

**IN THE PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL
HELD IN LADYSMITH, KWAZULU-NATAL**

CASE NO: PSCB477-17/18

PSA obo NP NDLOVU

APPLICANT

And

DEPARTMENT OF HEALTH (KZN)-UTHUKELA DISTRICT

RESPONDENT

ARBITRATION AWARD

DATE OF AWARD: 21 JULY 2019

ARBITRATOR: Saber Ahmed Jazbhay

Introduction

1. In the modern constitutional era, an employment relationship is akin to a marriage, and as an employer one has to ask yourself how you would treat your spouse in the case of personal tragedy or trauma and then act accordingly. Employers and employees owe each other the right of be treated fairly, equitably and with human dignity within the four walls of the Bill of Rights enshrined in the Constitution as well as the Labour Relations Act. It is in that spirit that the parties to this dispute entered into and subscribe to the PSCB Resolution 5 of 2001 which declares that intention as well as underlining the purport, spirit as well as the ethos underpinning that employment relationship.
2. I am still surprised how often employers can be short sighted where it comes to personal circumstances and well-being of their employees and the financial prejudice as well as stress they encounter when outcomes are delayed. As the cliché goes, justice delayed is justice denied. There is perceptibly a lack of empathy in that relationship and this offends against the aforementioned values referred to.
3. It is common cause that throughout the period of absence, the Applicant submitted medical certificates which, if needed to be will be expanded upon, the Respondent ought to have gone an extra mile, so to speak, and assisted the Applicant if there were shortfalls in the documentation needed in support of her application for TIL.
4. That this was not done touches on the importance of the need for a strong and progressive employer-employee relationship. The fact that, as the undisputed evidence suggests, that the Respondent took an extraordinary length of time to respond to the Applicant, sometimes in excess of two years is a major cause of concern and is tantamount to an egregious unfair labour practice .

Details of representation and background

5. The matter was set down as an arbitration on the 26th JUNE 2019. Applicant was represented by Mr ZAMANI NHLANGULELA (**PSA**) whilst the Respondent was represented by Mr CLEMENT QWABE. Both parties agreed that as all the facts in dispute were common cause they would be submitting written arguments and that no oral evidence would be lead.
6. At that hearing, in which the Applicant was present, both representatives had provided me with a brief background of what had transpired so as to bring the matter to this point.
7. It's common cause that this is an issue about whether, in acting as it did, namely by its conduct the Respondent has incorrectly interpreted and applied the Resolution 5 of 2001 (the Resolution) and in the process caused the Applicant severe financial prejudice.

8. To consider whether this is in fact the case, it is imperative that I set out the salient facts and the background as gleaned from the heads of arguments that the parties agreed to submit, despite my warnings about the dangers of such an approach especially in the absence of viva voce evidence and the rights of the parties to make oral submissions and cross-examine witnesses.
9. In the interests of justice, I directed the parties to submit heads of argument as follows:-
 - a. The Applicant will submit a comprehensive heads of argument by the 2ND JULY 2019.
 - b. The Respondent will respond with its heads of argument, after receipt of the Applicant's heads by the 9TH JULY 2019.
 - c. The Applicant will reply by the 16TH JULY 2019.

Matters that are common cause

It's common cause, ex facie the heads of argument, and submissions made during the initial arbitration process that

1. The Applicant is employed by the Respondent as a Forensic Pathology Officer.
2. She applied for temporary incapacity leave for the following periods
 - a. 17-12-2015 to 31-12.2015
 - i. Duration 14 days
 - ii. This period was disapproved and
 - iii. the Applicant was notified after two years
 - iv. And an amount of R R4660-00 was claimed from her
 - v. And an amount of R157-88 was deducted monthly
 - b. 23-2-2016 to 4-3-2016
 - i. Duration 8 days
 - ii. This period was disapproved and
 - iii. the Applicant was notified after one year
 - iv. And an amount of R R3418-03 was claimed from her
 - v. And an amount of R379-77 was deducted monthly.
 - c. 7-3-2016 to 18-3-2016
 - i. Duration 11 days
 - ii. This period was disapproved and
 - iii. the Applicant was notified after one year
 - iv. And an amount of R R3728-74 was claimed from her
 - v. And an amount of R414-30 was deducted monthly.
 - d. 17-5-2017 to 26-5-2017
 - i. Duration 15 days
 - ii. This period was disapproved and
 - iii. the Applicant was notified after 4 months
 - iv. And an amount of R 7015-53 was claimed from her
 - v. And an amount of R 637-77 was deducted monthly
3. That, having exhausted her sick leave, she had applied for short term as well as long term temporary incapacity leave on various periods referred to supra.
4. The Applicant admitted that , on one occasion she may have filed her application for TIL late than prescribed. The Respondent belatedly responded to her. **This was never disputed by the Respondent.**

5. Her applications for short term and long term leave for the periods set out in para 2 above were not approved by the Respondent. At best, there was a partial approval.
6. The Applicant lodged a dispute arguing that the Respondent incorrectly applied the provision of the said agreement and the relief sought is that I must make a determination whether or not if this was so, and if I determine in the Applicant's favour I must order that the Applicant's application for leave for the periods referred to be approved with full pay and that the Respondent must be ordered to refund any moneys deducted from the Applicant's salary as well as to order that the Respondent desists from claiming any amounts allegedly outstanding as the Applicant is suffering and will further suffer severe financial prejudice.

The Essence of the Dispute before me is as follows:

7. The Applicant has applied for temporary incapacity leave for the period long term and short term sick leave for various periods
 - a. For the period 17-12-2015 to 31-12.2015
 - b. For the period 23-2-2016 to 4-3-2016
 - c. For the period 7-3-2016 to 18-3-2016
 - d. For the period 17-5-2017 to 26-5-2017
8. She challenges the Respondent's decision to refuse her application for the periods in question.
9. She seeks the setting aside of the decision to decline her leave and to be reimbursed the monies unlawfully deducted by the Respondent with interest.
10. The Applicant was advised, outside the stipulated time lines, of the Respondent's decision to refuse her leave.

The issue I am to decide is whether

11. The Respondent failed to apply the collective agreement in respect of the Applicant's temporary incapacity leave for the periods in question.
12. Further , I am to determine whether the monies deducted by the Respondent for the period should be reversed and
13. Further, should my finding favour the Applicant what remedy may be appropriate in the circumstances.

APPLICANT'S SUBMISSION

10. 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 5 of 2001 (the "Resolution") to her applications for long term and short term sick leave for various periods as follows
 - a. For the period 17-12-2015 to 31-12.2015
 - b. For the period 23-2-2016 to 4-3-2016
 - c. For the period 7-3-2016 to 18-3-2016
 - d. For the period 17-5-2017 to 26-5-2017
11. Although inelegantly articulated by the Applicant's representative, the fact that this is a matter referred in terms of Section 24(2) and 24(5) of the Labour Relations Act 66 of 1995, interpretation and application of the provisions of the Resolution are further explained and developed by the Determination on Leave of Absence in the Public Sector (the "Determination") and the provisions of the Policy and Procedure on

Incapacity Leave and Ill-Health Retirement ("PILIR") which documents are cross referenced and must be read conjunctively.

12. Furthermore, as I understand the points argued by her representative in his heads, 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 the Determination and PILIR.

BACKGROUND

13. This has already being covered supra and is incorporated by reference herein.
14. The gravamen of her dispute turns on the Resolution read with PILIR and Determination on Leave in the Public Service.
15. The relevant provision, clause 7.5.1 of the PSCBC RESOLUTION 5 OF 2001 READ WITH PILIR AND DETERMINATION ON LEAVE IN THE PUBLIC SERVICE
 - i. Its common cause that given that the Applicant had exhausted her normal sick leave entitlement with full pay, and given that the Respondent was obliged to have advised her of the need to apply for temporary incapacity leave .
 - ii. 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. There was no evidence or argument made before me whether or not this was done.
 - iii. The provision is applicable to an employee such as the Applicant who has exhausted her normal sick leave credits in a cycle and who according to the relevant practitioner was required 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 her sick leave credits for that cycle provided that:
 1. 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).
 2. The Applicant at all times submitted a medical certificate which clearly indicated the nature of the ailment and the period of absence on sick leave that was required.
 3. The employer has an obligation (the provision reads "shall) 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).

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.
5. 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).

PILIR:

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. 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).
3. ***At all times, she submitted a medical certificate and normal leave forms in respect of each period of sick leave.***
4. 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. The Applicant at all times, in compliance, submitted a medical certificate in respect of each period of leave.

Clause 7.1.5.1 and 7.1.5.2 of PILIR provides that

1. The employee must submit the application for temporary incapacity leave within five working days after the first day of absence.
2. 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.
3. 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.
4. Should the employee fail to submit the application within the timeframes and/or failure by the supervisor to properly manage the process should be viewed in a serious light.

Clause 7.1.8 and 7.1.9 of PILIR provides that

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, she is not barred from doing so but the onus shifts to the employer

(supervisor). I make mention of this notwithstanding the fact that the Applicant's representative in his heads of argument omitted admitted an explanation that was never raised or disputed by the Respondent.

2. The employer must follow up with the employee and notify her of the need to submit an application together with the consequences should she fail to do so. **There is no evidence that this was ever done.**
3. 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.
4. 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.
5. 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.

Clause 7.3.1 of PILIR provides that the employer is obligated to, within five days of receipt of application:

1. To 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.
2. 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.
3. 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. **This never happened.** If it did, and I cannot infer from the facts as argued on paper, then this was never put to me.

Determination

1. Clause 13 (Temporary Incapacity leave) of the Determination outlines the requirements and process to be compiled 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. **As stated previously, the Applicant at all times submitted a medical certificate in support of her application for sick leave.**

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. There is no evidence to suggest that the Respondent complied.**
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. This time frame was never complied with.

Determination: Clause 15.1 and 15.5 13.1 provides that

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).
2. The employer must further notify the employee that a corrected medical certificate is required within two days of notification of non- compliance. ***There is no evidence that the Respondent at any stage indicated any problem with the Applicant's applications for sick leave and the accompanying medical certificates.***

INTERPRETATION/APPLICATION (APPLICANT'S SUBMISSIONS)

1. The interpretation and application of the Resolution means, firstly that clause 7.5.1(b) must be read with the relevant clauses in the Determination and the PILIR document; and, secondly, that the interpretation and application of the Resolution requires one to interpret and apply clause 7.5.1(b) in the context of said policies rather than in a vacuum.
2. In essence, the Resolution, and more particularly Clause 7.5.1(b) and the other applicable clauses in the policies referred to, supra, determine the procedures and/or time frames in terms of which the Respondent is required to respond to an application for temporary incapacity leave.
3. The Applicant's complaint in this referral, as gleaned from the heads of argument, is that the Respondent failed to adhere to those procedures and/or time frames, and that in turn resulted in severe financial prejudice to her.
4. In essence she referred the matter so that it could be determined at arbitration whether the Respondent was obliged to have adhered to and to have given effect to what the resolution, read in conjunction with the applicable policies, required.
5. The Respondent was obliged to inform the Applicant of her right to apply for temporary incapacity leave and subsequently approve or refuse the application for temporary incapacity leave within thirty days of receipt of the application and medical certificates.
6. It is thus submitted that the facts show that the Respondent failed to advise the Applicant of the need to apply for temporary incapacity leave after her normal sick leave entitlement of 36 days was exhausted and further to investigate the application within 30 days. In addition, the Respondent failed to give effect to provisions of the Determination and PILIR policy, for the Applicant was only formally informed after considerable and inordinate delays that the periods applied for previously were not approved.
7. The Applicant was only informed rather belatedly of the amounts due and the deductions made and the outstanding amount totalling R18 823-22. She was not afforded the chance to make submissions or arrange for repayments according to her personal circumstances.

8. It was submitted that in the judgment handed down on 30th December 2016, **Public Servants Association of South Africa obo Obogu v Head of Department: Department of Health Gauteng and Others [2016] ZALCJHB 544 (30 December 2016)**, any deduction had to be proceeded by a legal process in the absence of an agreement. *The issue for determination before the Court was whether it is permissible in terms of the provisions of section 38 (2) (b) (i) of the Public Service Act (I refer to this is because the Respondent vaguely alluded to section 38 in its heads of argument) for the State as an employer, to recover monies wrongly paid to its employees directly from their salary or wages, in the absence of any due process or an agreement between the parties. These provisions give the State as an employer, the right to deduct any amount "wrongly paid" to and owed by an employee wholly or in instalments from his or her salary. In the case before me the amount was not wrongly paid, rather it was arbitrarily deducted from the pension of the Applicant.* There is no evidence to suggest that the Applicant agreed to the deductions which suggests that the Respondent acted unilaterally and arbitrarily. This is capricious and unacceptable. Incidentally the Constitutional Court confirmed the judgment.
9. It is pertinent to note that in **Public Servants Association of South Africa obo Obogu v Head of Department: Department of Health Gauteng and Others**, as well as relevant to record that at para [14] the court held that "[T]he very basis of the principle of legality is that it is a mechanism that ensures that the state, its organs and its officials, do not consider themselves to be above the law in the exercise of their functions, but remain subject to it." The principle of legality derives from the provisions of section 1 (c) of the Constitution which provides that the Republic is one sovereign, democratic state founded on the value of '*supremacy of the constitution and the rule of law*'. The court added that "[I]n terms of section 2 of the Constitution, the supremacy of the Constitution means that '*law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled*'. The components of legality relevant for the purposes of issues **before the court are that in respect of conduct impugned;**
- a) The person whose act is under scrutiny must be authorised by law to take such action;
 - b) The action must be procedurally fair; and
 - c) The action must be rational, not arbitrary or capricious.
9. The PILIR policy states quite clearly at clause 7.1.1. that incapacity leave is not an unlimited amount of additional sick leave days at an employee's disposal. Incapacity leave is additional sick leave granted conditionally **at the employer's discretion**, as provided in the Determination and PILIR.
10. However, before the point is reached where this additional sick leave may be granted at the employer's discretion, both the employee and employer have to follow the procedures and timeframes set out in the two policies. Moreover, the discretion afforded to the Respondent was to be exercised judiciously after compliance with agreed guidelines and established process. **It is the failure of the Respondent to interpret, apply and comply with the process and respective policies that is in issue.**
11. In Clause 6 of PILIR, the employer's obligations and responsibilities are stated quite categorically: The employer shall in terms of PILIR be responsible to process applications and complete reports within specified timeframes.

My notes

1. While there are clear timeframes that the employer has to take once it receives the applicable documentation from the employee, there are also timeframes that the employee has to meet. However, as the initial obligation rests on the employer, unless the employer fulfils that obligation, it has to follow that there can't be a resultant obligation on the employee. Moreover, in the event that the employer fulfilled that obligation and the employee did not meet the said prescribed timeframes and/or other requirements, the policies start afresh or further obligation rests on the employer to ensure that the employee meets those obligations.
2. The Respondent did not have the discretion to deviate from the procedures set out in the Resolution and/or those set out in the Determination and PILIR policies, but was compelled to adhere to the procedures and timeframes. - In the circumstances where there was deviation, the Respondent was in breach of a collective agreement.

THE CONCLUSION AS ARGUED BY THE APPLICANT IS THAT:

1. The Respondent has failed to interpret the provisions of the Resolution in accordance with the plain meaning and in circumstances where its supplementary policies (PILIR and the Determination) provide both procedures and timeframes.
2. Further, the Respondent has failed to implement and apply the provisions of the Resolution and in so doing, has failed to comply with its obligations.
3. Consequently, the entire process of considering the Applicant's application for sick or short and long term incapacity leave concluded by the Respondent is flawed.

RELIEF SOUGHT BY THE APPLICANT IS FOR AN ORDER ON THE FOLLOWING TERMS:

1. Since the decision to decline the TIL applications was unnecessarily prolonged for an unjustifiable time.
2. The Arbitrator must also find the respondent to have breached the provisions of the Basic Conditions of Employment ACT, (Section 34) (1) (a) and (b);
3. The Arbitrator must also find the respondent to have applied unconstitutional declared Public Service ACT, Section 38 (2)(b)(i) by implementing unilateral deductions in the Applicant's salary since there was no consent or court order obtained.
4. The Arbitrator must also find the Respondent to have breached its own HRM Circular 35 of 2019 (Recovery of Staff Debts) which directs managers to comply with the Constitutional Court ruling on the application of Section 38(2)(b)(i) in respect of debt recoveries.
5. It is then our prayer and that of the applicant that the arbitrator directs the Respondent to approve all Applicant's TIL applications totalling 48 days, cease any deductions from her salary and refund

R 18 823.22 , with 13th Cheque deductions of over R 8000.00 with totalled R 26 832.22 already deducted within thirty days.

RESPONDENT'S SUBMISSION

1. Notwithstanding the facts that the facts are substantially common cause, the point of deviation is that the Respondent's argued that:
 - a. It assisted the Applicant in submitting her applications to Thandile Health Risk Management
 - b. Which disapproved 48 days
 - c. The Applicant was informed ,albeit belatedly, and
 - d. Those days would either be covered by her accumulated leave or if unavailable would be treated as unpaid leave.

For the sake of context and completion, the Applicant, through her representative did not argue that she never received these letters and therefore this isn't in dispute.

ANALYSIS OF EVIDENCE AND ARGUMENT

16. Its trite law that 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.
17. Further in arriving at the decision hereinafter I have considered and analysed relevant case law precedents evolving from previous and current decisions in respect of temporary incapacity leave.

Jurisdiction?

18. Although the parties tacitly agreed that the PSCBC was seized with jurisdiction, I found the decision in ***Public Servants Association O B O Liebenberg v Department of Defence and others (2013) 22LC 42*** relating to jurisdiction very instructive. Does the Council have jurisdiction? I submit it does. My reasoning is as follows.
19. The issue of the jurisdiction of Councils to arbitrate disputes referred under section 24 of the LRA has been finally settled after much uncertainty.
20. The following are important sections of the Liebenberg judgment that deserve mention verbatim: "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.

21. Another decision namely *PSA obo Gouvea v PSCBC and others* delivered on the 26 February 2013 has relevance to this matter and it is important to record the following from that judgment so that the issue of granting or refusing applications for temporary incapacity leave may be put to rest. Pertinently in this judgment the court stated that an employee whose normal sick leave credits in a cycle have been exhausted had a right (*note well since the Respondent argued that it was not an automatic right*) to be granted additional Temporary Incapacity Leave (TIL) on full pay provided that she
 - i. informed the supervisor that he/she is ill; (There *is no argument or evidence in this present dispute that this was not done by the Applicant*)
 - ii. a registered medical practitioner has duly certified the condition in advice; (The *Respondent admitted that this was done but it required a medical report from a specialist which it could have obtained had it been proactive and diligent*)
 - iii. the employer shall investigate the incapacity in terms of Schedule 8, clause 10(1) within 30 working days.
22. 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. Surely, given the nature of its version tersely and vaguely put before me in argument, the Respondent should have been more comprehensive and produced expert witnesses to gainsay its version. In this regard it was woefully deficient.
23. Like Judges I must be alert to and guard against, the temptation to substitute what they regard as reasonable, sensible or business like 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.
24. In the context of a contract which, in essence is what the collective agreement *inter partes* is tantamount to, it is imperative not to make a contract for the parties other than the one that they in fact entered into.
25. When dealing with matter related to the refusal by the employer to grant an employee temporary incapacity leave the first question 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 amazing 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 e.g. benefits. In this dispute the periods in question extends to before and after crucial judgments.

26. If the period in question is after the Gouvea decision (delivered on the 26 February 2013) read with the decision in Liebenberg then only will the question of the application of the collective agreement be interrogated.
27. In the present case the applicant applied for TIL for the periods as encapsulated supra and within the ambit of para 48
28. She was advised rather belatedly that the Respondent intended to recover monies and deductions were arbitrarily effected.
29. These were deductions from the Applicant's salary without her consent.
30. The period in question falls squarely after the period where the decision of the **Minister of Safety & Security v SSSBC & Others (2010) 6 BLLR 705 (LAC)** delivered on the 29 January 2010 read together with the Liebenberg decision (2013) thus applies . In terms of these decisions and in relation to the period in question the Council does have the requisite jurisdiction to determine the matter.

HAVING FOUND THAT COUNCIL HAS JURISDICTION

31. The next issue that requires introspection and examination relates to the Employer's interpretation and/or application of the Collective Agreement in respect of time frames.
32. In the **Public Servants Association & Another v PSCBC & Others [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 she be penalized. ***This was never done or if it was done, the Respondent has put up no evidence or argument to persuade me to accept its version.***
33. In reality where an employee applies for temporary incapacity leave (ito Resolution 7 of 2000 or Resolution 5 of 2001) and the employer through the Health Risk Manager takes more than 30 days to give a decision, it is tantamount to an egregious unfair labour practice and therefore, 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.
34. The Applicant applied for temporary incapacity leave for various periods namely
 - a. For the period 17-12-2015 to 31-12.2015
 - b. For the period 23-2-2016 to 4-3-2016
 - c. For the period 7-3-2016 to 18-3-2016

d. For the period 17-5-2017 to 26-5-2017

35. But the employer evidently communicated to the Applicant much later. Every employee has a legitimate expectation that he or she will be informed timeously of outcomes. This wasn't done.
36. The Respondent advised her that her leave was declined outside the 30 day period. It is unacceptable that the Respondent should treat the Applicant in such a cavalier manner lacking empathy and without the human touch of interacting with her. It ought to have called her in or a representative of the Respondent should have called her to discuss her situation. That it evidently didn't is most unfortunate and unfair.
37. This dispute deals within the application of the Resolution and the Council has jurisdiction to enquire whether the Respondent applied the terms and conditions of the Resolution fairly or correctly.
38. The Respondent's decision, which I have determined was a serious case of unfair labour practice, sought to have a retrospective effect, consequence whereof is that it amounts to an unreasonable and arbitrary exercise of discretion with unfair consequences, causing her financial prejudice.
39. The Respondent's conduct was, therefore, unfair and arbitrary and does not pass muster in terms and as I have interpreted, of the Resolution in the context of the factual matrix before me. It offered no explanation as to why it took so long for Thandile to respond to it and why it took so long to respond to the Applicant.

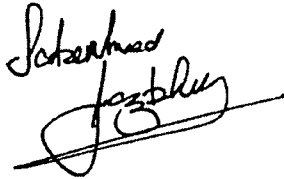
AWARD or DETERMINATION

40. Therefore I determine and order that: (in *the context of the facts before me in this case*)
41. The Respondent was guilty of unfair labour practice in acting as it did, and that it incorrectly applied the provisions of Resolution 5 of 2001 in relation to the application by the Applicant for Temporary Incapacity Leave;
42. As a result of the foregoing, by the unlawful conduct of deducting an amount of R18,823-22 in monthly instalments from the Applicant's salary, the Applicant suffered financial prejudice and will continue to be prejudiced if the Respondent does not reimburse her in that amount and if it feels entitled thereto it must follow due process.
43. Accordingly, the Applicant's application for the leave for the periods in question are approved.
44. The Respondent is ordered to reimburse the Applicant in respect of the amounts deducted. This must be paid into the bank account of the Applicant, details whereof are in the records of the Respondent, within

thirty (30) days from the date this award is served upon the Respondent. Interest thereon, at 10.5% shall run from the date of service to the date of payment.

45. Finally, all further claims must be stopped with immediate effect and if the Respondent is inclined towards recovering same it must follow due process.

THIS DONE AT DURBAN ON THIS 19th July 2019

A handwritten signature in black ink, appearing to read 'Saber Ahmed Jazbhay', with a long horizontal flourish extending to the right.

Panellist: SABER AHMED JAZBHAY