IN THE PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL

IN THE MATTER BETWEEN CASE NO.PSCB 610-09/10

PA De BEER APPLICANT

And

DEPT OF CORRECTIONAL SERVICES-NATIONAL RESPONDENT

IN LIMINE RULING ON JURISDICTIONAL POINTS

DETAILS OF HEARING AND REPRESENTATION

1. The matter was held in Durban on the 12 November 2010. The applicant was represented by Mr A De Wet an advocate and the respondent was represented by Mr S E Ndlovu.

BACKGROUND TO THE MATTER

2. The applicant was absent from work after exhausting his leave and invoked the provisions for Temporary Incapacity Leave (TIL) alternatively Policy and Procedure on Incapacity Leave for Ill-Health Retirement (PILIR). Certain portions of his leave were granted whilst others were declined.
3. The applicant lodged a grievance when his leave was declined.
4. At the arbitration the respondent raised points in limine and after discussions the following was agreed:

   The ordinary rules in respect of applications will not apply.

   i. The respondent (Dept of Correctional Services- National)) will serve its application on the points in limine on the applicant (Mr P A De Beer) and the PSCBC on or before the 25 November 2010.

ii. The applicant (Mr P A De Beer) will serve its response on the respondent and the PSCBC on or before the 26 November 2010.

iii. The respondent will serve its reply on the applicant and PSCBC on or before the 27 November 2010.

iv. A Ruling on the application must be made on or before the 30 November 2010.

v. The Council will advise the parties of the outcome of the application on or before the 3 December 2010. The issue of costs is reserved.

vi. The parties were required to make submissions on the merits of the matter so that the matter may be finalised. Should any points in Limine succeeding then the matter would be referred to arbitration.

SPECIAL NOTE

1. **The respondent did not file its reply on the 30 November 2010. After contacting the respondent's representative the due date for the reply was extended to the 3 December 2010. On the 10 December 2010 the respondent had still not filed its reply. On the 4 December 2010 (Saturday) the respondent's representative was contacted and informed that the replying paper were not received and that the ruling would be issued. In the interim I received correspondence from the applicant requesting the status of the matter.**
2. **In order not to prolong the ruling the salient aspects of the parties submissions are recorded below.**

RESPONDENT'S (EMPLOYER'S) APPLICATION

1.

5. It is common cause that the applicant's exhausted all his leave credits, and thereafter applied for temporary incapacity leave for the period 23 March 2007 to 30 April 2008.

2.

The applicant's application was forwarded to HRM for assessment, however such application was not recommended because of insufficient medical information to support the applicant's conditions of long absenteeism and treatment modalities employed in managing his conditions did not reflect the seriousness.

The applicant has voluntary stopped psychotherapy which was beneficiary to him. The doctor who treated him did not provide the detailed progress report and applicable diagnoses.

3.

Upon the receipt of the Health Risk Manager recommendations, the respondent applied their mind to the matter and decided to disapprove the TIL. The applicant was informed of such decision and was requested to report for duty on the 8 January 2008. The applicant did report for duty and worked as normal without any indication of sickness. It must also be noted that his doctor gave him sick note up to 30 April 2008 and his health condition from 8 January 2008 to 30 April 2008 was good and this was contrary to his doctor's sick notes.

4.

RES JUDICATA

The cause of action arose on the 5th October 2008, after the applicant's has been informed by the respondent representative that his temporary incapacity leave was disapproved.

4.1.

The applicant then referred the matter to bargaining council under the case No. PSGA 1372/08/09. The matter was referred as "other dispute on the decision made by DCS managers on the temporary incapacity leave".

4.2.

The conciliation was heard on the 20 February 2009 and ruling was granted on the 27 February 2009, dismissing the applicant's case. See the attached ruling marked "A"

4.3.

On the 18th May 2010, the applicant refers the new matter to bargaining council as interpretation and application of collective agreement of Resolution 7/2000 under case No.PSCB610-09/10. It must be noted that the second dispute arose from the same cause of action [temporary incapacity

leave for period 23 March 2007 to 30 April 2008], between the same parties and the same relief is sought.

4.4.

I humble submit that the dispute has been determined by the ruling dated 27 February 2009 and the council lack jurisdiction to hear the matter. See ***Gramanie v DUT [2010 JOL 25876 CCMA]***

5.

CONDONATION

5.1.

Section 191 of LRA provides the time frame for lodging the dispute. The applicant is expected to refer the matter to the council for conciliation within period of 90 days upon the date the dispute aroused or the date applicant became aware of the act or occurrence. See Wardlaw v Supreme Mouldings (Pty) Ltd [2007] 28 ILJ 1042 LAC.

5.2

Since the cause of action arose on the 5th October 2008 and the dispute was referred to the council on the 18 May 2010. The applicant ought to have filed the condonation application for late filing.

5.3.

No explanation was provided why the applicant's did not lodged condonation application. No good cause was shown, why the referral of the matter was late and the degree of lateness is excessive.

5.4.

The same was not done and the council lacks the jurisdiction to hear this matter. See **Bombadier Transportation (Proprietary) Ltd v Mtiya NO and others [unreported JR 644/09 11/3/2009], EOH Abantu (Pty) v CCMA & others [2010] 2 BLLR 172**

6.

PREMATURE APPLICATION

6.1.

The State via the Minister is entitled to issue a determination on the process to be followed for temporary incapacity leave.

6.2.

The Policy and Procedure on the incapacity leave & ill health retirement [PILIR] as determined in terms of section 3 (2) of the Public Service Act 1994 as amended, lay down clear guidelines that has to be followed when the employee is not happy with the decision of the employer/ outcome of the application. In terms of section 35 of Public Service Act, the employee who is not happy with the outcome of the application is entitled to lodge the grievance.

6.3.

The above was not done, therefore section 7 (2) of PAJA provide that no court or tribunal shall review any administrative decision in terms of the act unless any internal remedies provided for in any other law has been first exhausted.

6.4.

I humble submit that the applicant has not exhausted the local internal remedies as provided under section 35 of PSA, therefore the council lack jurisdiction to hear this matter.

7.

The granting of TIL is discretional at the instance of the employer and applicable resolution does not go into any details as to how the discretion is to be exercised. Therefore this is the prerogative of the employer.

8.1.

The dispute over the interpretation of a collective agreement exists when the parties disagree over the meaning of a particular provision. Whereas the dispute over the application of a collective agreement exist when the parties disagree over whether the agreement applies to a particular facts or circumstances. I am of the view that the above is not applicable in this matter.

8.2.

It is common cause that the respondent has exercised the discretion by disapproving applicant TIL, therefore the decision was no longer governed by collective agreement. The issue in dispute was about the fairness of employer's decision. The employee can challenge such decision through following the court processes not bargaining council process. Therefore the bargaining council lack jurisdiction to arbitrate this dispute. See **PSA obo Steyn v SAP 2010 JOL 26297 PSCBC**

9.

Further note that in the case of **SAPS v PSCBC & others [2008] 29 ILJ 1989 LC,** Niewoudt AJ held that no relief may be awarded by arbitrator in dispute regarding interpretation of collective agreement and this was not a casus omission. There are normal contractual remedies to the parties. Therefore the council is not clothe with powers to performed these functions. See also PSA obo Dhanraj,RM & 1 other PSCB 96-09/10

10.

LEGAL REPRESENTATION

10.1

The applicant may be allowed to be represented at arbitration by registered trade union, fellow employees or by himself. May also be allowed to be represented by legal representation in exceptional cases. In the case of **Shell SA Energy (Pty) Ltd v NBCCI & others [2010] JOL 25841 LC** it was held that in any forum other than a court of law there is no absolute right to legal representation. Therefore the legal representation may be allowed in the complex matters upon the receipt of the application. No application was received in this matter, therefore Adv de Wet cannot represent the applicant in this matter and I am of the view that the matter is not complex as such.

I humble submit that this application must be dismissed.

SPECIAL NOTE

The respondent did not make submissions on the merits of the matter.

EMPLOYEE'S RESPONSE TO THE APPLICATION

1.

The conciliation in the matter remained unresolved on the 18 May 2010 and thereafter set down for arbitration on the 12 November 2010.

2.

On the 8 June 2010 the PSCBC issued a notice to the parties to convene a pre-arbitration meeting. On the 25 June 2010 a telephonic pre-arbitration meeting took place between the Employee and Employer's representative Mr Ndlovu. After the telephonic pre-arbitration discussion the Employee set a minute to Mr Ndlovu.

3.

On the 4 August 2010 the matter was set down for arbitration. Due to the industrial action the matter could not proceed on the 31 August 2010 and was thereafter set down for the 12 November 2010.

4.

On the morning of 12 November 2010 and at the commencement of the arbitration the Employer's representative stated that the Employer had three points in limine it intended taking. One of those included a jurisdictional point.

5.

Despite annexure "B" having warned both parties that jurisdictional points may only be taken within five days from the conclusion of the pre-arbitration, the Employer persisted in taking a jurisdictional point.

6.

In order to avoid undue delay the arbitrator directed dates by which those points were to be taken and responded to.

7.

FIRST POINT IN LIMINE: RES JUDICATA

The Employer's contention is apparently that this matter was dealt with by the GPSSBC and therefore cannot be thereafter be dealt with by the PSCBC. There is no merit in this contention. The merits of the dispute between the parties were not finally adjudicated upon by the GPSSBC since Commissioner Mr P Pillay found that the GPSSBC had no jurisdiction to deal with the dispute and for this reason the matter was dismissed and referred to the PSCBC.

A matter only becomes *res judicata* if the merits of the dispute have been dealt with and finally and definitively been pronounced upon. Thereafter no party may have a second bite at the same cherry and refer the same dispute on the merits to another forum or same forum on a second occasion.

8.

SECOND POINT IN LIMINE: LATE REFERRAL

The Employer's contention is that the Employee only referred this dispute to the PSCBC during May 2010 and therefore out of time.

It was common cause between the parties before the GPSSBC that the Employee had proceeded timeously and well within the required time frame in respect of unfair labour practice claim.
At that time there was only on a threat by the Employer that certain temporary disability leave, for which the Employee had already been paid on full salary would be reversed to be leave without pay.
Following the threat that already paid temporary disability leave may be reversed, a grievance was immediately lodged. When the grievance was not successfully entertained, the matter was referred to conciliation where it came before the GPSSBC.
On the 27 February 2009 the GPSSBC referred the dispute to the PSCBC. In the meantime and since the Employee had been paid in full for the relevant period 23 March 2007 to 7 January 2008 the matter was not enrolled. Upon the resignation of the Employee on 28 February 2010 he was informed that an amount of R 352 106.20 was not going to be paid out to him as this part of his pension payout was to be set off against the sick leave that had been paid to him. When this happened the referral was acted upon. In other words immediately when the Employee's non-payment occurred the matter was proceeded with. It is therefore not open to the Employer to allege that the dispute was referred late to the PSCBC.

THIRD POINT IN LIMINE: JURISDICTION
The Employee's case revolves around the provisions of Resolution 7 of 2000 relating to temporary disability leave. In this regard an Employer has discretion whether or not to grant temporary disability leave. Whether the discretion is in fact exercised properly in terms of relevant criteria is a question of right and therefore arbitrable as an application" dispute.

If the Employer failed to comply with the terms of the collective agreement or failed to apply its mind at all or exercised its discretion unreasonably an arbitrator could intervene and give effect to the collective agreement.
If there is a dispute about the application of a collective agreement this forum has jurisdiction to deal with it.

A dispute about the application of a collective agreement is not only about whether a collective agreement applies to a certain set of facts but also where one party wishes to enforce the terms of the collective agreement.

MERITS

The Employee submitted wherein the following are recorded:

All period from 26 March 2007 until 30 April 2008 were covered by doctor's certificates.

On the 8 January 2008 the Employee returned to work as commanded. The Employee never received any response or feedback to his second application.

The Employee resigned on 28 February 2010. on his resignation the Employer informed the Employee that an amount of R 352 106.20 would be deducted from his **pension benefit** as a set off against the aforesaid **sick leave** that was paid to him which was subsequently held not to have been approved.

It is common cause that neither applications were dealt with within thirty days as required in Resolution 7 of 2000. In **Swart's** case a similar failure was referred to as "a blatant breach of the collective agreement and (one that) warrants relief.

In **Tiltman's** case it was held on the facts almost similar to this particular case that *"I do not consider that an employer who has already granted paid leave may after the fact and unilaterally set off the remuneration that has already accrued when exercising a different discretion namely to decide whether to prove an application for boarding.*

In both the **Swart** and **Tiltman** cases the Employer was ordered to pay the monies that were withheld. In the **Tiltman's** the order was accompanied by an order that interest be paid at the legal rate.

The Employee seeks an order that an award be made that the Employer pays him the amount of R 352 106.20 together with interest thereon at the legal rate calculated from the date of resignation 28 February 2010 to date of payment together with the costs of the arbitration hearing on 12 November 2010.

ISSUES TO BE DECIDED

7. I am to determine the following points in Limine raised by the Employer:
    i. Whether the matter may be deemed *Res Judicata;*
    ii. Whether condonation for the late filing of the dispute is necessary;
    iii. Whether the application is premature; and
    iv. Whether legal representation is permitted.
    v. Whether the Employee should be granted the relief sought.

At the outset I must point out that despite the Council's direction to the Employer in respect of the time frames to launch points in limine, the Employer despite being forewarned chose to raise what may be regarded as technical points. The Labour Relations Act in section 138 (1) guides arbitrator's to deal with matters quickly and speedily without legal technicalities but must be aware of the merits of the matter.
There is an increasing trend to violate the primary purpose of the LRA that of expeditiously dealing with matters by the raising preliminary points that could be dealt with without the matter being set down for arbitration, if the party intending to raise technical points do so in the form of a formal application. This would speedily finalise matters.

In respect of the points in limine raised I intend to deal with them as follows:

i. Whether the matter may be deemed *Res Judicata;*
The Employee referred the matter to the incorrect forum GPSSBC and the commissioner did not deal and determine the matter on its merits but determined that the matter be transferred to the PSCBC.
This is a common practice wherein an applicant approaches the wrong forum and the Council then transfers the matter to the appropriate forum. This matter may not be regarded as finalised by the GPSSBC.
As a consequence of the above the application to regard the matter as ***res judicata*** is dismissed.

ii. Whether condonation for the late filing of the dispute is necessary;

The applicant had timeously referred his dispute to the GPSSBC and the matter was stayed because there was not prejudice to the Employee. As soon as the decision was made to refuse the leave for which monies had already been paid sparked the Employee to pursue his dispute. Further I find that the Employer had not raised this point at the conciliation (I have taken cognisance of the decision in the Bombadier case) and the subsequent sitting that were either postponed or at the pre-arbitration telephonic arrangements.

The degree of delay if any is mitigated by the delay occasioned by the public servants strikes and the inaction of the Employer.

As a consequence of the above I determine that there is no merit in the point that condonation is warranted. The application is dismissed.

iii. Whether the application is premature

The applicant had exhausted the internal remedies and with his monies being deducted after his resignation it cannot be said that the application is premature. The cause of the grievance arose while the Employee was in the employ of the respondent. He pursued his dispute while he was informed that monies were to be deducted from his pension benefit to set off payments made to him for leave not authorised.

Therefore the application is correctly positioned. The application is dismissed.

iv. Whether legal representation is permitted.

The Employer had not provided any evidence from the Council's rules that bars the Employee legal representation in matters of this nature. This is not a matter relating to dismissal for conduct or capacity. In any event there are sufficient grounds that warrant legal representation. The matter relates to the interpretation or application of a collective agreement. The matter of setting off benefits against monies owed and the tax implications thereof and the volume of similar cases together with the comparative abilities of the parties necessitate legal expertise.

As a consequence of the above I determine that legal representation is permitted.

SURVEY OF EVIDENCE AND ARGUMENT

7. I am indebted to the parties for their comprehensive submissions and advise that it has been taken into account in arriving at my decision. I also note that the respondent elected not to reply in terms of the agreement. The respective submissions are annexed to the Ruling and to avoid unnecessary duplication only pertinent references were made in the determination.

ANALYSIS OF EVIDENCE AND ARGUMENT

In dismissing the points in limine raised by the Employer I am required to determine the matter on the merits.

The Employer had elected despite being given an indulgence not to challenge the argument of the Employee. In order to deal with the matter in its completeness I record the following before I make my determination.

8. The respondent concedes that the applicant after he had exhausted his statutory leave had applied for temporary incapacity leave His (applicant) leave for the period 23 March 2007 to 7 January 2008 was not approved. He returned to work on the 8 January 2008 and resigned on the 28 February 2010.
9. The Employee was informed that an amount of R 352 106.20 would be deducted from his pension benefits to set off monies paid to him for unauthorised leave. He seeks the refund of these monies together with interest at the prescribed rate from the 8 February 2010 to the date of payment.
10. This matter was conciliated and a certificate of outcome described the dispute as an interpretation and/or application of a collective agreement dispute.

11. It is clear from the submissions that the applicant had exhausted his leave entitlements and had applied in terms of the leave requirements for leave to be granted on full pay.
12. He followed the procedures and completed the requisite forms and was refused leave on full pay in respect of the period 23 March 2007 to the 7 January 2007.
13. It is pronounced in terms of section 138 of the Labour Relations Act that a commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.
14. Resolution 7 of 2000 was an agreement that was implemented on the 1St July 2000 and it records that disputes about the interpretation or application of the agreement shall be dealt with according to the dispute resolution procedure of the PSCBC.
15. In the PILIR determination published in April 2009 under clause

    3.1 DETERMINATION ON LEAVE OF ABSENCE IN THE PUBLIC SERVICE

    It stipulates "The leave dispensation as determined in the Leave Determination, read with the applicable collective agreements, ...three years.

    The collective agreements referred to in the footnotes are PSCBC Resolution 7 of 2000 as amended by PSCBC Resolution 5 of 2001, PSCBC Resolution 15 of 2002 and PSCBC Resolution 1 of 2007.
16. The employees that have exhausted their normal leave may apply for extended leave on full pay or leave without pay or utilise their accumulated leave. They would have to make the necessary application and if not satisfied with the outcome of their application may invoke dispute resolution procedures in terms of the existing collective agreements or ministerial determinations.

    In the current case the employee is challenging the decision to refuse his leave with pay that he has been paid and the employer had deducted from his pension benefits.

17. The crucial question is whether the Employer is in breach of the collective agreement, simply put whether the Employer correctly interpreted and applied the collective agreement in respect of temporary incapacity leave.
18. Matters of this nature are before arbitrators frequently and they are bound by the legal effect of the terms and conditions of collective agreements. In fact the parties have reduced their resolution of matters to writing and they are thereafter bound to give effect to the agreement.
19. The window period to respond to an application for temporary incapacity leave is stipulated in the agreement. Should the Employer seek to extend the requisite days then the necessary concessions must be made. It is unfair to let an employee believe that his leave is not challenged within the stipulated period and then out of the blue issue a directive that it is not approved. Clearly this is not fair practice and that the offending official or official must be made to account for their inaction.
20. In this case, and I hope that future cases are dealt with the requisite caution by the Employer because if prompt action is not undertaken in respect of these application the public funds may be compromised.
21. I have taken note of the Employee reference to decided cases and cases handed down by my colleagues and determined that the Employer's action to deduct monies after it has been paid and to then deduct the alleged unauthorised payments that are covered by a collective agreement from other benefits is unfair. I am aware that the Employer is entitled to recoup legitimate unauthorised/ illegal payments to employees. This is not such a case.
22. I have also considered the relief sought by the Employee in respect of costs and interest. In this regard I have taken into account that the Employee had been paid for a considerable period for which he did not render service and believe that this should be balanced against his pray for interest and costs. There is no order as to costs and interest.

23. As a consequence of the above I determine that the Employer pay the Employee the amount of R 352 106.20 within THIRTY (30) Days of the date when it receives this award.

AWARD

24. The Employer must pay the Employee the amount of R 352 106.20 within THIRTY (30) days of the date when it receives the award.
25. The aforesaid amount must be forwarded to the Employee by registered post to Postnet Suite 272, Private Bag X6, Cascades. Should the Employee's address have changed then in that event he must inform the Employer in writing of his new address and banking details.
26. I make no order as to interest and costs.

THIS DONE AT DURBAN ON THIS DAY OF 2010.

.....
ARBITRATOR: A S DORASAMY