

SOUTH AFRICA / JUDGMENT

Du Plessis v Public Service Co-ordinating Bargaining Council and Others (JR2218/11)

[2015] ZALCJHB 261 (14 August 2015)

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COURT

Labour Court Johannesburg

BEFORE

Tlhotlhamajie

CASE / FILE NUMBER

JR2218/11

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 2218/11

H C B DU PLESSIS Applicant and PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL MS
N G J MBILENI MINISTER OF SAFETY AND SECURITY SOUTH AFRICAN POLICE SERVICE First
Respondent Second Respondent Third Respondent Fourth Respondent

Delivered: 14 August 2015

TLHOTLHALEMAJE, AJ

Introduction:

- [1] This application was brought before the Court in terms of section 145(1) and (2), read together with section 158(1)(f) and (g) of the Labour Relations Act[1] (the LRA). The Applicant seeks to have an arbitration award, issued by the Second Respondent (Arbitrator) under the auspices of the First Respondent (PSCBC), reviewed, set aside and be substituted by a finding of this Court.
- [2] The Applicant also sought condonation for the late filing of the replying affidavit. The parties had agreed that condonation should be granted. The Court is satisfied that good cause has been shown in respect of the applicant's late filing of the replying affidavit.

Background:

- [3] The Applicant is employed by the Fourth Respondent (the SAPS) in the capacity of a Lieutenant-Colonel. There is a history of the Applicant making applications for temporary incapacity leave as well as ill-health retirement dating back to 2003.
- [4] He had referred a dispute to the First Respondent (the PSCBC) in terms of section 24 (2) and 24 (5) of the LRA. He sought approval of his application for temporary incapacity leave and ill-health retirement as contemplated in Resolution 7 of 2000[2] on the basis that he suffered from Post Traumatic Stress Disorder as a result of his exposure to traumatic events in the course of his duties.
- [5] The Applicant's contention was that his health problems started in 1998 when the offices of SAPS where he was stationed were petrol bombed whilst he was inside the building. He contends that his requests for trauma counselling were ignored by SAPS. He had however been treated for PTSD and depression by various medical practitioners and had furnished the SAPS with all of his medical reports.
- [6] It is common cause that when seeking temporary incapacity or ill-health retirement, an application has to be made with all the supporting

medical reports attached. The application is then forwarded to a Health Risk Manager (HRM), an independent body appointed by SAPS to advise on the granting of incapacity leave and ill health retirement of employees. The HRM is a medical assessor appointed to examine employees and to make recommendations to the National Commissioner on all applications related to incapacity leave, ill-health retirement and injuries sustained by employees. Ultimately the decision to grant or refuse such leave applications lies with the National Commissioner.

- [7] The Applicant's last made such an application on 18 August 2009 which was declined. Aggrieved, he filed a grievance which on his version was not attended to. This led him to approach this Court directly on 11 November 2009 under Case number JR2720/09. That application was however withdrawn after the parties had agreed that the SAPS would re-evaluate the Applicant. The re-evaluation was done, and the SAPS still refused to grant him the temporary incapacity leave or ill-health retirement. He then referred a dispute to the PSCBC resulting in the matter coming before the Arbitrator, and the resultant award which is the subject of this review application.

The award:

- [8] The arbitration proceedings took place on 10 March 2011. No oral evidence was led as the parties had agreed to have the matter

determined on the basis of written submissions and bundle of documents. The Arbitrator established that it was not in dispute that

the Applicant had indeed been diagnosed with PTSD since 1999. She made reference to clause 7.6 (a) of the Resolution which provides

that;

“Employees who, as a result of their work, suffer occupational injuries or contract occupational diseases shall be granted occupational injury and disease leave for the duration of the period they cannot work.”

[9] The Arbitrator in arriving at her conclusions also had regard to Clause 6 (a) of the National Instruction 2/2004[3] which, she held should be read in conjunction with the Resolution, and which provides that;

‘An employee who sustains an occupational injury, or who contracts an occupational disease, is entitled to occupational injury and disease leave with full pay, from the time that he or she becomes unable to work-

(i) until he or she can resume his or her work or

(ii) until he or she is discharged from service after an inquiry as contemplated in Section 34 of the Act.”

[10] The Arbitrator further found that the National Instruction set out the procedures to be followed in claiming entitlements under the Resolution, and that the HRM only made recommendations, which the SAPS (National Commissioner) had a discretion to either accept or reject.

[11] The Arbitrator further lamented over the manner with which the case was presented to her, and the lack of viva voce evidence. She commented that this approach had not made her task easier to interrogate other issues.

[12] She had further concluded that the report of the HRM had not been contradicted by any competent and experienced practitioner, and there was no basis to reject it as the SAPS had relied on it in taking a decision.

The grounds of review:

[13] The essence of the submissions made on behalf of the Applicant was that in the event that an employee of the SAPS contracts an occupational injury or disease, such as Post Traumatic Stress Disorder, then the SAPS does not have a discretion to refuse an

application for leave from the date that the employee becomes ill, to the date that he or she is fit to resume duties, or is discharged

from the SAPS.

[14] It was further submitted on behalf of the Applicant that the arbitration award was reviewable on the following grounds:

- a) The award is not justifiable in relation to the reasons given for it, alternatively it is not rationally connected to the evidence before the Arbitrator;
- b) The Arbitrator failed to apply her mind to the evidence and facts before her in finding that the SAPS had correctly interpreted and applied Resolution 7 of 2000 in not approving the Applicant's application;
- c) The Arbitrator committed a gross irregularity in failing to apply her mind to the evidence, misunderstood the evidence and attributed

motives to the applicant which could not reasonably be drawn from the evidence;

- d) The Arbitrator committed misconduct in that she disregarded relevant evidence, failed to apply her mind to facts presented, issued an unreasonable award;
- e) The applicant had proved his entitlement to relief at the arbitration proceedings.

[15] The SAPS disputes that the award is reviewable on the above grounds. It submitted that;

- a) The award is one that a reasonable commissioner could make, and it clearly evidences consideration having been given to the above

grounds of review.

- b) In disputes pertaining to the interpretation and/or application of collective agreements, the applicant bears the onus to prove that the interpretation and/or the manner of application contended for is the one that ought to be accepted, and that this must be proved on a balance of probabilities;
- c) Where the applicant contends that he ought to have been granted leave on grounds of ill-health retirement in terms of Resolution 7 of 2000, the factual precondition that must be shown by the applicant to exist is the inability to work owing to an occupational injury or disease;
- d) To the extent that the Applicant elected not to lead evidence on the fact that he was indeed unable to work owing to an occupational

injury or disease, he could not have discharged the onus to prove that the interpretation and manner of application contended for is the one that ought to be accepted;

- e) The arbitration award cannot be said to have been unreasonable in the circumstances where no evidence was placed before the Arbitrator.

The relevant provisions:

- [16] As per item (v) of the parties' pre-arbitration minutes[4], the Arbitrator was called upon to decide;

‘Whether the Applicant is entitled to temporary incapacity leave and ill-health retirement with reference to Resolution 7 of 2000’.

[17] This Resolution is a collective agreement as defined in section 213 of the LRA, in terms of which an employee has the right to apply for inter alia, temporary incapacity leave in circumstances where the prescribed sick leave cycle has been exhausted. The relevant provisions are;

Clause 7.5.1 Temporary disability leave:

“(a) An employee whose normal sick leave credits in a cycle have been exhausted and who, according to the relevant practitioner, requires to be absent from work due to disability which is not permanent, may be granted sick leave 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 of the Labour Relations Act of 1995
- (c) the employer shall specify the level of approval in respect of applications for disability leave.’

[18] Clause 7.5.2. Permanent disability leave, provides that;-

- a) Employees whose degree of disability has been certified as permanent shall, with the approval of the employer, be granted a maximum of 30 working days paid sick leave, or such additional number of days required by the employer to finalise the process set out in (b) and (c) below.
- b) The employer shall, within 30 working days, ascertain the feasibility of:
 - (i) alternative employment; or
 - (ii) adapting duties or work circumstances to accommodate the disability.
- c) If both the employer and the employee are convinced that the employee will never be able to perform any type of duties at her or his level or rank, the employee shall proceed with application for ill health benefits in terms of the Pension Law of 1996.

[19] In regards to the precise relief claimed by the applicant, it was recorded in the pre-arbitration minute that he seeks approval of temporary incapacity leave and ill-health retirement in terms of Resolution 7 of 20000 read with National Instruction 2 of 2004. The operation of sick leave as per the collective agreement is given effect to by National Instruction. The relevant provisions of the National Instruction are;

Clause 4(6) (a) which provide that:-

‘An employee who sustains an occupational disease or injury is entitled to occupational injury and disease leave with full pay from the time he/she becomes unable to work-

(ii) until he or she is discharged from the Service after an enquiry as contemplated in Section 34 of the Act.’

Clause 4(6) (b), which provides that;

“An employee who is absent from work due to an alleged occupational injury, or an occupational disease, must complete and submit the documents required for temporary incapacity leave and the documents must be referred to the health risk manager for verification and validation of the period of absence”

[20] The National Instruction further makes reference to refers to section 34 (1) (a) of the Police Service Act[5], which provides that:-

‘The National Commissioner may designate a member, a category of members or any other person or category of persons who may, in general or in a specific case inquire into the fitness of a member to remain in the Service on account of indisposition, disease or injury’.

Section 34(1) (f) of the same Act provides for an inquiry into:-

‘...a disease or indisposition alleged to have been contracted in the course of his/her duty...’

Furthermore, the administrative inquiry into the indisposition of injured employees is held in accordance with Regulation 68 (1) to the Police Service Act, which states that:-

‘the commissioner may, for administrative purposes, convene a board to inquire into:-

- (a) an injury alleged to have been sustained by a member or any other person in the service of this Department, in an accident arising out of or in the course of the execution of his functions, or a disease or indisposition alleged to have been contracted in the course and as a result of the execution of his functions....”

The legal framework and evaluation:

[21] In *Goldfields Mining South Africa (Pty) Ltd v CCMA*[6] the Labour Appeal Court in explaining the *Sidumo*[7] test held that provided that the arbitrator gave the parties a full opportunity to state their respective cases at the hearing,

identified the issue that he or she was required to arbitrate, understood the nature of the dispute and dealt with its substantive

merits, the function of the reviewing court is limited to a determination whether the arbitrator’s decision is one that could not be reached by a reasonable decision-maker on the available material[8].

[22] In essence, the enquiry is whether the decision arrived at by the Arbitrator in the light of the material placed before him or her falls within a range of reasonableness. In *C Arends & Others v SALGBC & Others*[9] the Labour Appeal Court (per Murphy AJA) advised against the folly of parties agreeing to have a matter determined without the leading of any oral evidence or agreed statement of case. Insofar as the merits of that case were concerned, it was held that;

“The appellants are to some extent the authors of their own misfortune. They placed the matter before the arbitrator as if there was a simple, single issue capable of resolution with the barest minimum of factual matter. Their approach was neither prudent nor correct. When parties desire to proceed without oral evidence in the form of a special case, it is imperative that there should be a written statement of the facts agreed by the parties, akin to a pleading. Otherwise, the presiding officer may not be in a position to answer the legal question put to him. Alternatively, without such a statement, the question put is in danger of being abstract or academic. Courts of law and arbitration tribunals dealing with disputes of right exist for the settlement of concrete controversies and not to pronounce upon abstract questions or to give advice upon differing contentions about the meaning of an

agreement. Where a question of legal interpretation is submitted to an arbitrator, the parties must set out in the stated case a factual substratum which shows what has arisen and how it has arisen. The stated case must set out agreed facts, not assumptions. The purpose of the rule is to enable a case to be determined without the necessity of hearing the evidence. An oral stated case predicated upon poorly ventilated and potentially unshared assumptions as to the facts defeats the purpose of the requirements of a stated case and, as this case shows, will lead to problematic results[10].” (Citations omitted)

[23] The case before this Court typifies a pattern within Bargaining Councils in the public sector when disputes in terms of section 24 of the LRA are referred. It appears that parties are content with referring such disputes and then concluding perfunctory pre-arbitration minutes that are meaningless and unhelpful to the Arbitrator. It is appreciated that the rules of bargaining councils within the public service in particular require parties to hold such pre-arbitration conferences prior to matters being set-down. This however does not imply that little attention and detail must be given to this obligatory process. There is a reason behind such rules as

they are meant to curtail the issues and enable Arbitrators to expeditiously deal with matters. Some seriousness and effort is

therefore required of the parties in this regard.

[24] Other than going through the motions in concluding meaningless pre-arbitration minutes, the parties in such application are also content with agreeing to dispense with oral evidence. They would then agree to file written heads of argument and then bombard unsuspecting Arbitrators with voluminous bundles and equally incoherent written heads of arguments. Once the parties have gone through this charade, they then pat themselves on their backs for a job well done, and expect the overwhelmed Arbitrators to make sense of their

respective cases, or worst still, to make a finding in their favour.

- [25] Even more disconcerting however is the temerity of the losing parties in the above circumstances to then approach this Court with contrived review applications, and complain that the Arbitrator had failed to take this or that evidence into account, as it had happened in this case.
- [26] The parties in this case agreed that each shall prepare and submit its own bundle of documents and to argue the matter by means of written heads of argument, and consequently, no oral evidence was presented[11]. Only one fact was recorded as being in dispute in the pre-arbitration minute, i.e. being whether the applicant was entitled to temporary incapacity leave and ill-health retirement in terms of Resolution 7 of 2000[12]. This issue is not by any stretch of imagination a simple one capable of resolution with the barest minimum of factual matter.
- [27] The Arbitrator was then presented with voluminous documents including two sets of bundles submitted by the applicant. Bundle A contained 105 pages, whilst bundle B contained 175 pages. The SAPS' bundle contained 105 pages, and two pages of written heads of argument. The applicant submitted nine pages of written heads. In total, the combined bundle of documents the Arbitrator had to sift through in order to determine the main issue contained 396 pages.
- [28] As stated in *C Arends & Others v SALGBC & Others*[13], when the parties desire to proceed without oral evidence in the form of a special case, it is imperative that there should be at least a written statement of the facts agreed by the parties, akin to pleadings. In this case however, the parties were content to burden the Arbitrator with a voluminous bundle, and written heads of arguments which obviously amongst other thing raised material disputes of facts. No attempt was made in the pre-trial minute to indicate what issues were in dispute or those that were common cause, to make the task of the Arbitrator easier. It was expected of the Arbitrator to sift through volumes of material, consider the written heads of argument, and come up with a reasonable conclusion.
- [29] To the extent that the parties chose this path in presenting their respective cases, they should be expected to stand and fall by it. They cannot therefore complain that the Arbitrator failed to take this or that evidence into account, when it is trite that documents do not speak for themselves, and also when it was not made easy for the Arbitrator to interrogate the issues as she had lamented in paragraph 5.7 of her award. It was even more crucial for oral evidence to be led or at least a formal statement of case under oath to be filed, as the parties knew that there were factual disputes surrounding voluminous medical certificates and reports, and the report of the HRM.
- [30] In the light of the principles set out in *Mgobhozi v Naidoo NO & others*[14] one would have expected that applicants seeking relief where temporal or permanent incapacity is claimed, especially in the light of the requirements set out in the Resolution and National Instruction,

would know that medical certificates or reports not accompanied by affidavits from medical practitioners are meaningless, and do not necessarily constitute admissible evidence. In the same vein, a document is mere hearsay evidence and a court or arbitrator may refuse to admit such evidence. Worst still, a case cannot be made out in written arguments, and such arguments in any event do not constitute evidence.

- [31] To this end, where a case is presented in the manner that it was presented as in the arbitration proceedings under review, I fail to appreciate what ‘evidence’ the Arbitrator could possibly have failed to take into account. This is even moreso, where there was no agreement recorded in the pre-trial minute as to what the common cause or disputed facts were in detailed terms, or where no proper statements of case under oath were filed, or even where a cursory reference was made to the effect that “the documents purport to be’ in the pre-arbitration minute.
- [32] Given the invidious position the Arbitrator was placed in, and in order to make sense of the voluminous material placed before her, she had had regard to Assessment Report[15] prepared by the HRM in terms of which the Applicant’s application for ill health retirement was declined. In the report, it was stated that firstly, the Applicant’s symptoms had improved; secondly, that he was physically fit to perform his duties, thirdly, that his concentration was noted to be good during assessments, and that he had the cognitive ability to complete tasks given to him at a high level. SAPS or the National Commissioner had followed these recommendations and had instructed the Applicant to resume his duties in an alternative position to accommodate his incapacity.
- [33] In argument, it was contended that the Arbitrator had made reference to the National Instruction when it had no bearing on the matter. This contention lacks merit on the basis that the purpose of the National Instruction is to regulate the management and administration of sick leave within the SAPS as provided for in the Resolution. The two documents cannot be read, interpreted or applied in isolation from each other. Even though, the National Instruction does not make reference to Resolution 7, its purpose, in the absence of any such mechanisms in the Resolution, is to provide mechanism for the implementation of the provisions of that Resolution.
- [34] Clause 4 (3) of the National Instruction deals sick leave, whilst clause 4 (4) deals with temporary incapacity leave. To the extent that it was common cause that PTSD is classified as an occupational disease, leave in this regard is regulated by the provisions of clause 4 (6) of the Instruction. Clause 5 and 6 of the Instruction make provision for procedures to be followed in the event that an employee seeks to apply for any form of leave, whilst clause 7 deals with the approval of leave. Clause 7 (3) of the Instruction deals with the role of the National Commissioner in matters pertaining to temporary incapacity leave. Leave pertaining to occupational diseases is dealt with in terms of clause 5 (6) and requires applications to be forwarded to the HRM for verification and validation of the period of absence, and in terms of clause 7 (2) (b), for such applications to go through the HRM for recommendations.

[35] I therefore fail to understand the contention that the two documents should be treated independently. Furthermore, to the extent that the Arbitrator had placed emphasis on the HRM report in arriving at her conclusions, I fail to appreciate how it can be said that the report was contradicted by the applicant, especially in view of the question of onus as submitted on behalf of the SAPS, and also in view of the evidentiary value to be attached to the Applicant's medical reports relied upon by him.

[36] As it was correctly pointed out on behalf of the third and fourth respondents, where the dispute relates to the interpretation or application of a collective agreement, the applicant bears the onus to prove that the interpretation and/or the manner of application

contended for is the one that ought to be accepted. Clause 4 (4) (a) makes it clear that the granting of temporary incapacity leave is at the discretion of the National Commissioner (or delegate), and I cannot find support on a reading of the provisions of the National Instruction that suggest that the National Commissioner is obliged to grant the applications for leave as long as certain conditions have been met. For the purposes of granting occupational injury and disease leave, the matter goes through the HRM as it had happened in this case, and the National Commissioner exercised his discretion.

[37] Where the HRM had made the findings as already illustrated above, and the National Commissioner had acted upon those recommendations, the onus was on the applicant to show in what material respects that decision should not have been taken in the light of his factual

precondition which was not corroborated by oral evidence. Furthermore, the applicant has to show in what respects the National

Commissioner had not exercised his or her discretion fairly. The Arbitrator in these circumstances could not have on her own simply

interrogated the documents before her, and be expected to come up with an outcome that was suitable to the Applicant.

[38] In the light of the manner with which the matter was presented before the Arbitrator, I fail to appreciate how it can be said that the outcome reached by the Arbitrator was not reasonable. The failure by an arbitrator to attach particular weight to evidence or attachment of weight to the relevant evidence and the like are not in themselves a basis for review. The issue is whether the resultant decision fell outside of a band of decisions to which reasonable decision-maker could come on the same material[16].

[39] I further fail to appreciate how it can be said that the Arbitrator had narrowed the scope of the enquiry as against what was to be determined under the pre-arbitration minutes, when the parties had themselves narrowed the issues for determination to whether the Applicant was entitled to temporary incapacity leave and ill-health retirement with reference to Resolution 7 of 2000. The arbitrator gave the parties a full opportunity to state their respective cases at the hearing and they chose a particular manner of presenting their

respective cases. She had also identified the issue that she was required to arbitrate, understood the nature of the dispute, dealt with its substantive merits and had arrived at a reasonable outcome.

[40] In *C Arends & Others v SALGBC & Others*, it was also held that an arbitrator faced with a request to determine a special case where the facts are inadequately stated should decline to accede to the request^[17]. In this case however, the parties as already stated merely presented the Arbitrator with documents and written heads of arguments. This is how they wished to have their matter determined and the Arbitrator had indulged them. I did not therefore understand the applicant's case for the purposes of this review application to be that the Arbitrator should have declined to determine the matter in the light of the manner with which the material placed before her.

[41] In the light of the above, I am satisfied that based on the material before the Arbitrator, there is no basis for a conclusion to be reached that the outcome she had reached did not fall within a range of reasonableness. I have further had regard to the issue of costs, and it is my view that upon a consideration of law and fairness, a cost order is not warranted in this case.

Order:

- i. The application to review and set aside the arbitration award issued by the second respondent under case number PSCB207-10/11 is dismissed.
- ii. There is no order as to costs.

Tlhotlhemaje, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant: Mr Gouws of Johan Gouws Attorneys

On behalf of the Respondent: Adv Mosam

Instructed by:

The State Attorney

[1] No 66 of 1995 as amended

[2] At page 49 of bundle of documents

[3] Issued by the National Commissioner of Police in terms of section 25 of the Police Act 86 of 1995.

[4] Page 72 of Index

[5] South African Police Services Act 68 of 1995.

[6]

(2014) 35 ILJ 943 (LAC) at para [20]

[7]

[2007] 12 BLLR 1097 (CC)

[8] See also South African Medical Association obo Mabuza and Others v Commissioner Moletsane and Others (JR834/12) [2014] ZALCJHB 66 (14 March 2014) at para [8]

[9]

[2015] 1 BLLR 23 (LAC)

[10] At para [15]

[11] Para 7.1 p12 of the founding affidavit

[12] Clause IV of pre arbitration minute at p72 of index bundle

[13] Ibid

[14]

(2006) 27 ILJ 786 (LAC)

[15] Dated 28 December 2009 (p86 of the indexed bundle)

[16] Herholdt v Nedbank

(2013) 34 ILJ 2779 (SCA) at para [25]

[17] At para [17]

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