IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE NO: JR 388/07

In the matter between:

PUBLIC SERVANTS ASSOCIATION

OF SA OBO P W J DE BRUYN APPLICANT

AND

MINISTER OF SAFETY AND SECURITY 1ST RESPONDENT

NATIONAL COMMISSIONER,

SOUTH AFRICAN POLICE SERVICE 2ND RESPONDENT

JUDGMENT

MOLAHLEHI J

Introduction

[1] The applicant, the Public Servants Association (PSA) on behalf of its member, Mr De Bruyn (the employee) seeks an order reviewing and setting aside the decision of the second respondent in terms of which the application for paid special incapacity leave for the period 25 February 2005 to 19 March 2006 was disapproved. The applicant also challenged the decision refusing to treat the 180 days absence from the workplace as paid leave.

[2] The applicant further seeks an order declaring that:

(a) the employee was entitled to special incapacity leave for the period 25 February 2005 to 19 March 2006; and

(b) the unpaid leave of 180 days be converted to paid leave.

Background facts

[3] The employee, who had been in the employ of the respondents since 1980, was booked off sick due to depression from 19 July 2004. At that stage the employee was working as a section head in the personnel services at the provincial office in Polokwane.

[4] Following the instruction by the third respondent, the employee resumed his duties during March 2006 and was then assigned, section head: skills development facilitator and administration.

[5] The applicant booked sick leave on the ground that he was undergoing medical treatment. He asserted that he had been diagnosed with *"Post Traumatic Stress Disorder"* (PTSD).

[6] The employee submitted an application for ill-health retirement during February 2005, and attached thereto his doctor's medical report which set out his health condition. In the application form the employee described the demands of his job as follows:

> *"To ensure that I am aware of all daily and future activities on provincial area offices and station level pertaining to personnel services which includes transfers, promotions, terminations, medical aids, leave section, disciplinary, records, budget, recruitment, grievances, labour management, etc. Daily management of stats and projects and submitting*

of reports. Managing of job description, evaluations, preparing for meetings."

[7] The details of disablement arising from the ill-health is described as follows:

"My illness is a direct result of matters and situations that occurred at my place of work during June / July 2004 as well as months and times prior to this date. Unfair Labour Practice, Victimisation, Defamation and Bullying. As well as scenes of accidents and gruesome crime scenes attended."

[8] In determining the impact of work performance on him the employee stated that:

"Can not function under unfair labour practices as currently been practised in the South African Police Service."

[9] In detailing the specific difficulties in performing his duties the employee indicated in the application form that:

"I do not have any trust anymore in the management of the SAPS."

[10] In the statement attached to his application the employee complained about how some of his superiors spoke to him during the morning of 13th July 2004. One of the issues that arose during the morning of that day concerned a letter of a certain Maimela who apparently complained about services rendered to him by the employee. The employee was offended by the response from Commissioner Binta when he told him that he had just received the letter of Maimela and

certain Pretorious was phoning to discuss its contents thereof. The employee quotes Commissioner Binta who seem to have enquired about this matter as having said:

> *"Why don't you want to help this man (referring to Maimela), is this because he is a black man."*

The employee further relates other unhappy encounters with Commissioner Binta.

[11] The South African Police Services (SAPS) responded to the above application in a letter dated 3rd March 2006, wherein the Divisional Commissioner indicated that the application for ill-health retirement had been considered and the decision taken was that the employee should resume duties. The employee was required to report for duty on 13th March 2006.

[12] The employee indicates in his founding affidavit that he could not attend work on 13th March 2006, as he was in hospital receiving psychiatric treatment.

[13] The Divisional Commissioner addressed another letter dated 24th March 2006, to the employee and indicated that the medical board of the third respondent took a decision on 31st March 2005, in terms of which it was resolved that the employee's illness could not be regarded as an illness arising in the performance of his official duties. The letter further indicated that absence for a period exceeding 36 working days required the submission of a request for a special leave to be made.

[14] The employee submitted special leave forms together with medical certificates indicating that his absence was due to major depression and PTSD.

[15] The second respondent responded to the special leave application in a letter dated 5th June 2006, wherein it is indicated that leave was approved for the period 6th September 2004 to 24th February 2005. Leave for the period 25th February 2005 to 19th March 2006, was disapproved and the period beyond 25th February 2005 was to be regarded as annual leave. The employee then lodged a grievance which remained unresolved.

[16] The employee contended that he was prejudiced by the decision of the respondent in that:

> *"30.1 because of the period of approximately 1 year between the ill health retirement application and disapproval thereof, which is submitted constituted an unreasonable delay;*
>
> 30.2 *by the decision that temporary leave had been granted for the period 6 September 2004 to 24 February 2005 but not for the period 25 February 2005 to 19 March 2006; and*
>
> *30.3 by the period of approximately 1 year between the medical board decision that illness was not work related and the communication of that decision to De Bruyn, which is submitted constituted an unreasonable delay."*

[17] The employee further contended that there was no fair and valid reason for disapproving a portion of the temporary incapacity leave but approving another portion thereof. The decision of the respondent was challenged for being procedurally unfair, having been taken without taking into account relevant considerations, being taken arbitrarily or capriciously and grossly unreasonable. It was also contended that the decision was unconstitutional in that it constituted unfair labour practice.

Analyses

[18] In essence, the case of the employee is that despite the medical board taking the decision on 31st March 2005, he was advised of such a decision only on the 20th March 2006. This decision was according to the employee contrary to the recommendation of the consultant who had recommended temporary incapacity leave. It is the case of the employee as indicated above that the decision of the respondents was arbitrary and/or unreasonable.

[19] The applicant argued that this Court has in terms section 158 (1) (g) of the LRA power to review any decision taken or any act performed by the state in its capacity as employer.

[20] In their answering affidavit the respondents raised two points in *limine*. The first point in *limine* relates to jurisdiction. In this regard the respondent argued that the entitlement or otherwise of the disability leave is governed by clause 7.5.1 of the Resolution 5 of 2001 of the Public Service Coordinating Bargaining Council (the PSCBC) as amended by Resolution 5 of 2001. This Resolution

regulates the process of applying for and granting incapacity and permanent disability leave. The resolution regulates the process whereby employees who have permanent disabilities are accommodated in the workplace and receive ill-health benefits.

[21] The issue that has arisen as a result of the employee's claim is whether or not the refusal by the respondents to grant special incapacity leave and refusal to grant paid leave of 180 days constitutes an administrative action in terms of section 1 of the Promotion of Administrative Justice Act (the PAJA) or is a decision that arises from the employment relationship which should be governed by the provisions of the LRA.

[22] The authorities are in agreement that a distinction should be drawn between actions or decisions of the state that are administrative in nature and those that arise from the employment relationship. Those decisions that are administrative in nature are governed by section 1 of PAJA read with section 33 of the Constitution. And those that arise from the employment relationship are governed by the provisions of the LRA read with section 23 of the Constitution. In this regard see the unpublished decision of this Court in *NUTESA v Central University of Technology Free State case number J2043/08*, including the authorities cited therein.

[23] In *Chirwa v Transnet Limited 2008 (3) BLLR 251 (CC),* the Constitutional Court, held that the decisions or actions arising from employment relationship are to be governed by the provisions of the LRA and disputes arising therefrom

should be dealt with through the various processes provided under the provisions of that Act. In this respect the essence of Chirwa judgment is that the provisions of PAJA should not detract from the dispute mechanisms provided for under the LRA. See *NJ Kotze v The National Commissioner, South African Police Service & Another, unreported case number JR16736/2006.*

[24] In the *Kotze's* case the Court was faced with facts which are very much similar to those in the present case. The applicant in that case sought to review and set aside the ruling of the director of Medical Administration of the SAPS that he should resume work following the decision declining his application for ill-health retirement. The Court in finding that the relief sought by the applicant fell within the provisions of resolution 5 read with the provisions of section 24 of the LRA, held that the applicant would, had he used the provisions of section 24 of the LRA, have had a full and complete remedy to meet any complaints that he might have had. In this respect the Court further held that:

> *"As a result of all the above I am of the view that applicant's remedies lie within the provisions of the collective agreements applicable to the relationship between the parties and the provisions of the LRA."*

[25] In the light of the above discussion, in my view, leave, including incapacity and temporary incapacity leave at the respondents' workplace is governed by the provisions of resolution 5 of 2001 of the PSCBC, which is a binding collective bargaining agreement.

[26] The appropriate forum to challenge the decision of the second respondent refusing the employee special paid leave or temporary incapacity leave is not an administrative action or the exercise of a public power as contemplated in PAJA. In refusing to grant the employee special leave or temporary incapacity leave the third respondent was exercising a discretion provided for and governed by the resolution 5 of 2001 of the PSCBC. It is therefore my view that the cause of action for the applicant rests in the application and/or interpretation of the provisions of the PSCBC resolution. The appropriate forum for that is the PSCBC, through its dispute resolution mechanism. Thus the employee's application stands to be dismissed for this reason.

[27] In the circumstances of this case I do not believe that it would be fair to grant costs.

[28] In the premises I make the following order:

(i) The application is dismissed.

(ii) There is no order as to costs.

Molahlehi J

Date of Hearing : 25th June 2008

Date of Judgment : 10th December 2008

Appearances

For the Applicant : Adv F J Van der Merwe

Instructed by	:	Bouwers (Roodepoort) Incorporated
For the Respondent:		Adv T J Bruinders SC
Instructed by	:	The State Attorney