



Commissioner : SABER AHMED JAZBHAY
Case No. : PSCB 118-16/17
Issued : 1ST OCTOBER 2016

In the ARBITRATION between:

PSA O.B.O. N THULO APPLICANT

and

DEPARTMENT OF EDUCATION – KWAZULU-NATAL RESPONDENT

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A. DETAILS OF HEARING AND REPRESENTATION

1. The arbitration proceedings commenced at 13H00 on the 7th September 2016 at the DURBAN TEACHERS CENTRE at No. 1 College Road, Asherville. The parties are represented as above.

After discussing the matter the parties agreed and drafted a stated case with submission dates as follows:

- As there were no disputes of facts, no oral evidence would be led and I must determine the dispute based on the heads of argument each party would submit.
- Both parties will serve their heads of arguments in the WORD FORMAT on the commissioner on or before the 27th September 2016.

B. BACKGROUND

2. The applicant had applied for temporary incapacity leave as follows¹

Date from	Date to	No of days	Approved/not approved
13 March 2014	11 April 2014	30	Not approved
02 June 2014	13 June 2014	12	Not approved
03 October 2014	12 December 2014	71	Not approved
14 April 2015	30 April 2015	17	Not approved
TOTAL		130	

3. She challenges the respondent /employer's decision to refuse her applications for the periods in question. She seeks the setting aside of the decision to decline his leave and to be reimbursed the monies deducted by the employer.
4. The applicant was advised of the respondent's decision to refuse her leave. In essence, the applicant prays for an order in the following terms:

The respondent must grant all the TIL applications that the applicant has made so far and to stop any unlawful deductions and refund monies already deducted without due process. The respondent, on the other hand, prays for the case to be dismissed.

C. ISSUE TO BE DECIDED

5. I am to decide: whether
 - (a) The Council has the requisite jurisdiction to entertain the dispute;
 - (b) If it has jurisdiction, did the respondent fail to apply the collective agreement in respect of the applicant's temporary incapacity leave for the periods in question.

¹ Its common cause

- (c) Further, I am to determine whether the monies deducted by the respondent for the period should be reversed and further and should my finding not favour the applicant what remedy may be appropriate in the circumstances.

D. THE LEGAL BASIS RELIED UPON

1. PSCBC RESOLUTION 7 OF 2000 READ WITH PILIR AND DETERMINATION ON LEAVE IN THE PUBLIC SERVICE:

1.1. Resolution:

- 1.1.1. Clause 7.5.1 (Disability Management Leave) of PSCBC Resolution 7 of 2000 provides for the general guidelines and process to be considered and applied by the Respondent when determining an application for temporary disability leave.
- 1.1.2. The provision is applicable to an employee that has exhausted his/her normal sick leave credits in a cycle and who according to the relevant practitioner, requires to be absent from work due to disability which is not permanent. Such employee may be granted sick leave on full pay notwithstanding the exhaustion of his/her sick leave credits for that cycle provided that: His/her supervisor is informed of the employee's illness; and the relevant registered medical practitioner has duly certified such condition in advance as temporary disability, except where conditions do not allow (Clause 7.5.1(a) (i) and (ii) of the Resolution).
- 1.1.3. The employer is obligated during the thirty working days from notice of the disability to investigate the extent of the employee's inability to perform his/her normal duties, the degree of inability and the cause of such inability. The employer is further obligated to perform such investigation in accordance with item 10(1) of Schedule 8 of the LRA (Clause 7.5.1(b) of the Resolution).
- 1.1.4. Part 2, Clause 1.2 in the Determination on Leave of Absence in the Public Service (the Determination) states that the Determination gives effect to clause 7 of the Resolution, as amended. Clause 13.1 under the heading Temporary Incapacity Leave, states that incapacity leave is additional leave granted conditionally at the employer's discretion, read with the policy and Procedure on Incapacity Leave for Ill-health Retirement determined by the Minister for Public Service and Administration in terms of sec. 3(3)(c) of the Public Service Act, 1994, (PILIR).

2. PILIR:

- 2.1. Clause 7 (the Management of Temporary and Permanent Incapacity Leave) of PILIR expounds the Resolution and details the timeframes and obligations on both the employee and employer:
- 2.2. The employee may apply for temporary incapacity leave with full pay on the prescribed forms in terms of PILIR for each period of absence (Clause 7.1.2 of PILIR).
- 2.3. For an application for temporary incapacity leave to be considered, the employee must provide sufficient proof that he/she is too ill to work satisfactorily and attach a medical certificate from a registered medical practitioner certifying the condition as temporary with his/her application.

3. PILIR: Clause 7.1.5.1 and 7.1.5.2

- 3.1. The employee must submit the application for temporary incapacity leave within five working days after the first day of absence. Should the employee not submit an application, the employee's supervisor must immediately notify the employee that if an application is not received within a further period of two days, the period of absence will be regarded as leave without pay. Should the employee fail to submit the application (within the further two days) or fails to submit compelling reasons why the application cannot be submitted, the supervisor must immediately inform the relevant department that the absence must be covered by annual leave or as unpaid leave. Should the employee fail to submit the application within the timeframes and/or failure by supervisor to properly manage the process should be viewed in a serious light.

4. PILIR: Clause 7.1.8 and 7.1.9

- 4.1. It is apparent that the initial obligation is on the employee to submit an application for temporary incapacity leave. However, should the employee fail to do so within the prescribed timeframe, he/she is not barred from doing so but the onus shifts to the employer (supervisor). The employer must follow up with the employee and notify him/her of the need to submit an application together with the consequences should he/she fail to do so. The clause acknowledges that there will be circumstances in which the employee does not comply with the timeframes, which could be for reasons of negligence, impossibility and or ignorance, thereby placing the ultimate onus on the employer to inform the employee. The employee cannot be held responsible for the consequences of any late submission of an application where the employer has failed to comply with its obligation to inform the employee of the need and timeframe in which to submit an application.
- 4.2. The employee **may** be subjected to a full health assessment by the appointed Health Risk Manager. This allows for a comprehensive assessment and evaluation which assists the employer determine how the employee's duties may be adapted to accommodate his/her disability.

5. PILIR: Clause 7.3.1

- 5.1. The employer is obligated to, within **five days of** receipt of application:

Verify that the application is complete and signed correctly (which includes attachment of relevant documentation) and if the application is incomplete and or unsigned, the employer must immediately return the application to the employee for resubmission within a further five days. The resubmission date of the complete application will be recorded as the date of submission. The provision acknowledges that there will be circumstances in which the employee submits an incomplete application (in respect of information, documents and or signatures). It further places an onus on the employer to draw any defect in the application to the employee's attention and request that the application be corrected and resubmitted. Accordingly, no application should be declined for incompleteness or non-compliance as the employer is obliged to bring such error to the attention of the employee prior to the employer considering the application.

6. Determination

- 6.1. Clause 13 (Temporary Incapacity leave) of the Determination outlines the requirements and process to be complied with when considering an application for incapacity leave. Many of the obligations relating to proof of illness, attachment of medical certificates and consent to disclose of medical records by the medical practitioner are consistent with the provisions contained in the PILIR. The employee must further notify his/her supervisor of his/her illness immediately and submit an application within five working days of the day of the absence.
- 6.2. The employer is again obliged to inform the employee of the consequences of not making an application and the timeframe in which to do so should the employee not submit an application within the initial five day period of absence. The employer is again obliged to conditionally grant temporary incapacity leave with full pay for a period of thirty days subject to the outcome of an investigation into the health of the employee.
- 6.3. The employer is obliged to, consistent with PILIR, approve and/or refuse the application within thirty days of the date of receipt of the complete application.

7. Determination: Clause 13

- 7.1. Medical practitioners are those persons that are certified to diagnose and treat patients and who are registered with professional councils established by an Act of Parliament. For the purposes of temporary incapacity leave the employer only accepts medical certificates issued and signed by practitioners registered with the Health Professional Council of South Africa.

8. Determination: Clause 15.1 and 15.5

- 8.1. The employer must notify the employee in the event that the medical certificate submitted by the employee is not in compliance with required form and or detail (validity). The employer must further notify the employee that a corrected medical certificate is required within two days of notification of non-compliance.

9. Determination: Clause 15.4

- 9.1. In the event of an employee refusing/failing to submit a medical certificate describing the nature and extent of the illness for purposes of temporary and permanent incapacity leave, the period of absence will be covered by annual leave (with the employee's consent) or unpaid leave.

E. SUMMARY OF THE EVIDENCE

6. Some prefatory remarks

As the undisputed evidence will unpack, this matter was borne out of a series of tragic events experienced by the applicant, which instead of being speedily resolved on the basis of compassion and good sense, escalated into unfortunate arbitration. As the evidence of the applicant will show, I am still surprised how often employers in the public service can be short sighted as well as impervious where it comes to personal circumstances of their employees. The employment relationship in the modern constitutional era is akin to a marriage and as an employer one has to ask oneself how you would treat your spouse in the case of personal tragedy and then act accordingly. The undisputed facts of this case reflect a serious, if not a callous disregard, for the rights of the applicant vis-à-vis her right to human dignity and fair labour practices. The first being a foremost foundational principle in the Bill of Rights to our Constitution and a constitutional guarantee underpinned by a wealth of jurisprudence emanating from the Constitutional Court.

The above being said by way of introduction, I turn to the dispute at hand. In this matter, the applicant referred a dispute to the above Council relating to the interpretation and application (in terms of Clause 24(2) and 24(5) of the Labour Relations Act, 1995, as amended) of Resolution 7 of 2000 (the “Resolution”) to her application for short term and long term temporary incapacity leave for the following periods

Date from	Date to	No of days	Approved/not approved
13 March 2014	11 April 2014	30	Not approved
02 June 2014	13 June 2014	12	Not approved
03 October 2014	12 December 2014	71	Not approved
14 April 2015	30 April 2015	17	Not approved
TOTAL		130	

The claim is founded on the conduct, in other words the manner in which it handled the issue of the applications for short term and long term temporary incapacity leave for the aforementioned periods by the respondent towards the applicant which the applicant contends as regards the incorrect interpretation and application of the provisions of the Resolution as amplified by the provisions of the Policy and Procedure on Incapacity Leave and Ill-Health Retirement (“PILIR”) and the Determination on Leave of Absence in the Public Sector (the “Determination”) which documents are cross referenced and must be read conjunctively.

It is the Applicant’s case that the Respondent incorrectly interpreted as well as failed to comply with the procedural obligations and provisions of the Resolution read with PILIR and the Determination and following the inordinate delay consequent thereto she suffered severe financial prejudice and the fact that it is based on her disability, alternatively incapacity which were exacerbated by a personal tragedies she experienced.

F. APPLICANT'S SUBMISSION

7. The Applicant is employed by the Respondent as an educator at Folweni High School². She has been on sick leave since May 2013 as she suffers from severe depression, arthritis of the spine, pseudo dementia and hypertensive. **This has been not been disputed by the Respondent as the facts are supported by medical reports.**
8. As the Applicant's normal sick leave provision was exhausted³, she had applied for long and short term temporary incapacity leave for the periods outlined above. Each application was supported by a medical certificate/report issued by a registered medical practitioner. The Applicant had applied at the time when the leave was taken. In other words, she applied timeously. *This too has been admitted by the Respondent⁴.*
9. It was argued that ⁵ in respect of the first period from 13 March 2014 to 13 April 2014, although she had applied on 13 March 2014 for the leave, the Respondent only advised her only on 27 February 2015 after it had submitted the applications to a Health Risk Manager for further assessment, examination and recommendation. ***This was undisputed by the Respondent.⁶***
10. The reasons⁷ advanced for declining the application was that "The submitted diagnosis is vague and/or invalid⁸, as it does not indicate the nature or severity of the impairment to justify absence from work". ***The Applicant was informed by the Respondent in writing on 27 February 2015 that the leave was turned down⁹.***
11. In respect of her absence from work for the period 3rd October to 12 December 2014, she had initially applied for temporary incapacity leave on 30 September 2014 for the period in question.¹⁰ The reasons advanced in her medical certificate for her absence from duty was cited as major depressive disorder and chronic pain syndrome.
12. She was, however only advised on the 30th September 2015¹¹ that her application was declined or refused, and the reasons advanced for declining the leave was because the period applied for was considered excessive for the condition diagnosed and also as "Not all treatment options explored"¹². *This was admitted by the Respondent¹³.*
13. In respect of the periods 02nd June 2014 to 13 June 2014, although the Applicant had fulfilled her obligation in terms of submitting her application for temporary incapacity leave timeously, she only became aware on 11 May 2016 when she obtained a print out of from the PERSAL system, that the period was not approved¹⁴.

² Its common cause

³ Again its common cause

⁴ See para 4.2 of its heads of argument

⁵ it will be noted at page 2 of Applicant's Bundle "A1"

⁶ See para 4.2 of the Respondent's heads of argument

⁷ See page 3 of Applicant's bundle "A1"

⁸ See para 4.2 of Respondent's heads of argument

⁹ See page 18 of the Respondent's bundle of documents

¹⁰ See page 55 of the Respondent's bundle

¹¹ See page 57 of the Respondent's bundle

¹² See page 57 of the Respondent's bundle

¹³ At para 4.5 of its heads of argument

¹⁴ See page 1 of the Applicant's Bundle "A1"

Furthermore, it was argued and it remains undisputed that the Respondent has not to date furnished any reasons for declining this application although it is obliged to do so. ***The Respondent has made no submissions in this regard and therefore this is taken to have been admitted.***

14. The Applicant proceeds to argue, and once again it remains undisputed, that the same can be said about her application for temporary incapacity leave for the period 14th April 2015 to 30th April 2015. Once again the Applicant fulfilled her obligations in terms of submitting her applications timeously. ***The Respondent has made no submissions in this regard and therefore this is taken to have been admitted.***
15. The Respondent failed to formally advise her of the outcome of that application. Once again, it was only when she received the PERSAL print out from the Respondent that she discovered that this application was not approved. Furthermore, it was argued and it remains undisputed that the Respondent has not to date furnished any reasons for declining this application although it is obliged to do so. ***The Respondent has made no submissions in this regard and therefore this is taken to have been admitted.***
16. The Applicant has also attached a report¹⁵ from her treating Specialist Psychiatrist, Dr. VS Hadebe¹⁶ whose diagnosis¹⁷ is as follows:

"Mrs Thulo has a poor prognosis due to ongoing cognitive impairments. She has failed several anti - depressant trials. She has been offered electro-convulsive therapy and refused due to fears of worsening cognition. An application for ill health retirement has been submitted. She is currently applying for ill-health retirement in view of her failure to remit."

17. The Applicant submitted two reports from Dr Ann Watts, a Clinical Psychologist who assessed her on 03rd and 7th March 2014 respectively¹⁸ as well as on 07 and 08 October 2015¹⁹. I was directed to page 19 of the Applicant's bundle "A1" where Dr Watts concludes that the Applicant's

"performance during the neuropsychological assessment revealed that she was functioning adequately within the spheres of attention and concentration; visuo-spatial functions; visual memory; verbal comprehension; speed of information processing and executive skills."

However, she goes on

"Notwithstanding (the foregoing), deficits were evident within the spheres of verbal memory, verbal fluency and visual attention to detail. In addition, she presented with moderate depression and severe anxiety. In the absence of an organic basis to her cognitive problems, these appear to be consequent to the effects of her depression and comorbid (sic) anxiety subsequent to the loss of her only daughter on her cognitive functioning."

Consequently, the Applicant

"has been unable to cope with work since the death of her daughter almost 5 years ago. As such her prognosis is poor. In view of the cognitive and emotional problems evident on assessment Mrs Thulo will probably not be able to cope with her work as an educator at the level that is expected of her."

¹⁵ This report is dated 26 April 2016

¹⁶ See pages 8 to 12 of the Applicant's bundle "A1"

¹⁷ at page 12

¹⁸ See pages 17 to 20 of the Applicant's bundle "A1".

¹⁹ See pages 13 to 16 of Applicant's bundle "A1"

Dr Watts recommended that

"A referral to a Clinical Psychologist for psychotherapy and to a psychiatrist for psychopharmacological management should be considered as her depression and grief seem to be chronically presenting since the death of her daughter."

18. This detailed report and it remains undisputed, was submitted to the Respondent in March 2014²⁰.

19. As regards the re-assessments undertaken by Dr Watts on the 7th and 8th October 2015, the following is stated²¹:

"In addition, her level of depression symptoms seems to have increased consequent to the death of her son and she now presents with 'severe' depression and 'severe' comorbid anxiety. As stated in the prior report, in the absence of evidence of an organic basis for her cognitive problems, the deficits evident on assessment appear to be consequent to the effects of her depression and comorbid anxiety subsequent to the loss of her only daughter (and now her son) on her cognitive functioning."

She repeats that

"As noted in her previous assessment, Mrs Thulo has been unable to cope with work since the death of her daughter almost five years ago. Her prognosis remains poor and she remains unable to work as an educator at the level that is expected of her, especially as her depression appears to have been compounded by the additional death of her son this year."

20. In fact, it is argued that during April 2016, a Dr D Singh a Psychiatrist, made an independent secondary assessment at the behest of Thandile Health Risk Management²² Evidently, Dr Singh referred the Applicant to an Occupational Therapist, N.B NGCOBO whose report is illuminating.

21. She submits²³ that

"Her challenges at this stage will negatively impact upon her ability to master the cognitive and physical demands of being an educator as stated above. From the psychologist and Dr Hadebe's (psychiatrist) report it was reported that her prognosis remains poor. The several anti-depressant trials done have yielded no change she still has ongoing cognitive impairments."

22. She was of the opinion that the Applicant was at that

"stage unable to return to work as an educator. Temporal medical boarding could be the option. Continuing receiving appropriate psychological support with pharmacological intervention."

23. I was requested²⁴ to take cognizance of the fact that, that report, which was only requested in April 2016, was actually commissioned by the Health Risk Manager who was acting at the behest of the Respondent. The Applicant argues that it is interesting to note that the findings of BG Ngcobo alludes to the findings of, inter alia,

²⁰ No report or evidence to contradict these were presented in argument

²¹ See page 16 of the Applicant's bundle "A1"

²² See page 21 of the Applicant's bundle "A1"

²³ At page 31

²⁴ At para 7 of the Applicant's heads of argument

the Clinical Psychologist, Dr Anne Watts²⁵ who, as early as March 2014 indicated that “As such (the Applicant’s) prognosis is poor.”

24. It is bearing in mind of the foregoing that I made the prefatory remarks at para 6 supra.

25. I reiterate that the Applicant applied for TIL for the following periods:

Date from	Date to	No of days	Approved/not approved
13 March 2014	11 April 2014	30	Not approved
02 June 2014	13 June 2014	12	Not approved
03 October 2014	12 December 2014	71	Not approved
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G. STATEMENT OF LEGAL ISSUES THAT ARISE FROM THE MATERIAL FACTS

There are two decided cases in terms of legal precedents guiding TIL Applications and which I was referred to by the applicant. These are:-

- 1 ***PSA obo Liebenberg v Department of Defence and Others [2012] ZALCCT 47; (2013) 34 ILJ 1769 (LC)*** where the Court found that where the employee and her union were dissatisfied with the employer’s refusal to grant temporary incapacity leave and the procedure for granting or refusing such leave was governed by the collective agreement, her remedy lay in the referral of a dispute over the application of the agreement to the bargaining council in terms of Section 24 of *the LRA*.
- 2 ***Public Service Association of South Africa and Another v PSCBC and Others [2013] ZALCD 3 (26 February 2013)*** in which, the Applicant argued, the Labour Court resolved that employees cannot be subjected to retrospective leave without pay when an application for incapacity leave is declined. Such leave without pay can only be implemented from a date given to the employee to return to work, if the employee fails to return to work on the day.

H. THE ISSUES THAT I AM REQUIRED TO DECIDE

The respondent has on all occasions advised the applicant that his applications were disapproved after the 30 working day period in terms of PSCBC Res 7 of 2000. The commissioner is required to interpret and decide on the provisions of the above collective agreements in respect of TIL and also use previous decided cases. The table above at para 25 bears reference.

I. THE PRECISE RELIEF CLAIMED

The respondent must grant all TIL applications that the applicant has made so far and to stop any unlawful deductions and refund monies already deducted without due processes.

J. RESPONDENT’S SUBMISSION

The Respondent in its submissions substantially confirms the facts as alleged by the applicant²⁶ save for what is contained hereinafter.

²⁵ See t page 31 of Applicant’s bundle “A1”.

²⁶ Reference is made therein where necessary

K. STATEMENT OF MATERIAL FACTS

To avoid unnecessary prolix, therefore I only set out the salient points argued by the Respondent to present its version. It argues as follows:

26. Given “the sheer volume of 70,000 educators as ranged against 5000-7000 administration staff the delays in responding to the applications for incapacity are at times inevitable”.
27. While there may be procedural delays in processing of the application for leave, “substantive reasons exist for the non-approval of the leave”²⁷. It goes on to state that the Applicant suffered no “as she could not (sic) come back to work any earlier if she claimed that she was indisposed”²⁸.
28. It goes on to argue that the Applicant’s “has had a negative impact on teaching and learning” since “learners have been seriously disadvantaged by her absence”²⁹.
29. The Applicant’s absence has “created a financial burden on the school as well as the Department”³⁰.
30. The application of Resolution 7 of 2000 with regards to management of temporary incapacity leave becomes problematic as the assessment and motivation by the Health Risk Management takes longer than expected³¹.
31. It further argues that “while sick leave is a privilege the employer has the right to refuse extended leave after considering amongst other things the impact it has on teaching and learning as well as the financial burden it creates on the Department”³².
32. In the circumstances the Respondent concludes that it “expects the outcome to be in its favour.”³³
33. In amplification of its expectation the Respondent submits that “Cognisance (sic) must be taken of point 4 of Annexure A and B of the Application of Temporary Incapacity Leave for short periods and long periods respectively which states”³⁴ that

*“This application is subject to an investigation in terms of the Determination on Leave of Absence, read together with the Policy and Procedure on Incapacity and Ill-health Retirement (PILIR). In light hereof, the Employer shall grant temporary incapacity leave **conditionally** for a maximum period of 29 working days/30 working days with full pay subject to the outcome of the said investigation. **Please note that if this application is declined based upon the outcome of the investigation, the period of temporary incapacity leave shall be converted to either annual leave or be unpaid leave.**”*

L. ANALYSIS OF EVIDENCE AND ARGUMENT

²⁷ The Respondent does not amplify this argument

²⁸ See para 4.10 of its heads of argument

²⁹ See para 4.11 of its heads of argument

³⁰ *ibid*

³¹ See para 4.11 of the Respondent’s heads of argument.

³² See para 4.12 of the Respondent’s heads of argument. **However, it fails to amplify in what way and it further fails to submit any evidence to gainsay these allegations.**

³³ See para 5.1 et seq

³⁴ See page 1 and page 19 of the Respondent’s bundle of documents

34. In order to remain within the scope of section 138 (1) of the Labour Relations Act the relevant provision of the applicable resolutions have been read with the applicable provisions relating to the terms and conditions of employment of employee by the employer. Further the previous and current decisions in respect of temporary incapacity leave have been taken into account in arriving at my decision.
35. In terms of decision in **PSA obo Liebenberg v Department of Defence and Others [2012] ZALCCT 47; (2013) 34 ILJ 1769 (LC)** the issue of the jurisdiction of councils to arbitrate disputes referred under section 24 of the LRA has been settled. The following are important sections of the judgment:

“It had been common cause that the department was obliged by the collective agreement to notify the employees of the fate of the applications for TIL within 30 days. There is no basis for the Commissioner’s ruling that the directive which imposed that obligation had not been included in the collective agreement.”

The Court accordingly ruled that the council had jurisdiction to entertain the dispute under section 24 of the LRA, and remitted the matter to the council to arbitrate on the merits.

36. Further the decision in **Public Service Association of South Africa and Another v PSCBC and Others [2013] ZALCD 3 (26 February 2013)** has relevance to this matter and it is important to record the following from the judgment, so that the issue of granting or refusing applications for temporary incapacity leave may have a degree of clarity. The decision is that

“An employee whose normal sick leave credits in a cycle have been exhausted has a right to be granted additional Temporary Incapacity Leave (TIL) on full pay provided that:

- i. the employee informs the supervisor that he/she is ill;
- ii. a registered medical practitioner has duly certified the condition in advice;
- iii. the employer shall investigate the incapacity in terms of Schedule 8, clause 10(1) within 30 working days.”

That judgment goes on to state that

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, in context in which the provision appears, the apparent purpose to which it is directed and the material known to those who are responsible for its production.....

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 that they in fact made.....

This report sought to have retrospective effect. The consequence of a retrospective effect is that it amounts to an unreasonable and arbitrary exercise of discretion with unfair consequences to an employee.

37. When dealing with matter related to the refusal by the employer to grant an employee temporary incapacity leave, the first question, to my mind is whether the period in question in which the employee was absent from work runs before the or if after is it before the decision in Liebenberg as it will have an impact on the issue of the jurisdiction of councils to arbitrate such disputes whether as “interpretation” or “application” of a collective agreement or any other guise for example, benefits.

38. If the period in question is after the, so called Gouvea decision read with the Liebenberg decision then only will the question of the application of the collective agreement be interrogated.
39. In the present case the applicant's applied for all the Applicant's applications for TIL were after these decisions.
40. The applicant was advised of the respondent's decision and it deducted monies in installments from the applicant's salary. The deductions were being made after the decision in respect of the application for TIL being communicated to the applicant.
41. Thus the periods in question fall after the period where the decision of the Minister of Safety & Security v SSSBC & Others (2010) 6 BLLR 705 (LAC) decision delivered on the 29 January 2010 read together with the Liebenberg decision (2013) has applicability. In terms of these decisions and in relation to the period in question the Council does have the requisite jurisdiction to determine the matter. The period (cause of action) falls after the **Minister of Safety & Security v SSSBC & Others (2010) 6 BLLR 705 (LAC)** decision delivered on the 29 January 2010 and after the decision in PSA O B O Gouvea v PSCBC and others delivered on the 26 February 2013.
42. The decisions recorded above have created two schools of thought and arbitrators are at liberty to make their own decisions, based on the facts before them on whether to follow these cases or not.
43. The next issue that requires introspection is related to the Employer's application of the Collective Agreement which involves its failure to comply with the timelines. In the **Public Servants Association & Another v PSCBC & Others (D751/09) [2013] ZALD 3 (26/02/2013)** the Court stated that where the State exceeds 30 days in investigating and giving an employee a response on his / her application, it cannot penalize the employee. Only from when the employee has been told to come back to work, can he/she be penalized. In reality where an employee applies for temporary incapacity leave (ito Resolution 7 of 2000) and the employer through the Health Risk Manager takes more than 30 days to give a decision, the period outside of the 30 days is at the peril of the employer and the employee will be paid until such time that he/she is told that his/her application is rejected and therefore he/she must return to work.
44. The Applicant applied for TIL as follows and for sake of completeness their outcome is included

Date from	Date to	No of days	Approved/not approved
13 March 2014	11 April 2014	30	Not approved
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45. This dispute deals with the application of the Resolution and the Council has jurisdiction to enquire whether the employer applied the terms and conditions of the Resolution fairly or correctly.
46. The Respondent's decision sought to have retrospective effect. The consequence of a retrospective effect/decision is that it amounts to an unreasonable and arbitrary exercise of discretion with unfair consequences to an employee.
47. Therefore I determine and Order that:

- (a) The respondent incorrectly applied the provisions of Resolution 7 of 2000 in relation to the Applicant's application for Temporary Incapacity Leave;
- (b) As a result of the foregoing, the applicant suffered financial prejudice;
- (c) The Applicant's application for the leave for the period in question **is** approved;
- (d) The Respondent is hereby ordered to
 - a. To cease forthwith to make any unlawful deductions, and to
 - b. reimburse the Applicant in respect of the amounts recovered from her salary.



Commissioner: Saber Ahmed Jazbhay
(AWARD PSCB 118-16 PSA obo N Thulo)