IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT PORT ELIZABETH

CASE NO: **P118/07**

In the matter between:

SOUTH AFRICAN POLICE SERVICE Applicant

and

PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL First Respondent

LOUIS VERMAAK Second Respondent

ROUCHÈ WAGG (WEITZ) Third Respondent

JUDGMENT

Introduction

1. This matter concerns an application and a counter application for the review of the award rendered by the second respondent on or about 27 November 2006. Both applications are out of time and are accompanied by applications for condonation. Although the explanations for the respective delays are suspect, I granted the applications for condonation due to the fact that neither application was opposed.

2. The third respondent is employed by the applicant. During August 2002 she suffered a horrific incident at work when her colleague was threatened, in her presence, by Superintendent Moraba that she and

others would be shot if a grievance that he had was not resolved to his satisfaction.

3. The third respondent was psychologically affected by the incident and commenced receiving medical treatment.

4. In the beginning of 2003 the applicant moved a number of employees to Zwelitsha as a result of a restructuring. The third respondent resisted this move.

5. The third respondent stopped working on or about 31 March 2003, on the face of it as a result of a mental problem that made it impossible for her to discharge her services.

6. The third respondent submitted applications for incapacity leave during or about June 2003, October 2003 and March 2004. The applicant continued paying her until approximately April 2005, when payment ceased. The third respondent resumed employment with the applicant during May 2006 and it resumed her payment.

7. Third Respondent referred a dispute to conciliation, and when that failed, requested arbitration. In the request for arbitration document she described the dispute as follows:

> *Interpretation and Application of Collective Agreement Resolution 7/2000 and 12/1999, the National Commissioner has failed to apply it's mind as to the Applicant's Application for incapacity leave (temporary and permanent) and has disapproved said leave.*

> *The Employer has incorrectly applied and interpreted the said resolutions and has further failed to alternatively place Applicant in a post that is best suited to her current health status and has ignored requests to do so. This dispute should be read with the dispute lodged under case number PSCBC.14-05/06.*

8. The applicant and third respondent conducted the arbitration on the basis of documents submitted to the second respondent which they agreed to *[be] what they purport to be* and by submitting written arguments to the second respondent. As will become clear later in this judgment, the manner in which the parties presented their respective cases before the second respondent, has profound consequences. It would however not serve any purpose to speculate about their reasons for doing so as the record is silent on this issue.

9. The second respondent identified the question to be decided at the commencement of his award as

> *It needs to be decided whether or not the respondent complied with the provisions of PSCBC Resolution 7 of 2000 and 12 of 2000* [this should read 1999] *when it forced the applicant to resume duties, refused the applicant further incapacity leave, deemed the applicant's absence to be unauthorized and whether or not the respondent complied with its incapacity procedures.*

10. The key findings of the second respondent are:

10.1. The third respondent was not entitled to be paid for days that she had

been absent due to illness in excess of 36 working days in a 3 year cycle, unless an agreement to the contrary applied.

10.2. The applicant acted *quite recklessly* with the third respondent's application for incapacity and the delay in processing that application severely prejudiced the third respondent.

10.3. No conclusive evidence had been placed before him to the effect that the third respondent could not work due to an injury sustained at work.

10.4. The third respondent was entitled to a remedy due to the fact that the applicant had not complied with its relevant procedure in processing her applications for incapacity leave, and he had a wide discretion in deciding such remedy.

10.5. Under the circumstances compensation would be the most appropriate remedy.

11. In the premises the second respondent made the following award:

1. *The respondent did not comply with the provisions of PSCBC Resolution 7 of 2000 and 12 of 2000 [sic].*

2. *The respondent is ordered to pay as compensation to the applicant an amount equivalent to 6 months of the applicant's current salary.*

3. *….*

4. *….*

Review application

12. Mr Gqamana who appeared for the applicant, submitted that the award stood to be reviewed on two grounds namely that:

12.1. The second respondent had exceeded his powers by making an award for compensation in a dispute that did not deal with an unfair dismissal or an unfair labour practice, but with the interpretation and application of a collective agreement.

12.2. The second respondent had acted unreasonably in finding that the applicant had unduly delayed the processing of the third respondent's claims for temporary and/or permanent incapacity leave.

13. Neither party referred me to any authority dealing with the relief that may be awarded by an arbitrator in a dispute regarding the interpretation or application of a collective agreement. Section 24 of the Labour Relations Act is also silent on the issue.

14. Section 193 of the Labour Relations Act expressly deals with competent relief in cases of unfair dismissal disputes or unfair labour practice disputes. Mr Grobler, who appeared for the third respondent, submitted that the relief that ought to be given in a dispute pertaining to the interpretation or application of a collective agreement ought to be the same as the relief granted in unfair dismissal or unfair labour practice disputes. I do not concur. It seems to me that the Act would have provided for this if that was the intention. Furthermore, the fact

that Part B of Chapter 3 of the Act (dealing with collective agreements) does not expressly provide for relief in disputes about the interpretation and application of collective agreements, is not a *casus ommissio*. The normal contractual remedies are available to the parties and there is no reason why these remedies would not adequately protect their rights.

15. Mr Grobler also submitted that the true nature of the dispute before the second respondent was one of an unfair labour practice. This submission floundered when he was unable to indicate one reference in the third respondent's referral or heads of argument before the second respondent that could relate to an unfair labour practice dispute.

16. Mr Grobler finally submitted that what the second respondent had in fact done, was to award damages, even though he termed it *compensation*. There is however no indication whatsoever in the award that the second respondent had damages in the ordinary sense of the word in mind when calculating the compensation.

17. Accordingly the second respondent did exceed his powers when he awarded compensation to the third respondent and the award falls to be set aside.

18. In view of the aforegoing finding it is not necessary for me to deal with the applicant's complaint that the second respondent had acted unreasonably in finding that the applicant had unduly delayed the processing of the third respondent's incapacity leave applications. I am however of the view that the applicant did not deal with the

applications with the necessary degree of diligence and shall take this aspect into account when dealing with the question of costs.

Counter Review

19. Mr Grobler contended that the second respondent's finding that

> *No conclusive evidence was placed before me that the* [third respondent] *could not work due to an injury sustained at work.*

cannot be sustained in the light of the undisputed medical reports that served before him.

20. Leaving aside the question as to whether the third respondent was attempting an appeal under the guise of a review, the submission cannot prevail.

21. Clause 7 of Resolution 7/2000 deals with leave and Clause 7.6(a) is reproduced due to its materiality in the matter.

> *7.6 Leave for Occupational Injuries and diseases:*
>
> *(a) 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.*

22. The wording is clear – employees are only entitled to be paid for the duration of the period that they can not work.

23. The third respondent bore the onus to persuade the second respondent

that she could not work for the period that she had not been paid, or a part thereof.

24. The only evidentiary material on the point that the second respondent had before him, was:

24.1. Reports by Dr Taylor dated 31 August 2004 and 13 October 2004. The latter report clearly indicated that the third respondent could not work due to illness, and favours her.

24.2. A report dated 17 October 2005 by Lynn Markman. This report is inconclusive but suggests that the third respondent had over stated her symptoms.

24.3. A report dated 11 November 2005 by Dr Verster. This report said that

> *Her symptoms would not stabilize or improve if she has to return to these stressors and would be better off outside the SAPS.*

This is not an unequivocal statement that the third respondent could not work.

24.4. A report dated 13 December 2005 by Letitia Malan. This report also does not unequivocally state that the third respondent could not do her work.

24.5. Thandile Health Risk Management is the entity charged with making recommendations to the applicant about incapacity or ill health

applications. It presented a report dated 31 January 2006 to the applicant. This report, which also served before the second respondent, recommended that the third respondent not be granted incapacity leave.

25. These reports do not indicate that the third respondent could not work as a result of an injury at work, for the period that she had not been paid (April 2005 to April 2006).

26. If anything, it would seem that the second respondent's finding that there was no conclusive evidence before him that the third respondent could not work, was correct rather than reviewable.

27. The counter application of the third respondent must accordingly fail.

Costs

28. Mr Gqamana did not vigorously pursue the issue of costs, although he did submit that costs should follow the result in both the review and counter review applications.

29. He was correct in not doing so. This court awards costs according to the requirements of law and fairness. As indicated above, I do not believe that the applicant has diligently dealt with the third respondent's applications for incapacity leave. Had it done so these proceedings may never have eventuated.

30. I am accordingly of the view that it would be equitable for each party to carry their own costs.

31. Accordingly I make the following order:

1. The award by second respondent is set aside.

2. The third respondent's counter application for review is dismissed.

3. The award is substituted by an award that the third respondent is not entitled to payment for the period for which she did not receive payment.

4. There is no order as to costs.

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NIEUWOUDT AJ

DATE OF HEARING: **12 February 2008**

DATE OF JUDGMENT: **15 February 2008**

APPEARANCES:

FOR THE APPLICANT: **Adv N Gqamana**

INSTRUCTED BY: **The State Attorney**

FOR THE THIRD RESPONDENT: **Adv M Grobler**

INSTRUCTED BY: **J Gruss Attorneys**