was forwarded by the respondent to SOMA (A39) and subsequently again declined on 7 July 2017 (A40).
10. Dr I Taylor, a specialist psychiatrist, diagnosed the applicant as suffering from major depression and generalized anxiety disorder for the relevant period (See Par. 2.5 of Part C dated and signed by Dr I Taylor on 01 03 2017, (R19).
11. The applicant's treatment comprised inter alia, psychotherapy and medication. The applicant's medical condition and treatment is set out in greater detail in Part C of the TIL application (R18-R30)
12. The applicant's supervisor was at all material times informed and aware of the applicant's illness / incapacity, in respect of the period in respect of which TIL was applied for. (A27, A28 & R18-R30).
13. The respondent accepted the application for TIL for processing and for purposes of making a determination thereon.
14. The application for TIL was supported by the required medical certificates and the treating Psychiatrist, Dr Taylor completed Part C of the pro forma TIL for such application (R18-R30).
15. The applicant was granted conditional incapacity leave by the respondent subject to the advices of the Health Risk Manager (SOMA) and decision there anent of the respondent on the application for incapacity leave in question
16. The Application for TIL submitted to the department were referred to SOMA
17. The applicant was off work (sick) for the period set out in the table below.
18. A registered medical practitioner duly certified the applicant's condition as a temporary incapacity for the period set out in the table below (A27 & Part C R18-R30)
19. The respondent with respect to 7.5.1 (b), conducted an investigation in accordance with Item 10(1) of Schedule 8 of the Labour Relations Act 66 of 1995 (LRA) in respect of the application for TIL in the table below by delegating such investigation to SOMA who subsequently produced a recommendation.
20. The respondent / SOMA did not attend on the applicant during the period of her absence.
21. The respondent / SOMA, apart from submitting recommendations to the respondent in respect of the declined TIL application below did not clinically examine the applicant or refer the applicant to another medical practitioner / specialist for a second opinion
22. The respondent declined the application for TIL, in the table below, for the reasons set out in the documents at A32-A33 & A40 in respect of the period in question
23. To date the respondent has not covered any portion of the period of declined TIL (i.e. the period of TIL applied for below) by way of monthly deductions from the applicant's salary or utilisation of the applicant's vacation leave credits
24. For purposes of this dispute the application for TIL and the outcome thereof, as set out in the table below is relevant:

Item	Dates & Periods	TIL Application Reference in bundle	Date Application received by Respondent / Reference in bundle	Outcome Received by Applicant: Declined / Granted / Unknown. Date & Reference in bundle
1	01 03-26 04 2017	(A11-A26 & R18-R30))	See above	Declined: 11 05 2017 (A32-A33). Received by applicant on 15 May 2017

25. The applicant returned to work on 2 May 2017 and currently reports for duty

The applicants' submissions

- 4 The applicant argued to the effect that:
 - The applicant submitted her medical certificates on 2 March 2017 together with an application for sick leave (form Z1)
 - On 12 March 2017 the applicant was informed by her supervisor that her normal sick leave was exhausted

- On 15 May 2017 some 38 working days later the respondent informed her that her application for TIL had been declined

5 In the circumstances, the applicant's claim had been declined outside the prescribed 30 days. On the basis of the judgment in *PSA obo Gouvea v PSCBC & others* (D751/09) [2013] ZALCD3 (26 February 2013) [20]) this was unfair as it amounted to retrospective treatment

The respondent's submissions

6 The respondent argued to the following effect:

- The date of submission was the date the complete application for TIL was submitted i.e. 3 April 2017
- That if one took 17 May 2017 as the date of notification of the outcome of the declined TIL, then it meant the applicant had been notified within 28 working days.

7 In the circumstances the respondent sought that the applicant's claim be dismissed

ANALYSIS OF EVIDENCE AND ARGUMENT

8 ¹ The LAC in *HOSPERSA obo Tshambi v the Department of Health: KZN*² set out what an arbitrator ought to do when there is a **dispute about the nature of a dispute**³.

- An arbitrator is required to determine the nature of a dispute objectively⁴, and not simply defer to the parties' subjective characterisation.
- The approach is one of substance over form, determined objectively on an inquisitorial basis to ascertain the relevant facts.

¹ I have submitted awards on similar facts concerning incapacity leave. In so far as the legal context and argument is concerned, what follows will, where necessary, be similar.

² In *HOSPERSA obo Tshambi v the Department of Health: KZN* (LAC) Case no. DA1/2015 (24 March 2016) (Tshambi), the LAC pointed out that it is not so that simply because a right may derive from a collective agreement, that this meant it was a section 24 dispute. E.g. in Tshambi there was no indication in the record that the respondent disputed that the collective agreement provides that an employee on suspension is entitled to full pay, or that the respondent disputed that the collective agreement bound itself and the appellant. In the circumstances, the court asked itself what the dispute about the collective agreement could have been i.e. there was no apparent dispute relating to the collective agreement. The salient facts were that an employee was suspended without pay. Had the arbitrator interrogated the applicant's categorization of the dispute, which was disputed by the respondent, it would have become apparent that the true dispute / nature of dispute was an unfair labour practice relating to suspension (s186(2)(b) of the LRA), referred out of time. The fact that an express right to be paid during suspension derived from a collective agreement did not change the nature of the dispute; rather it was simply evidence of the right. More so that the Labour Relations Act 66 of 1995 creates several special remedial processes to address different kinds of rights assigning some to particular fora, and others to be dealt with in accordance with particular procedures, one of which is a class of unfair labour practices as contemplated in section 186(2). In other words, on the basis of the true dispute, i.e. an unfair labour practice, the applicant could not succeed, unless the Bargaining Council had jurisdiction, the late referral was condoned and then subject to proof of their claim.

³ *HOSPERSA obo Tshambi v the Department of Health: KZN* (LAC) Case no. DA1/2015 (24 March 2016) [1]

⁴ *HOSPERSA obo Tshambi & Department of Health: KZN* (LAC) Case no. DA1/2015 (24 March 2016) [16]

- Although the true dispute is generally apparent from the formulation of the dispute and the parties' allegations, the true dispute may only emerge once all the evidence is in⁵.
- Failure to determine the true dispute (nature of dispute referred), leading to a decision based on an incorrect characterisation will constitute an irregularity⁶.

9 As to what is a dispute and what disputes about the interpretation or application of a collective agreement are, the LAC has pointed out that a *dispute*:

- Logically, requires at minimum, a difference of opinion about something between two or more persons
- *About the interpretation of a collective agreement requires, at minimum, a difference of opinion about what a provision of the agreement means* e.g. the situation where the parties differ over the meaning of a provision of the collective agreement.⁷
- *About the application of a collective agreement requires at minimum, a difference of opinion about whether it can be invoked⁸ (Including e.g. whether the collective agreement **is applicable** at all⁹) or whether the activity which gives rise to the **controversy is covered** by the collective agreement¹⁰ and includes whether an agreement **applies to the facts in question** and the **manner in which the agreement is applied**, which includes non-compliance¹¹.*

10 The dividing line between interpretation or application disputes may not always be clear and it is possible for both types of disputes to arise in the same case¹².

⁵ CUSA v Tao Ying Industries & others (2008) 29 ILJ 2461 (CC) [66], SASSA V NEHAWU and others (LC) C233/14 [5] dated 30 April 2014

⁶ E.g., where the formulation of the dispute is patently wrong is not bona fide, is not supported by the allegations, ill conceived or misleading. Or constructed to disguise the real dispute in order to bypass time limits laid down in the LRA, this is contrary to the principle of expedition of disputes, which these time limits were enacted to ensure. The LAC in Tshambi at par. [32] pointed out that although no time limits are prescribed for s 24 disputes, that the watchword in labour disputes is expedition. Accordingly, the yardstick against which to determine appropriate periods for the referral of such labour disputes are the provisions of section 191(1) of the Labour Relations Act 66 of 1995. Although decisions on this would have to be fact specific, the appropriate enquiry would be into the history of the engagement between the parties about the controversy and the lapse of time since engagement to resolve the controversy ceased [32].

⁷ PSA obo Swart v Department of Correctional Services: EC (2006) 27 ILJ 653 (BCA), SAMWU v SALGBC [2012] BLLR 334 (LAC) 29 November 2011 [27]

⁸ HOSPERSA obo Tshambi & Department of Health: KZN (LAC) Case no. DA1/2015 (24 March 2016) [17]

⁹ E.g., the relevant workers are not covered by the terms of the collective agreement.

¹⁰ HOSPERSA obo Tshambi & Department of Health: KZN (LAC) Case no. DA1/2015 (24 March 2016) [29]

¹¹ Referred to as the wider approach, see IMATU obo Bubb & others v SALGBC and others (SALGBC) HQ 051003 dated 7 August 2012 at [27-28] and authorities cited. See SAMWU v SALGBC [2012] BLLR 334 (LAC) 29 November 2011 [29], [30], [31] and Oelofsen & another and SAPS (2006) 27 ILJ 639 (BCA) at 648 D-E and authorities cited. And see UASA & another v BHP Billiton Energy Coal SA Ltd & another (2013) 34 ILJ 2118 (LC) [26]

¹² J Grogan. Collective Bargaining. (20017) Juta, Cape Town, 114. *The dividing line between interpretation and application disputes may not always be absolutely clear. A dispute over the interpretation of a collective*

Accordingly, although there is a difference in the meanings of the terms **interpretation** and **application** respectively, they should not be read disjunctively but as related i.e., disputes about what the agreement means and what it is applicable to¹³. That while application does not extend to enforcement¹⁴, once **application** is proven; the referring party can procure more than just a declaratory order, and can obtain pursuant to such finding, substantive relief¹⁵. This is in line with the purpose of section 24 as set out by Tlhotlhemaje J in *Tabane v PSCBC*¹⁶ and others namely:

*The purpose of section 24 of the LRA is to resolve disputes where a party to an agreement is alleged to have been in breach of the provisions of that agreement by failing to apply its terms either correctly or at all*¹⁷.

- 11 A collective agreement in terms of the Act is not an ordinary contract and the context within which a collective agreement operates under the Act is vastly different from that of an ordinary commercial contract¹⁸. The very fact that it is a collective agreement is a context material to its interpretation. Maintaining the primacy of collective agreements is quintessential to sustaining a viable and vibrant collective bargaining system¹⁹. In terms of Section 23 and 31 of the LRA, not only the actual parties to the collective agreement, but each member of the trade unions in question²⁰ / employer's organisations are also bound²¹ including the State (as employer) and Union parties²².

agreement exists if the parties disagree over the meaning of a particular provision. A dispute over the application of a collective agreement arises when the parties disagree over whether the agreement applies to or in a particular set of facts and circumstances. It is quite possible that both types of disputes may arise in the same case

¹³ *HOSPERSA obo Tshambi & Department of Health: KZN* (LAC) Case no. DA1/2015 (24 March 2016) [22]-[25] and [29] ... the potential for seamlessness between these two notions in a real dispute ...

¹⁴ ... a bargaining council may monitor and enforce compliance with its collective agreements in terms of this section (33A) or a collective agreement concluded by the parties to the council. Section 33A of the Labour Relations Act, 66 of 1995 and see *Rukwaya & others v Kitchen Bar Restaurant* (2018) 39 ILJ 180 (LAC) [18]

¹⁵ *HOSPERSA obo Tshambi & Department of Health: KZN* (LAC) Case no. DA1/2015 (24 March 2016)[22], [24]

¹⁶ *Tabane v PSCBC and others* (LC) C27/15 (28 September 2017)

¹⁷ *Tabane v PSCBC and others* (LC) C27/15 (28 September 2017) [15] with reference to *PSA obo Liebenberg v Department of Defence and others* (2013) 34 ILJ 1769 (LC) [2].

¹⁸ *North East Cape Forests v SA Agricultural Plantation and Allied Workers Union and Others*, (1997) 18 ILJ 971 (LAC)

¹⁹ *IMATU v SALGBC & others* (D476/09) (2010) 31 ILJ 1407 (LC) [11].

²⁰ *eThekweni Municipality (Health Department) v IMATU obo Foster and others* (2012) 33 ILJ 152 (LAC) [27]

²¹ See also *SAMWU and SALGA and others* (LAC) supra

²² Section 23 (3) of the LRA provides that:

"[W]here applicable, a collective agreement varies any contract of employment between an employee and employer who are both bound by a collective agreement."

Section 31 of the LRA provides that a collective agreement concluded in a bargaining council, subject to section 32, binds:

- (a) the parties to the bargaining council who are also parties to the collective agreement;
- (b) each party to the collective agreement and the members of every other party to the collective agreement in so far as the provisions thereof apply to the relationship between such a party and the members of such other party; and
- (c) the members of a registered trade union that is a party to the collective agreement and the employers who are members of a registered employer's organization that is such a party, if the collective agreement regulates-
 - (i) terms and conditions of employment; or
 - (ii) the conduct of employers in relation to their employees or the conduct of the employees in relation to their employers.

Collective agreements differ markedly from conventional contracts²³, and are binding on and may vary existing contracts of non-signatories by virtue of the LRA. The purpose and primary objectives of the LRA²⁴, the values of the RSA Constitution²⁵ e.g. fairness and equity²⁶, to promote orderly collective bargaining²⁷, to ensure effective and sound industrial relations, the effective, fair and speedy resolution of disputes,²⁸ to advance economic development, social justice, labour peace and democratisation of the workplace²⁹, human dignity, equality, advancement of rights, non discrimination, to uphold the rule of law, accountability and transparency as may be relevant to the case in question, also inform the process of interpretation (including the interpretation of a collective agreement).

12 The following examples from case law, in this regard, are instructive:

- Collective agreements are subject to the Principle of Legality and cannot trump regulations / legislation unless expressly provided for³⁰
- *A bargaining council is empowered in terms of s33A of the LRA to enforce a collective agreement, which it has concluded. The dispute resolution procedure provided for in clause 28(a) of the collective agreement seeks to do precisely that. It is binding on both the appellants and the respondent, and it provides each of them with a remedy which they are obliged to pursue in the event of non-compliance by the other party.*³¹
- *A collective agreement may, like any other agreement, also be determined for fundamental breach. Any dispute about the termination of an agreement would be arbitrable under s 24. ... Collective agreements are legally binding instruments. Any dispute over the interpretation or application (which would include enforcement) of a collective agreement is a rights dispute, and a resort to power to settle differences is not permitted*³². Where the main dispute concerned the lawfulness or otherwise of the termination of or non-compliance with a collective agreement. This is the quintessential interpretation or application dispute in terms

²³ See also **Fakude & others v Kwikhot (Pty) Ltd** (2013) 34 ILJ 2024 (LC [24], [25]

²⁴ Sections 1 and 3 set out the primary objects and manner of interpretation of the Labour Relations Act 66 of 1995.

²⁵ The Constitution of the Republic of South Africa, 1996 and see **CUSA v Tao Ying Metal Industries and others** (2008) 29 ILJ 246 CC [103]

²⁶ **SAMWU v SALGA and others** (LAC) Case No. DA 06/09 dated 29 November 2011

²⁷ **eThekweni Municipality (Health Department) v IMATU obo Foster** (2012) 33 ILJ 152 (LAC) at [26]

²⁸ **North East Cape Forests v SA Agricultural Plantation and Allied Workers Union and Others**, 1997) 18 ILJ 971 (LAC)

²⁹ **NEHAWU v UCT and others**. See also **CUSA v Tao Ying Metal Industries and others** (2008) 29 ILJ 246 CC [95]

³⁰ **NEHAWU, PSA, HOSPERSA, PAWUSA & others v MEC DOH: EC & others** (LC) Case No's: P118/11; 125/11 & 127/11, 11 February 2013, [17]-[22]

³¹ **Rukwaya & others v Kitchen Bar Restaurant** (2018) 39 ILJ 180 (LAC) [18]

³² Clive Thompson Organisational Rights and Collective Bargaining in Thompson & Benjamin SA Labour Law (vol 1 service 41 of 2000) AA1-140-141, cited with approval in **UASA & another v BHP Billiton Energy Coal SA Ltd & another** (2013) 34 ILJ 2118 (LC) [23]-[24]

of s 24, in respect of which the CCMA has jurisdiction³³ and that the CCMA in dealing with a s 24 dispute within its jurisdiction, has the power to determine any issue which gave rise to the termination of the collective agreement³⁴.

- [41] In *Mzeku & others v Volkswagen SA (Pty) Ltd & others*³⁵ the Labour Appeal Court confirmed that a collective agreement is binding on all union members, even those who are in dispute with their own union about its terms. The only limitation on the primacy of collective agreements is where a term is unlawful or unconstitutional. Thus in *SACCAWU & another v Shakoane & others*³⁶ the Labour Appeal Court held that a collective agreement may not override statutory provisions: and in *Larbi-Odam & others v MEC for Education*³⁷ the Constitutional Court held that, where the effect of an agreed provision was to unfairly discriminate, its origin in a collective agreement would not constitute a justification³⁸.
- ...[A] collective agreement is unlike other ordinary contracts and that the primary objects of the Act are better served by an approach that is practical to the interpretation and application of such agreements. This, it was stated, was better suited to promote the 'effective, fair and speedy resolution of labour disputes'³⁹
- Where a collective agreement has been applied correctly, i.e. there is no dispute as to the interpretation or application, the Bargaining Council does not have jurisdiction to decide whether this is unfair⁴⁰.
- A collective agreement may not be applied in an unfair manner, (e.g. where a discretion is exercised such that it has a retrospective effect, contrary to agreed time frames, this would constitute an unreasonable and arbitrary exercise of a discretion with unfair consequences to an employee and inconsistent with the objectives of the LRA)⁴¹

³³ *UASA & another v BHP Billiton Energy Coal SA Ltd & another* (2013) 34 ILJ 2118 (LC) [26]

³⁴ *UASA & another v BHP Billiton Energy Coal SA Ltd & another* (2013) 34 ILJ 2118 (LC) [31]

³⁵ (2001) 22 ILJ 1575 (LAC)

³⁶ (2000) 21 ILJ 1963 (LAC)

³⁷ 1998 (1) SA 745 (CC)

³⁸ *Department of the Premier, Western Cape v Plaatjies NO & others* (2013) 34 ILJ 2876 (LC) per Steenkamp J Par at [41] citing from *Larbi-Odam & others v MEC for Education* 1998 (1) SA 745 (CC)

³⁹ *North East Cape Forests v SA Agricultural Plantation and Allied Workers Union and Others*, (1997) 18 ILJ 971 (LAC) 980C, referred to with approval by Mlambo JP in *SAMWU v SALGA and others* (DA 06/09) (2012) 33 ILJ 353 (LAC) [15]

⁴⁰ *Department of the Premier, Western Cape v Plaatjies NO & others* (2013) 34 ILJ 2876 (LC) per Steenkamp J Par [46]-[47]

⁴¹ *PSA and HC Gouvea v PSCBC, Commissioner R Lyster NO and Department of Land Affairs* (D751/09) [2013] ZALCD 3 (26 February 2013) at [20], to the effect that a collective agreement may not be applied unfairly. The LC held, in the context of the employer failing to conduct investigations in accordance with Item 10(1) of Schedule 8 of the LRA in 30 days as prescribed in R 7/2000 that the belated refusal to grant the employee TIL, acquired a retrospective effect / application and was accordingly an unreasonable and arbitrary exercise of a discretion with unfair consequences for the employee. "The limited facts of this matter suggest that on 24 June 2008 the third respondent had finalised all investigations and had made its decision which it communicated to Ms Gouvea by a letter it issued to her on that day. She had to report back at work on 1 July 2008. From the given

- An elementary tenet of collective bargaining is that the constituency is bound by the bargain, good or bad, that its representatives make on its behalf. The obvious remedy available to the constituency is not to elect or re-elect its representatives, perhaps to dismiss them or even to sue or charge them for negligence, fraud or other causes. The bargain, however, stands, unless it is manifestly unconstitutional, a submission not made in these proceedings⁴².
- Where constitutional validity is not an issue it seems that an interpretation that accords best with the general purpose of the Act (as set out in section 1) and the more specific purpose of a particular section, should be followed⁴³
- The declared purpose of the LRA is to advance economic development, social justice, labour peace and democratisation of the workplace. This is to be achieved by fulfilling its primary objects, which include giving effect to s23 of the Constitution and South Africa's international obligations. The LRA must therefore be purposively construed in order to give effect to the Constitution⁴⁴
- The managerial powers of the DG cannot, in my view, trump the statutory powers of the arbitrator when interpreting and applying the collective agreement.⁴⁵
- In interpreting the collective agreement, the arbitrator is required to consider the aim, purpose and all the terms of the collective agreement. Furthermore, the arbitrator is enjoined to bear in mind that a collective agreement is not like an ordinary contract. Since the arbitrator derives his/her powers from the Act he/she must at all times take into account the primary objects of the Act. The primary objects of the Act are better served by an approach that is practical to the interpretation and application of such agreements, namely, to promote the effective, fair and speedy resolution of labour disputes. In addition, it is expected

facts, as I understand them, a report was issued by the Health Risk Manager declining the application for a periodical temporary incapacity leave for 4 December 2007 to 30 June 2008. This report sought to have a retrospective effect. The consequence of a retrospective effect is that it amounts to an unreasonable and arbitrary exercise of a discretion with unfair consequences to an employee. Nowhere in clause 7.5 of Resolution 7 of 2000, is there a suggestion that the employer may not grant further sick leave after the lapse of a 30 day period. On the contrary, as investigations shall be in accordance with item 10 (1) of Schedule 8 of the Act, a further sick leave period may be granted to the employee." Subsequent to the decision in *Tshambi* two further decisions of the Labour Court have been handed down, see *POPCRU & another v Department of Correctional Services & another* (2017) 38 ILJ 964 (LC) to the effect that where a claim for additional sick leave in terms of PILIR, conditionally granted, is subsequently refused, all be it long outside the 30 day period, no right is infringed and consequently where a medical assessment does not warrant additional sick leave, section 38 of the Public Service Act applies and an employee has no claim in terms of PILIR. And see *Department of Roads and Transport v PSCBC and others* (LC) Case no. PR40/14 (15 February 2017), where the Labour Court confirmed that the meaning of "shall" in clause 7.5.1 (c) of Resolution 7/2000 with reference to the 30-day period was peremptory, consistent with the objectives of the LRA.

⁴² *IMATU v SA Local Government Bargaining Council & others* (2010) 31 ILJ 1407 (LAC) [13]

⁴³ *Ceramic Industries Ltd t/a Betta Sanitary Ware v NCBWU* (2) (1997) 18 ILJ 671 (LAC) 675G-H referred to in *SAMWU v SALGBC & others* (2012) 33 ILJ 353 (LAC) [15]

⁴⁴ *NEHAWU v University of Cape Town & others* (2003) 24 ILJ 95 (CC) [41] referred to in *SAMWU v SALGBC & others* (2012) 33 ILJ 353 (LAC) [15]

⁴⁵ *Per Tlalets DJP in Western Cape Department of Health v Van Wyk & others* (2014) 35 ILJ 3078 (LAC). [21]

of the arbitrator to adopt an interpretation and application that is fair to the parties.⁴⁶

- o I am satisfied, therefore, that the commissioner properly applied his mind to the issues before him, that he considered all the material before him and adopted an approach that gave effect to the purpose of the collective agreement in a manner that achieved equity and fairness amongst eThekweni's employees. If one interprets the collective agreement within the context of the shift workers, considering one of the purposes of the LRA, which is to promote fair labour practices, then without doubt the commissioner's approach of fairness cannot be said to be unreasonable. The award of the commissioner is clearly one that a reasonable decision-maker would have made⁴⁷.

- 13 It is preferable to refer to the purpose for which the particular instrument has been crafted, rather than "intention". The purpose of an Act, or as in the current case, of a collective agreement, is the guiding factor in determining the meaning thereof and accordingly, a meaning, taking into account the text, context and material known to those responsible for its production, which facilitates the attainment of the purpose of the collective agreement, which in turn is informed by the purposes of the LRA, will be adopted above another that does not⁴⁸. Our courts have adopted a purposive approach to the interpretation of statutes including the LRA and collective agreements⁴⁹

⁴⁶ Per Tlaletsi DJP in *Western Cape Department of Health v Van Wyk & others* (2014) 35 ILJ 3078 (LAC). [22]

⁴⁷ Per Mlambo J in *SAMWU v SALGA and others* (DA 06/09) (2012) 33 ILJ 353 (LAC) [19]

⁴⁸ See Hogg. P.W. 1992. *Constitutional Law of Canada*. 3rd edition. 809-815 to the effect that a purposive approach, unlike a generous broad or liberal approach, which may overshoot the meaning of a statute or in this case a collective agreement, may be helpful, but only so long as it is subordinate to purpose. A purposive approach will normally narrow the scope of meaning or a right to include activity that comes within that purpose and exclude activity that does not. This is echoed in the provisions of Section 3 & Section 1 of the Labour Relations Act, 66 of 1995.

⁴⁹ See **SAMWU v SALGA and others** (LAC), Case No. DA 06/09 dated 29 November 2011 [14] per Mlambo JP. **Western Cape Department of Health v Van Wyk & others** (2014) 35 ILJ 3078 (LAC) [21]-[22]. **NEHAWU v University of Cape Town and others** (2003) 24 ILJ 95 (CC) [40]-[41]

[40] In my view the focus of section 23(1) is, broadly speaking, the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both. In giving content to that right, it is important to bear in mind the tension between the interests of the workers and the interests of the employers which is inherent in labour relations. Care must therefore be taken to accommodate, where possible, these interests so as to arrive at the balance required by the concept of fair labour practices. It is in this context that the LRA must be construed.

The Labour Relations Act

[41] The declared purpose of the LRA "is to advance economic development, social justice, labour peace and the democratization of the workplace." This is to be achieved by fulfilling its primary objects which includes giving effect to s 23 of the Constitution. It lays down the parameters of its interpretation by enjoining those responsible for its application to interpret it in compliance with the Constitution and South Africa's international obligations. The LRA must therefore be purposively construed in order to give effect to the Constitution.

14 The approach to the interpretation of documents including legislation, statutory instruments and contracts was set out by the Supreme Court of Appeal in **Natal Joint Municipal Pension Fund v Endumeni Municipality**⁵⁰ as follows:

[18] Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own⁵¹. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School*⁵². The present state of the law can be expressed as follows. **Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors**⁵³. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself'⁵⁴, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.

[19] All this is consistent with the 'emerging trend in statutory construction'⁵⁵. It clearly adopts as the proper approach to the interpretation of documents the second of the two possible approaches mentioned by Schreiner JA in *Jaga v Dönges NO* and another⁵⁶, **namely that from the outset one considers the context and the language together, with neither predominating over the other. This is the approach that courts in South Africa should now follow, without the need to cite authorities from an earlier era that are not necessarily consistent and frequently reflect an approach to interpretation that is no longer appropriate. The path that Schreiner JA pointed to is now received wisdom elsewhere. Thus Sir Anthony Mason CJ said:**

⁵⁰ (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012) per Wallis JA (Farlam, Van Heerden, Cachalia and Leach JJA concurring) (footnotes included)

⁵¹ Spigelman CJ describes this as a shift from text to context. See 'From Text to Context: Contemporary Contractual Interpretation', an address to the Risky Business Conference in Sydney, 21 March 2007 published in *JJ Spigelman Speeches of a Chief Justice 1998 – 2008* 239 at 240. The shift is apparent from a comparison between the first edition of Lewison *The Interpretation of Contracts* and the current fifth edition. So much has changed that the author, now a judge in the Court of Appeal in England, has introduced a new opening chapter summarising the background to and a summary of the modern approach to interpretation that has to a great extent been driven by Lord Hoffmann.

⁵² *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School* [2008] ZASCA 70; 2008 (5) SA 1 (SCA) paras 16 - 19. That there is little or no difference between contracts, statutes and other documents emerges from *KPMG Chartered Accountants (SA) v Securefin Ltd & another* 2009 (4) SA 399 (SCA) para 39.

⁵³ Described by Lord Neuberger MR in *Re Sigma Finance Corp* [2008] EWCA Civ 1303 (CA) para 98 as an iterative process. The expression has been approved by Lord Mance SCJ in the appeal *Re Sigma Finance Corp* (in administrative receivership) *Re the Insolvency Act 1986* [2010] 1 All ER 571 (SC) para 12 and by Lord Clarke SCJ in *Rainy Sky SA and others v Kookmin Bank* [2011] UKSC 50; [2012] Lloyd's Rep 34 (SC) para 28. See the article by Lord Gribner QC 'The Iterative Process of Contractual Interpretation' (2012) 128 LQR 41.

⁵⁴ Per Lord Neuberger MR in *Re Sigma Finance Corp* [2008] EWCA Civ 1303 (CA) para 98. The importance of the words used was stressed by this court in *South African Airways (Pty) Ltd v Aviation Union of South Africa & others* 2011 (3) SA 148 (SCA) paras 25 to 30.

⁵⁵ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* [2004] ZACC 15; 2004 (4) SA 490 (CC) para 90.

⁵⁶ *Jaga v Dönges NO & another, Bhana v Dönges NO & another* 1950 (4) SA 653 (A) at 662G-663A.

'Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasise the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise.'⁵⁷

More recently Lord Clarke SCJ said 'the exercise of construction is essentially one unitary exercise'.⁵⁸

- 15 In **Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd** (687/12) [2013] ZASCA 120 (20 09 2013) the SCA, with reference to **KPMG Chartered Accountants (SA) v Securefin Ltd & another**⁵⁹ and **Natal Joint Municipal Pension Fund v Endumeni Municipality**⁶⁰, confirmed that in terms of the integration / parol evidence rule, evidence cannot be led to add to, detract from or modify the words / provisions constituting the contract, however external evidence to prove the meaning of the words that make up the contract are admissible from the outset of the inquiry, irrespective of whether there is any ambiguity as follows:

*These cases make it clear that in interpreting any document the starting point is inevitably the language of the document but it falls to be construed in the light of its context, the apparent purpose to which it is directed and the material known to those responsible for its production. Context, the purpose of the provision under consideration and the background to the preparation and production of the document in question are not secondary matters introduced to resolve linguistic uncertainty but are fundamental to the process of interpretation from the outset*⁶¹.

- 16 In summary, where a dispute exists as to the interpretation or application of a collective agreement an arbitrator is enjoined to adopt a practical and purposive approach to the interpretation of the collective agreement, *taking into account the text used in the light of ordinary rules of grammar and syntax; the context in which the provision appears, the apparent purpose to which it is directed and the material known to those responsible for its production*⁶², and adopt an interpretation and application that is fair to the parties⁶³ in accordance with the purpose and primary objectives of the LRA⁶⁴.

⁵⁷ K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd [1985] HCA 48; (1985) 157 CLR 309 at 315.

⁵⁸ Rainy Sky SA and others v Kookmin Bank supra para 21.

⁵⁹ KPMG Chartered Accountants (SA) v Securefin Ltd & another 2009 (4) SA 399 (SCA) paras 39 and 40

⁶⁰ Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) paras 18 and 19.

⁶¹ Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd (687/12) [2013] ZASCA 120 [16]

⁶² SA Municipal Workers Union V SA Local Bargaining Council & others (2012) 33 ILJ 353 (LAC) [15]

⁶³ PSA obo Liebenberg v Department of Defence & others (2013) 34 ILJ 1769 (LC) [29] and see Spies v National Commissioner SAPS [JOL] 21525 (LC) [22] referred to in Janse Van Rensburg and others v Minister of Safety and Security [2009] 4 BLLR 400 (LC) [25]

⁶⁴ Western Cape Department of Health v Van Wyk & others (2014) 35 ILJ 3078 (LAC)

[22] In interpreting the collective agreement the arbitrator is required to consider the aim, purpose and all the terms of the collective agreement. Furthermore, the arbitrator is enjoined to bear in mind that a collective agreement is not like an ordinary contract. Since the arbitrator derives his/her powers from the Act he/she must at all times take into account the primary objects of the Act. The primary objects of the Act are better served by an approach that is practical to the interpretation and application of such agreements, namely, to promote the effective, fair and speedy resolution of labour disputes. In addition it is expected of the arbitrator to adopt an interpretation and application that is fair to the parties.

See also Tabane v PSCBC and others (LC) C27/15 (28 September 2017) [15]. The purpose of section

An arbitrator is empowered to determine a dispute concerning the **interpretation or application** of a collective agreement by way of an appropriate award that gives effect to such collective agreement⁶⁵. The determination is not a review of the employer's decision⁶⁶ but a determination of the dispute referred by the applicant in terms of the Labour Relations Act 66 of 1995⁶⁷

- 17 The applicant has formulated her claim as one concerning the interpretation or application of a collective agreement, namely PSCBC Resolution 7/2000, relating to the declining of her application for TIL. The applicant contends that the respondent failed to apply the provisions of clause 7.5.1 of PSCBC Resolution 7/2000, in respect of the period within which it should have conducted the investigation into the nature and

24 of the LRA is to resolve disputes where a party to an agreement is alleged to have been in breach of the provisions of that agreement by failing to apply its terms either correctly or at all. The principles applicable to the interpretation of collective agreements are trite as restated in *Western Cape Department of Health v Van Wyk and others*. The legal position is that:

- a) When interpreting a collective agreement, the arbitrator is enjoined to bear in mind that a collective agreement is not like an ordinary contract, and he/she is therefore required to consider the aim, purpose and all the terms of the agreement;
- b) The primary objects of the LRA are better served by an approach which is practical to the interpretation of such agreements, namely to promote the effective, fair and speedy resolution of labour disputes. In addition, it is expected of the arbitrator to adopt an interpretation and application that is fair to the parties.
- c) A collective agreement is a written memorandum which is meant to reflect the terms and conditions to which the parties have agreed at the time that they concluded the agreement.
- d) The courts and arbitrators must therefore strive to give effect to that intention, and when tasked with an interpretation of an agreement, must give to the words used by the parties their plain, ordinary and popular meaning if there is no ambiguity. This approach must take into account that it is not for the Courts or arbitrators to make a contract for the parties, other than the one they in fact made (*Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 ALL SA 262 (SCA));
- e) The parol evidence rule when interpreting collective agreements is generally not permissible when the words of the memorandum are clear. [Note the distinction between evidence to add to, detract or modify the words used in a contract (which is inadmissible) and the admissibility of evidence from the outset to prove the meaning of the words irrespective of ambiguity See *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd* (687/12) [2013] ZASCA 120 [16]]
- f) Collective agreements are generally concluded following upon protracted negotiations, and it is expected of the parties to those agreements to remain bound by their provisions. It therefore follows that such agreements cannot be amended unilaterally.

⁶⁴ *PSA obo Liebenberg v Department of Defence & others* (2013) 34 ILJ 1769 (LC) [29] and see *Spies v National Commissioner SAPS* [JOL] 21525 (LC) [22] referred to in *Janse Van Rensburg and others v Minister of Safety and Security* [2009] 4 BLLR 400 (LC) [25]

⁶⁵ S 138. CCMA accreditation of bargaining councils in terms of S 127 of the Labour Relations Act 66 of 1995; Section 138(9) of the Labour Relations Act 66 of 1995 provides that: "The commissioner may make any appropriate arbitration award in terms of this Act, including but not limited to, an award-

- (a) that gives effect to any collective agreement;
- (b) that gives effect to the provisions and primary objects of this Act;
- (c) that includes or is in the form of a declaratory order" (emphasis added)

⁶⁶ See *Minister of Safety and Security v SSSBC and others* (2010) 31 ILJ 2680 (LC) [24]. Although this matter deals with promotion and S 193(4), the argument is equally applicable to the interpretation or application of collective agreements (S 24 & S 31) and S 138(9). In addition, arbitration is a hearing *de novo* and accordingly a fresh determination of the dispute.

⁶⁷ See *Western Cape Department of Health v Van Wyk & others* (2014) 35 ILJ 3078 (LAC). [21] The managerial powers of the DG cannot, in my view, trump the statutory powers of the arbitrator when interpreting and applying the collective agreement. [21] ... The primary objects of the Act are better served by an approach that is practical to the interpretation and application of such agreements, namely, to promote the effective, fair and speedy resolution of labour disputes. In addition, it is expected of the arbitrator to adopt an interpretation and application that is fair to the parties.

extent of her incapacity and I am required to determine whether the provisions, as interpreted, apply to the applicant's situation.

18 In the circumstances, I am satisfied, given the above and the nature of the applicant's dispute, that:

- The main issue concerns the interpretation and application of PSCBC Resolution 7/2000
- The appropriate forum for the applicant to challenge the respondent's decision relating to the declining of her applications for TIL, in terms of the said collective agreement, is the PSCBC⁶⁸.

19 Resolution 7 of 2000 as amended by PSCBC Resolutions 5 of 2001, 15 of 2002 and 1 of 2007 (Referred to herein as R 7/2000⁶⁹) amongst other things at paragraphs 7.4 and 7.5 covers **normal sick leave**, and **incapacity management** i.e. **temporary incapacity leave (TIL) and permanent incapacity leave (PIL)** including **Ill Health Retirement (IHR)**. R 7/2000 is amplified by the Policy and Procedure on Incapacity Leave and for Ill Health Retirement (PILIR)⁷⁰ determined by the Minister for Public Service and Administration (**MPSA**) in terms of section 3(3) of the Public Service Act, 1994. PILIR was introduced by the **dpsa** in order to guide departments to properly manage applications for sick and incapacity leave (TIL/ PIL & IHR) in accordance with R 7/2000 and to control and streamline procedures to expedite such processes. In addition, *The Determination and Directive on Leave of Absence in the Public Service* (Determination of Leave) made by the Minister for the Public Service and Administration (**MPSA**) in terms of section 3(5)

⁶⁸ *PSA obo Liebenberg v Department of Defence & others* (2013) 34 ILJ 1769 (LC) [29] and see *Spies v National Commissioner SAPS* [JOL] 21525 (LC) [22] referred to in *Janse Van Rensburg and others v Minister of Safety and Security* [2009] 4 BLLR 400 (LC) [25]

⁶⁹ R 7/2000 is binding on and applies to the State as employer and employees who fall within the registered scope of the PSCBC. Any disputes concerning the interpretation or application thereof shall be dealt with according to the dispute resolution procedure of the PSCBC, see par 2 and 14 of R 7/2000.

⁷⁰ PILIR, in addition to adding detail in the form of time periods, structures, reporting, nature of and submission of documents and reference to the health risk manager (HRM), a company of multi disciplinary medical experts, specializing in occupational medicine, appointed by the **dpsa** and National Treasury: Pensions Administration, who assess and advise the employer on employees' applications for incapacity relief, the employer being responsible for the final decision (see e.g. PILIR paragraph 6.4, 6.5, 7.1.1, 7.2.9 & 8), *inter alia* all emphasize that TIL is not an automatic entitlement but is granted at the discretion of the employer and that where TIL is refused the employer must cover the period of absence as requested by the employee or where the employee fails to notify the employer or there are insufficient annual leave credits, by unpaid leave (e.g. See PILIR paragraphs 7.2.11, 7.3.5.1 (g) or 7.3.5.2 (j), depending on whether an application is for Short Period of TIL (1-29 working days requested per occasion) or Long Period of TIL (30 working days or more). In practical terms this will mean, that where there are no leave credits the employer will effect deductions from the employee's salary to recover the amount already disbursed as salary, to the employee, for the period/s in question. While PILIR, does not necessarily fall within the ambit of jurisdiction of the PSCBC, it provides the context for a consideration of applications for incapacity leave, the employer being required, at the very least, to comply with its own policy documents.

and 5(6) of the Public Service Act, 1994 as amended, amongst other things, gives effect to clause 7 of R 7/2000.

- 20 PSCBC Resolution 7/2000 makes provision for incapacity management relating to temporary and permanent incapacity in excess of the 36 days normal sick leave and Ill Health Retirement (IHR) at Par 7.5. Par 7.5.1, PSCBC Resolution 7 of 2000, provides for the extension of sick leave in the case where an employee has exhausted their 36 working days sick leave⁷¹ in a particular sick leave cycle as follows:

Temporary Incapacity Leave:

- (a) *An applicant 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:***
- (i) *her or his supervisor is informed that the applicant is ill, and*
 - (ii) *a relevant registered medical and/or dental practitioner has duly certified such a condition in advance as temporary incapacity except where conditions do not allow.*
- (b) *The employer shall, during 30 working days, investigate the extent of the inability to perform normal official duties, the degree of incapacity and the cause thereof. Investigations shall be in accordance with item 10(1) of Schedule 8 in the Labour Relations Act of 1995*

- 21 The provisions of Item 10(1) of Schedule 8 to the Labour Relations Act, 66 of 1995 are incorporated by reference (see Par 7.5.1 (b) of R 7/2000)⁷². The employer is required, within a period of 30 working days, to assess the degree of incapacity, the extent and cause thereof in accordance with the provisions of Item 10(1). Item 10(1) of Schedule 8 to the LRA reads as follows:

10 Incapacity: Ill health or injury

- (1) *Incapacity on the grounds of ill health or injury may be temporary or permanent. If an employee is temporarily unable to work in these circumstances, the employer should investigate the extent of the incapacity or the injury. If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should*

⁷¹ Par. 7.4 of R 7/2000 provides that an employee is entitled to the grant of 36 working days sick leave on full pay in a 3 year cycle.

⁷² See also *TVET SA (Pty) Ltd v Swanepoel, CCMA & another (LC) C882/2015 [25]-[27]* where the court held that Item 10 & 11 of the Code of Good Practice: Dismissal, is binding on all Commissioners in terms of Section 188(2) of the Labour Relations Act, 66 of 1995.

investigate all the possible alternatives short of dismissal. When alternatives are considered, relevant factors might include the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement for the ill or injured employee. In cases of permanent incapacity, the employer should ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee's disability.

- 22 Par 7.5.1(a) of R 7/2000 provides that an employee **may** be granted sick leave on full pay, in this case TIL. The word *may* signify that the grant is discretionary. Read with par 7.4, an employee's entitlement to paid sick leave is limited to 36 days in a 3 year cycle and any further paid sick leave, referred to as temporary incapacity leave (TIL), is subject to the employer's approval. In the circumstances, whether or not an employee is granted TIL depends on the discretion of the employer after investigation and approval as per Par 7.5.1 of R 7/2000.
- 23 An employee who has exhausted their 36 working days sick leave *vide* par 7.4, of R 7/2000 may be granted additional sick (incapacity) leave (TIL) on full pay where the provisions of paras 7.5.1(a) (i) & (ii) of R 7/2000 are complied with and the employer after investigations, including investigations in accordance with Par. 7.5.1 (b) of R 7/2000 and Item 10(1) of Schedule 8 to the LRA, so decides. In this regard, R 7/2000 lays down no minimum / maximum period for TIL. In terms of PILIR, TIL is divided into TIL less than 30 days and Long TIL (L/TIL) i.e. 30 days and more. This however is a requirement of PILIR and not R 7/2000
- 24 In summary:
- An employee is entitled to 36 working days sick leave with full pay in a 3 year cycle.
 - Where an employee has exhausted their 36 days sick leave in a 3 year cycle, and according to the relevant medical practitioner requires to be off work due to a temporary incapacity, they may be granted paid sick leave (TIL) at the discretion of the employer provided that:
 - Their supervisor is informed of their illness⁷³; and

⁷³ Par 7.5.1 (a)(i) R 7/2000. In terms of Clause 7.1.8 of PILIR the application should be submitted within 5 working days after the first day of absence. A similar provision is made for the submission of TIL by an employee, in the Determination and Directive on Leave of Absence in the Public Service, August 2012 (Determination on Leave)

- A registered medical/dental practitioner, certifies in advance (unless this is not possible in the circumstances)⁷⁴, that the employee is required to be absent from work, due to a temporary incapacity
- The employer shall, during 30 working days, investigate the extent of the inability to perform normal official duties, the degree of the inability and the cause thereof. Investigations shall be in accordance with Item 10(1) of Schedule 8 of the LRA⁷⁵ to the following effect:
 - The employer should investigate whether the incapacity⁷⁶ may be temporary or permanent.
 - If the employee is temporarily unable to work the employer should investigate the extent of the incapacity or injury.
 - If the employee is likely to be absent for an extended period⁷⁷, the employer should investigate all possible alternatives short of dismissal (in this regard relevant factors might include the nature of the job, period of absence, seriousness of the illness or injury, the possibility of securing a temporary replacement for the ill or injured employee).
 - If an employee is permanently incapacitated, the employer should ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee's incapacity.
- Where TIL granted conditionally is refused, the period is covered by way of unpaid leave⁷⁸, unless the employee has existing leave credits (annual leave or capped leave) that may be used.

at clause 15.6. In addition and in the event an employee does not submit their application within the indicated period, then in terms of PILIR and the Determination on Leave (at 7.1.9, 7.1.9.1 & 7.9.2 and 15.7, 15.7.1 & 15.7.2 respectively) the employee's manager or supervisor must notify the employee that unless an application is received within 2 working days or the employee submits compelling reasons why such application cannot be submitted, the failure by an employee to submit their application within the prescribed period or failure by the supervisor/manager to properly manage it, *must be viewed in a serious light and disciplinary steps should be taken.*

⁷⁴ Par 7.5.1 (a)(ii) R 7/2000

⁷⁵ See Par 7.5.1 (b) R 7/2000

⁷⁶ Incapacity on the grounds of ill health or injury. Item 10(1), Schedule 8, Code Of Good Practice Dismissal to the Labour Relations Act 66 of 1995

⁷⁷ That is a period that is unreasonably long in the circumstances. Item 10(1), Schedule 8, Code Of Good Practice Dismissal to the Labour Relations Act 66 of 1995

⁷⁸ With regard to the issue of unpaid leave Par. 7.10 (a) of R 7/2000 provides that only in exceptional cases may an employer grant an employee more than 184 days of unpaid vacation leave in a period of 18 months. In terms of Par 26 of the Determination and Directive on Leave of Absence in the Public Service, made by the Minister for the dpsa, a Head of Department may in exceptional circumstances grant an employee more than 184 days of unpaid leave in a period of 18 months.

- If the employee is not satisfied with the employer's decision, s/he may lodge a grievance and dependent on the outcome refer a dispute to the General Secretary of the PSCBC⁷⁹.

25 R 7/2000 refers to the employer taking the necessary decisions, and as stated above the HRM is appointed to advise and make recommendations to the employer in respect of applications for incapacity and IHR. The responsibility for making such investigations and for taking such decisions within the time frames agreed in R 7/2000 however rests on the respondent, not the HRM. In so far as it may be relevant, no directive or act of a minister / functionary may be contrary to a collective agreement that concerns conditions of employment of employees appointed in terms of the Public Service Act⁸⁰

26 The clear purpose of Par. 7.5. 1 of PSCBC Resolution 7/2000 (and PILIR, see above) is to ensure that employees' incapacity is dealt with in a controlled and orderly manner, properly managed, addressed and resolved within the relevant time frames, which if followed would result in TIL being confirmed / declined, alternatively the accommodation of the employee (but within the time frame provided) in line with the principle of effective, fair and speedy resolution of labour disputes.

27 In the matter of **PSA and Another v PSCBC and Others** (D751/09) [2013] ZALCD 3 (**Gouvea**), the Labour Court, in dealing with the failure of an employer to render a decision regarding the approval or disapproval of TIL within the 30 day period, per Cele J stated as follows:

[20] The limited facts of this matter suggest that on 24 June 2008 the third respondent had finalised all investigations and had made its decision which it communicated to Ms Gouvea by a letter it issued to her on that day. She had to report back at work on 1 July 2008. From the given facts, as I understand them, a report was issued by the Health Risk Manager declining the application for a periodical temporary incapacity leave for 4

⁷⁹ Par 7.2.10.2 (c) of PILIR / Par 15.13 (d) of the *Determination and Directive on Leave of Absence in the Public Service*

⁸⁰ See the Public Service Act, 1994: E.g. S 6(b), S 5(5) & 5(4)(b). In terms of sections 5 (6)(a), 5 (6)(b) and 5 (4)(b) of the Public Service Act, 1994, a collective agreement concluded in a bargaining council established for the whole or a particular sector in the public service, shall in respect of conditions of service of employees appointed in terms of the Public Service Act, be deemed a determination by the MPSA in terms of section 3(5). The MPSA for purposes of the proper implementation of the collective agreement, may elucidate or supplement such determination by means of a directive, provided the directive is not in conflict with or derogates from the terms of the agreement. In terms of section 5(4)(b) Any act by any functionary in terms of the Public Service Act may not be contrary to the provisions of any collective agreement concluded by a bargaining council established for the public service or sector thereof. See also *Western Cape Department of Health v Van Wyk & others* (2014) 35 ILJ 3078 (LAC). [20]-[21].

December 2007 to 30 June 2008. **This report sought to have a retrospective effect. The consequence of a retrospective effect is that it amounts to an unreasonable and arbitrary exercise of a discretion with unfair consequences to an employee.** Nowhere in clause 7.5 of Resolution 7 of 2000, is there a suggestion that the employer may not grant further sick leave after the lapse of a 30 day period. On the contrary, as investigations shall be in accordance with item 10 (1) of Schedule 8 of the Act, a further sick leave period may be granted to the employee.

- 28 The Labour Court in **Department of Roads & Transport V PSCBC and others**⁸¹ per Lallie J, relied with approval on the decision of Cele J in **Gouvea**, and held that the 30 day period in PSCBC R 7/2000, consistent with the objectives of the LRA, was peremptory as evident from the fact that the respondent was enjoined by PSCBC R 7/2000 to take into account the provisions of Item 10(1) of Schedule 8 to the LRA. I am of the view that the **Gouvea** and **Department of Roads & Transport V PSCBC and others** judgements, which concern R 7/2000 are binding on the PSCBC.
- 29 An employee may be granted sick leave on full pay where the provisions of paragraphs 7.5.1(a) (i) & (ii) of R 7/2000 are complied with and the employer after investigations, including investigations in accordance with Item 10(1) of Schedule 8 to the LRA and within 30 working days, so decides. R 7/2000 is amplified by the Policy and Procedure on Incapacity Leave and for Ill Health Retirement (PILIR). PILIR requires that where TIL is refused the period of absence must be covered by annual leave (to the extent that leave credits are available) or by unpaid leave⁸².
- 30 The respondent has a discretion to grant or refuse incapacity leave, in the case of a refusal this should be accompanied by reasons⁸³, subject to compliance with R 7/2000, in particular the employer **shall, during 30 working days, investigate the extent of the inability to perform normal official duties, the degree of inability and the cause the cause thereof. Investigations shall be in accordance with Item 10(1) of Schedule 8 in the Labour Relations Act 66 of 1995**⁸⁴.

⁸¹ Case No. PR40/14 (15 February 2017)

⁸²See PILIR paras 7.2.11, 7.3.5.1 (g) or 7.3.5.2 (j), (depending on whether an application is for Short Period of TIL (1-29 working days requested per occasion) or Long Period of TIL (30 working days or more...))

⁸³ See e.g. the discussion in *Valuline & others v Minister of Labour & others* (2013) 34 ILJ 1404 (KZP) [54], [55], [56], [57], as to the rationale for giving reasons. See also Par. 7.3.5.1 (e) / Par. 7.3.5.2(i),ii)B of PILIR & Par. 15.13.2 of the Determination and Directive on Leave of Absence in the Public Service, made by the Minister for the dpsa, in terms of which the Head of Department inter alia is required to give reasons for the refusal.

⁸⁴ Par. 7.5.1 (b) PSCBC Resolution 7/2000

31 Par. 7.5.1 (b) of R 7 / 2000 refers to **working days**. Clause 28.1 of Schedule 1 of the Constitution of the PSCBC provides that *working days means all days excluding Saturdays, Sundays and Public Holidays and excludes the first and includes the last such day*. In the instant case, the decision to decline TIL, depending on the date taken as the date of the submission of the application for TIL, the decline was either outside or within the 30 working day period as per R 7/2000⁸⁵ (see Table 1).

32 Table 1

Item	Period	Receipt of TIL by Respondent ⁸⁶ (and number of working days from 01 03 2017)	Date applicant informed TIL declined ⁸⁷ (and number of working days taken)
1	01 03 2017-26 04 2017 (40 working days)	12 03 2017 ⁸⁸ (8 days)	15 05 2017 (43 days)
2	01 03 2017-26 04 2017 (40 working days)	15 03 2017 ⁸⁹ (10 days)	15 05 2017 (40 days)
3	01 03 2017-26 04 2017 (40 working days)	03 04 2017 ⁹⁰ (23 days)	15 05 2017 (28 days)

33 The question arises as to what date is to be taken as the date for the submission of the application for TIL.

- The applicant attended on Dr I Taylor on 1 March 2017 who completed Part C (Statement by attending Doctor) of the TIL application form and inter alia:
 - Diagnosed her as suffering from major depression and generalized anxiety disorder (R19)
 - Stated that she could not work due to her illness (R26)
 - Issued a medical certificate to the effect that she had depression and was not capable of working for the period 1 March 2017 to 26 April 2017 (A27)
- On 2 March 2017, the applicant completed an application for sick leave form (Form Z1) and submitted this together with Part C to the respondent (Graaf-Reinet Office).

⁸⁵ Par. 7.5.1(b) PSCBC Resolution 7/2000

⁸⁶ See Par. 29 & 30 of the parties' agreed facts.

⁸⁷ The respondent declined the TIL application on 11 May 2018 (A32-A33). At Par 32 of the parties agreed facts. It was agreed that the applicant received the outcome of the declined TIL application on 15 May 2017.

⁸⁸ Date applicant informed sick leave exhausted and to apply for TIL & forms delivered

⁸⁹ Date applicant submitted incomplete application

⁹⁰ Date applicant submitted complete application

- On or about 12 March 2017 the applicant's supervisor informed her that she had exhausted her sick leave and should apply for TIL and arranged delivery of a blank TIL application form to the applicant.
- The applicant completed the application for TIL for the period 1 March 2017 to 26 April 2017 (Part A of TIL Application pages 1-14 (A11-A24)) and handed in the forms to the Chief Administration Clerk on 15 March 2017 who forwarded it to the Grahamstown HR Office (which services the region including the Graaf-Reinet Office).
- The Part A given to the applicant and completed and submitted by her on 15 March 2017 were *sans* page 10 of Part A (paragraph 7.3 – 7.5).
- On 30 March 2017 (R10) the Grahamstown Office advised the Graaf-Reinet Office that the employee missed out page 10 and attached it for completion and return (R11 paragraph 7.3 to 7.5 page 10). The applicant completed page 10 and it was faxed to the Grahamstown Office on 3 April 2017 (R17).
- The employer declined the TIL on 11 May 2017 and the applicant was informed of the outcome on 15 May 2017.

34 In terms of paragraph 7.5.1 R7/2000 an employee

- a) Who has exhausted their normal sick leave **may be** granted sick leave on full pay provided:
 - o Their supervisor is informed of their illness and
 - o A medical practitioner has certified such condition as a temporary incapacity
- b) The employer investigates the extent of the inability to perform normal official duties, the degree and cause thereof in accordance with item 10(1) of Schedule 8 to the LRA, within a period of 30 working days.

35 Any leave sought by an employee in the public service is premised on the requirement that an employee submits an application on the prescribed form and that approval by the appropriate authority is given. Where an employee nevertheless goes on leave without approval, they may well be considered absent without authorisation and disciplinary action instituted against them⁹¹. In addition, with regard to normal sick leave, an employee is required to utilise and manage their normal sick leave responsibly and with circumspection⁹²

⁹¹ See R1/2003

⁹² Paragraph 14.2 Leave Determination

- 36 In cases of TIL employees must notify their supervisor immediately (unless the nature and extent of their illness / injury prevents them) and must submit an application for TIL⁹³ within 5 working days after the first day of absence⁹⁴.
- 37 Paragraph 7.5.1(b) of R7/2000 requires that the employer must investigate the circumstances within a period of 30 working days.
- 38 Where an employee does not submit an application for TIL within 5 days of the first day of absence, the employee's supervisor is required (immediately) to notify the employee to submit the TIL application within 2 working days failing which the sick leave period will be regarded as unpaid or annual leave. Failure by the employee to provide his/her application form within the stated period or a supervisor to properly manage it will be viewed in a serious light including possible disciplinary action⁹⁵.
- 39 It is evident that in the public service the orderly and effective management of TIL, and practical realities require employees to manage their sick leave responsibly and in the event they wish to apply for TIL, after exhausting their normal sick leave, to inform the employer accordingly and to submit a medical certificate⁹⁶ and application form for TIL⁹⁷ together with relevant information to assist the employer in considering and conducting the required investigation in accordance with item 10(1) of Schedule 8 of the LRA. The requirement for the submission of a medical certificate and application as provided for in PILIR and the Leave Determination do not serve to limit paragraph 7.5.1 of R7/2000 but rather to regulate the manner in which an employee applies for temporary incapacity leave.
- 40 In the circumstances while an employee is entitled to the grant of 36 working days sick leave with full pay in a 3 year cycle, this is subject to the production of a medical certificate⁹⁸, submission of an application⁹⁹ and subject to the employee utilizing and managing their sick leave responsibly¹⁰⁰.

⁹³ See PILIR paragraph 7.4.1 Annexure A for short term TIL and 7.1.4.2 Annexure B for long term TIL / Paragraph 15.2 Leave Determination

⁹⁴ PILIR paragraph 7.1.7 and 7.1.8 / Leave Determination paragraph 15.2 and 15.6 Similar provision applies in respect of sick leave paragraph 14.4 and 14.5 of the Leave Determination

⁹⁵ Leave Determination paragraph 15.7, PILIR paragraph 7.1.9

⁹⁶ Paragraph 7.4(a)(b)(d) and (e) R7/2000

⁹⁷ Similar provisions apply with respect to the submission of application for sick leave as for TIL although the format of the application differs paragraph 14.4 and 14.5 of the Leave Determination

⁹⁸ Paragraph 7.4 (b)(c)(d) and (e) R 7/2000

- 41 In the case of an application for TIL, this is granted at the discretion of the employer after considering the application by the applicant, the advices of the Human Resource Manager, any necessary steps taken in terms of item 10(1) of the LRA, the medical certificate and any other information supplied by the applicant. The Head of Department, on receipt of the application form and medical certificate is required (shall) within 30 working days approve or refuse the temporary incapacity leave granted conditionally¹⁰¹. It stands to reason that the employer can only do so once it is in receipt of the prescribed application and medical certificate, which the employee is required to submit in accordance with the regulations in PILIR and the Leave Determination.
- 42 The respondent argues that the relevant date was when the complete application for TIL was submitted by the applicant i.e. **3 April 2017**. It is not clear whether the applicant is of the view that the date of submission was 12 March 2017 or 15 March 2017 as he argued that the respondent only notified the applicant after 38 days. In the event, the date of submission is taken as:
- 12 March 2017; i.e. the date the applicant was informed that she had exhausted her sick leave and had to apply for TIL and the forms delivered to her. The number of working days taken up to 15 May 2017 is 43 days.
 - 15 March 2017; i.e. the date on which the applicant submitted the incomplete application. The number of days taken is 40 days.
 - 03 April 2017; i.e. the date on which the applicant submitted the complete application. The number of days taken is 28 days.
- 43 Given that:
- Employees are required to manage their sick leave responsibly and with circumspection.
 - That although employees are entitled to a specific number of day of sick leave with full pay over a 3 year period, no such entitlement exists in respect of TIL as the respondent may at his/her discretion grant such leave.
 - That the respondent accepted the applicant's application for TIL for processing and for purposes of making a determination, albeit that it was submitted late.
 - That an employee is required to apply for TIL

⁹⁹ Paragraph 14.5 Leave Determination

¹⁰⁰ Paragraph 14.2 Leave Determination

¹⁰¹ Paragraph 15.10 Leave Determination / PILIR paragraph 7.2.9 STIL and paragraph 7.3.5.4 (e) LTIL

- That a specific application form is required to be submitted by an employee for application for TIL.

44 I find that the date of the submission of the application for TIL was the date the completed application was received by the respondent, namely 3 April 2017 and accordingly the notification of the outcome to the employee on 15 May 2017 (i.e. 28 days) was within the prescribed period of 30 days.

45 In the circumstances, the applicant's case must fail and I make the following award.

AWARD

46 The applicant, Ms Ntombesizwe Mtembu-Tala (PERSAL No. 05429099) is not entitled to temporary incapacity leave for the period 01 03 2017-26 04 2017.

47 The applicant's claim referred under Case Reference PSCB384-17/18 is dismissed.



John Cheere Robertson

PSCBC Panelist

Sector: Public; National Prosecuting