



# ARBITRATION AWARD

Commissioner: **Retief Olivier**

Case No.: **PSCB 75-17/18**

Date of Award: **24 November 2017**

In the ARBITRATION between:

**SAPU obo S Khumalo**  
(Union / Applicant)

and

**South African Police Services**  
(Respondent)

**Applicant representative:** Michael Koeglenberg – SAPU \_\_\_\_\_  
Union/Applicant's address C/o 3<sup>rd</sup> Avenue & Talent Str \_\_\_\_\_  
Parow \_\_\_\_\_  
7500 \_\_\_\_\_  
Telephone: 021 930 4377 \_\_\_\_\_  
Telefax: 021 930 3964 \_\_\_\_\_

**Respondent:** South African Police Services \_\_\_\_\_  
Respondent's representative: Col E Sitzer \_\_\_\_\_  
Waghthuis \_\_\_\_\_  
Pretoria \_\_\_\_\_  
Telephone: 012 393 7162 \_\_\_\_\_  
Telefax: 012 393 7159 \_\_\_\_\_

## **PARTICULARS OF PROCEEDINGS AND REPRESENTATION**

1. The arbitration was held on 17 November 2017 at the SAPU offices in Parow. Mr M Koegelenberg, a union official from SAPU represented the employee, Ms Khumalo. Col. Sitzer represented the respondent, the South African Police Services.

## **THE ISSUE IN DISPUTE**

2. I must decide whether the respondent is in breach of Resolution 7 of 2000 i.e. the interpretation or application of a collective agreement as contained in Sections 24(2) and 24(5) of the LRA and more specifically whether the respondent applied the provisions of clause 7.5.1 fairly in declining the Temporary Incapacity Leave (TIL) application.

## **THE BACKGROUND TO THE DISPUTE**

3. Ms Khumalo had applied for Temporary Incapacity Leave. She applied for the following period:
  - a. 2014-08-22 to 2014-08-29 (8 Days)
4. The feedback to her application was received on 23 November 2015. The application was denied.

## **SUMMARY OF EVIDENCE AND ARGUMENT**

5. The parties presented bundles of documents and submitted opening statements.

### **Applicant's version:**

6. The applicant representative stated that following being hospitalized, the applicant also submitted a Temporary Incapacity Leave application for the period from 22 August 2014 to 29 August 2014. She submitted the application, together with the medical certificate on 1 September 2014 to human resource office. Her supervisor Capt. N M Botes completed the employer section, and it was signed accordingly. She made frequent feedback enquiries and was much later told that her application was not approved in November

2015 and monies were deducted from her salary. She later learnt that her application had gone missing and that her employer completed a new application on her behalf. She was unaware of this. This application was only submitted in September 2015. Documentary evidence was presented confirming this.

7. It was argued that according to PSCBC resolution 7 of 2000 in Paragraph 7.5.1 it is stated:

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

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

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

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

8. It was thus submitted that the Employer has not complied with the time frame in Sec 7.5.1.

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

9. The applicant only received the feedback to her application submitted in September 2014 on 23 November 2015, and it was clear that the period of 30 days was not adhered to.

10. The final decision to grant temporary incapacity leave lies with the employer. The 30 days leave conditionally granted allows the employer to lodge and investigation into the incapacity in terms of schedule 8 of the LRA. However this was not done.

11. It was therefore requested that the Respondent approve the Temporary Incapacity Leave and that the applicant's leave which was captured as unpaid leave, be approved as paid sick leave and that no deductions be made.

### **Respondent's version:**

12. The respondent submitted that the when an employee submits a Temporary Incapacity Leave application it had to go through three levels of authority, namely at the Station, at the Provincial level and at the National level. This inevitably leads to delays. In this instance the respondent conceded that the initial application had gone missing and that it was not disputed that the employer submitted a second application on behalf of the applicant in September 2015. The respondent therefor conceded that the employer had not complied with the time frames in the said resolution. It was also however submitted that an arbitrator cannot grant Temporary Incapacity Leave.

### **ANALYSIS OF THE EVIDENCE AND ARGUMENT**

13. The issue in dispute is whether the respondent is in breach of PSCBC Resolution 7 of 2000. PSCBC Resolution 7 of 2000, par 7.5.1 reads as follows:

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

- i) her or his supervisor is informed that the employee is ill, and*
- ii) a relevant registered medical and/or dental practitioner has duly certified such a condition in advance as temporary disability except where conditions do not allow.*

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

14. This must also be read together with paragraph 7.2.9 of the Policy and Procedure on Incapacity Leave and Ill-Health Retirement (PILIR) which states "The Employer must within 30 days after receipt of both the application form and medical certificate referred to in paragraphs 7.1.4 and 7.1.5, approve or refuse temporary incapacity leave granted conditionally."

15. It is trite that temporary incapacity leave is not a statutory entitlement but can be applied for in cases where an employee's normal sick leave had been exhausted. It is also not an unlimited amount of additional sick leave at the employee's disposal, but can be granted at the employer's discretion based on its investigations.
19. It is further accepted as common cause that the applicant's TIL applications had not been dealt with in terms of the time frames in the Collective Agreement, as acknowledged and conceded by the Respondent. The documentary evidence confirms that the feedback was submitted more than 12 months outside of the time frames allowed in the said Collective Agreement. Compliance with a Collective Agreement is however not a discretionary matter, and whoever is responsible for the delay and for what reason does not change the fact that the employer does not comply with the Collective Agreement.
16. In the case of ***SAMWU v City of Cape Town and Others (C 701/13) dated 26 May 2014*** Judge Steenkamp reiterated that adherence to Collective Agreements are peremptory. He noted that that concerns about time frames, in that particular instance about time frames in the disciplinary procedure, as agreed to in a Collective Agreement, because of its peremptory nature and its embodiment in contracts of employment, lead to non-compliance, and may in fact be defeating the purpose of the process. He noted however "But that is the deal that the parties brokered through collective bargaining. They may have to reconsider their deal. But that can only be done through a process of collective bargaining."
17. It is also necessary to note the determination in the matter of ***PSA obo H C Gouvea v PSCBC and others, LC Case no D751/09, dated 26 February 2013*** where it was found: "[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 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.” (my emphasis).

18. This finding was confirmed very recently in the matter of ***Dept. of Roads and Transport v J C Robertson & others, LC Case No PR 40/14***, delivered on 15 February 2017. The Court found:

“[9] The arbitrators’ interpretation of clause 7.5.1 of Resolution 7 of 2000 which is based on the decision in PSA HC Gouvea (supra) cannot be faulted. When exercising the discretion to grant or refuse TIL, the applicant was enjoined by Resolution 7/2000 to take into account provisions of item 10(1) of schedule 8 of the Labour Relations Act. The interpretation the arbitrator gave to clause 7.5.1 (c) is consistent with the letter and spirit of the LRA. His decision is not based only on giving a peremptory meaning to the word ‘shall’ in clause 7.5.1 (c) of resolution 7/2000. He therefore conducted the correct enquiry in the correct manner and reached a reasonable decision.”

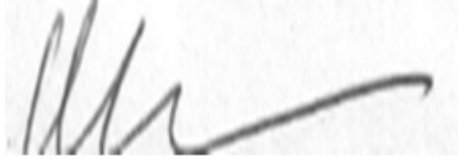
19. I therefore deem it fair to order the respondent to pay back the monies deducted from the applicant in respect of the TIL that was declined. As noted the respondent submitted that it is beyond the scope of an Arbitrator to grant the temporary incapacity leave. As indicated in the above decision, it was about determining compliance and the relief granted is not compensation, but where there is not compliance any monies deducted should be paid back or the employer ordered to refrain from deducting monies. This is in fact also what was decided in the matter of ***PSA obo Liebenberg and the Dept. of Defense, Labour Court case C 938/2011*** by Judge Steenkamp, noting that he followed the LAC case ***Minister of Safety and Security & others v PSA obo De Bruyn (2010) 31 ILJ 1813 (LAC)***. Judge Steenkamp noted that there would be no point to lodge an interpretation/ application dispute if the arbitrator could not order a particular respondent to comply with the Collective Agreement.

### **AWARD**

20. The respondent is in breach of Resolution 7 of 2000. I therefore order the following:
- 20.1 That the Respondent pays back the leave monies deducted from the applicant for the period of 8 days, as from 22 August 2014 to 29 August 2014. This amounts to R 2 752-63.

20.2 That all leave captured as unpaid for these periods, be amended from unpaid leave to paid sick leave, and that no deductions be made from the Applicant.

20.3 That the employer implements this award by not later than 15 December 2017.

A handwritten signature in black ink, appearing to be 'R. Olivier', written on a light-colored background.

**Arbitrator: Retief Olivier**