



Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA
HELD AT PORT ELIZABETH

Case no: P190/12

In the matter between:

**SOUTH AFRICAN POST OFFICE
LTD.**

First Applicant

and

SYLVIA NORTJIE KRIEK

First Respondent

BOTHA DU PLESSIS (N.O.)

Second Respondent

**THE COMMISSION FOR
CONCILIATION, MEDIATION AND
ARBITRATION**

Third Respondent

Heard: 17 April 2014

Delivered: 22 April 2016

Summary: (Review – unfair labour practice – refusal of extended leave benefit claim – policy underwritten by insurer – Jurisdiction – decision to refuse benefits – Jurisdiction - benefit - Merits of award – reasonableness threshold met – Costs – insufficient justification for punitive award – cost award set aside – remittal of award to quantify relief by issuing variation order)

JUDGMENT

LAGRANGE J

Introduction

- [1] The first respondent in this matter, Mrs Kriek ('Kriek'), was employed as an account manager with the South African Post Office ('SAPO') and had been employed by it for 27 years. She was booked off work from March until November 2010. She applied for temporary total disability ('TTD') leave benefits for the period 6 March to 5 July 2010. Her application was refused on 8 November 2010 on the basis that there was "evidence of sick leave abuse; there was no medical justification to justify the prolonged absence, and, her absence was ascribed to an injury on duty." SAPO demanded repayment of TTD leave benefits it had paid to her pending the outcome of her application amounting to R 62,328.52 and commenced deductions from her salary to recover the this amount. The amount of deductions actually made was never clarified in the arbitration. In December 2010 she referred an unfair labour practice dispute regarding the provision of benefits to the CCMA which she described as a "refusal of temporary total disability benefits".
- [2] The matter was referred to arbitration. On 24 August 2011, the arbitrator dismissed an *in limine* objection raised by the applicant challenging the jurisdiction of the CCMA to determine the matter. Subsequently in the award, the arbitrator held that the refusal of TTD benefits was an unfair labour practice and ordered the applicant to grant such benefits to Kriek and to refund her any deductions made to recover TTD benefits already paid to her. The arbitrator also ordered the applicant to pay Kriek's costs on an attorney client scale and the cost of her expert witness, on the basis that the conduct of the applicant in dealing with Kriek had been appalling.
- [3] The applicant seeks to the review award. Apart from taking issue with the merits of the arbitrator's reasoning in accepting that her entitlement to TTD benefits was established, the applicant raises two jurisdictional challenges to the award. Firstly, it contends that the TTD benefits were determined by the SANLAM policy which SAPO concluded with SANLAM, and did not amount to a benefit due to Kriek in terms of section 186 (2)(a) of the Labour Relations Act 66 of 1995 ('the LRA') as it was not something she

was entitled to claim as matter of right in contract or *ex lege*. Secondly, the decision to refuse Kriek TTD benefits was not a decision of the applicant but of the insurer Sanlam. Hence, the decision could not be attacked as amounting to “conduct of the employer...relating to the provision of benefits to an employee”, as described in section 186(2)(a). The applicant also wishes to have the punitive cost order set aside on the basis that there was no evidence to support the conclusion that it had treated Kriek “appallingly”.

- [4] The review application was launched nine weeks after the final award and was accordingly late. The applicant has applied for condonation for the three-week period, which is not opposed.

Condonation application

- [5] The review application was filed on 22 May 2012, the award having been received by the applicant's attorneys on 28 March 2012. Consequently, the delay was approximately two weeks, which is not significant. A number of reasons for the delay are advanced by the applicant, but in the main, they do not evidence a party that had approached matters in a dilatory fashion. There is also no obvious prejudice suffered by Kriek as a result of the delay. In the circumstances, I would only decline to grant condonation if the merits of the review were very poor, which is not the case. Accordingly, the late filing of the review application is condoned.

The review application

Jurisdictional grounds

- [6] Before addressing the merits of the jurisdictional issues, it is necessary to deal with the contention that the applicant ought to have taken the arbitrator's jurisdictional ruling on review after it was handed down and must be assumed to have waived its right to challenge the ruling by proceeding with the arbitration. I do not think there is merit in this approach. This court has frequently emphasised that it is inimical to the objects of expedited dispute resolution in the Labour Relations Act, 66 of

1995 ('the LRA'), for review proceedings to be dealt with on a piecemeal basis.¹

- [7] A second objection to the applicant seeking to set aside the *in limine* ruling is that such relief was never included in the notice of motion or the amended notice of motion submitted in terms of rule 7A or (8). The applicant purports to address this irregularity by submitting an amended notice of motion with its heads of argument, but such notice did not accompany the heads of argument filed with the registrar. This objection might have some bearing on costs, but does not dispose of the need for the issue to be addressed. It is well established that a court may even raise a jurisdictional point *mero motu* if it comes to its attention. If a jurisdictional matter is raised affecting the power of an arbitrator to make an award, the court cannot be prevented from considering such an issue. To do otherwise might result in the court upholding an award which the

¹ See, for example, ***Trustees for the time being of the National Bioinformatics Network Trust v Jacobson & others* (2009) 30 ILJ 2513 (LC)** at 2516-7 :

"[61] [F]or this court routinely to intervene in uncompleted arbitration proceedings would undermine the informal nature of the system of dispute resolution established by the Act. The second (related) reason is that to permit applications for review on a piecemeal basis would frustrate the expeditious resolution of labour disputes. In other words, in general terms, justice would be advanced rather than frustrated by permitting CCMA arbitration proceedings to run their course without intervention by this court. This conclusion was recently underscored by the Constitutional Court. In *Commercial Workers Union of SA v Tao Ying Metal Industries & others* (2008) 29 ILJ 2461 (CC), Ngcobo J stated at paras 62, 63 and 65:

"[62] The role of commissioners in resolving labour disputes is set out in s 138(1) of the LRA which provides:

"The 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."

[63] The LRA introduces a simple, quick, cheap and informal approach to the adjudication of labour disputes. This alternative process is intended to bring about the expeditious resolution of labour disputes. These disputes, by their very nature, require speedy resolution....

[65] ... This requires commissioners to deal with the substance of a dispute between the parties. They must cut through all the claims and counter-claims and reach for the real dispute between the parties. In order to perform this task effectively, commissioners must be allowed a significant measure of latitude in the performance of their functions.' "

arbitrator had no legal authority to make and would offend the principle of legality.²

- [8] In any event, the applicant argues that the challenge to the arbitrator's assumption that the applicant's claim related to the unfair refusal to provide a benefit was expressly addressed in the founding papers. Secondly, it contends that it expressly raised as a ground of review the matter of the identity of the party which took the decision to refuse the benefit. In effect, it submits that even if it did not expressly seek to set aside the *in limine* jurisdictional ruling, it was entitled to independently raise these jurisdictional issues as grounds of review. On the basis that jurisdictional issues can be raised at a later date, in my view there was nothing to prevent the applicant raising the issues in the review proceedings even if they were not raised at the arbitration hearing.

Classification of TTD payments as a benefit

- [9] In his *in limine* ruling on this issue on 24 August 2011, the arbitrator reasoned as follows in deciding that he had jurisdiction to consider Kriek's claim as an unfair labour practice:

"10. The crisp question to ask is what the nature of this benefit is. It constitutes additional sick leave provided by the respondent. The respondent decides whether an employee qualifies or not for the TTD benefits. A decision is not referred to Sanlam. It follows that this benefit must be part of the employment contract. In my view the dispute at hand is not to interpret a policy. It will be the applicant's case that this benefit was unfairly withheld from [her] and she has to discharge that onus.

11. In the matter *Protokon (Pty) Ltd v CCMA* (2005) 25 ILJ 1105 (LC) it was ruled that a dispute of this nature was to be [justiciable] by way of arbitration as an unfair labour practice. "The fact that an employer is entitled by the terms of the benefit scheme policy to exercise a discretion... As to the terms upon which the benefit is to be provided or as to whether the benefit is to be provided at all, does not take the benefit outside the

² The most recent restatement of the principle appears in ***Qibe v Joy Global Africa (Pty) Ltd: In re Joy Global Africa (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2015) 36 ILJ 1283 (LAC)** at 1286, par [4].

ambit of the unfair labour practice jurisdiction provided by section 186(2)(a) of the Act.

12. Therefore, in light of the above, I was suitably persuaded that the CCMA has jurisdiction to hear this matter and determine whether the respondent unfairly had with help the benefit.”

[10] In ***Apollo Tyres SA (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others***³, the LAC summarised the classification of benefits which can be submitted to arbitration as unfair labour practice disputes under s 186(1)(a) :

“[45] The Labour Court pointed out that there are many employer and employee rights and obligations that exist in many employee benefit schemes. In many instances employers enjoy a range of discretionary powers in terms of their policies and rules. The Labour Court further pointed out that s 186(2)(a) is the legislature's way of regulating employer conduct by superimposing a duty of fairness irrespective of whether that duty exists expressly or implicitly in the contractual provisions that establish the benefit. The court continued and stated that the existence of an employer's discretion does not by itself deprive the CCMA of jurisdiction to scrutinize employer conduct in terms of the provisions of the section. It concluded that the provision was introduced primarily to permit scrutiny of employer discretion in the context of employee benefits. I agree with this conclusion.

[46] I also agree, with qualification, with the Labour Court's conclusion that there are at least two instances of employer conduct relating to the provision of benefits that may be subjected to scrutiny by the CCMA under its unfair labour practice jurisdiction. The first is where the employer fails to comply with a contractual obligation that it has towards an employee. The second is where the employer exercises a discretion that it enjoys under the contractual terms of the scheme conferring the benefit.”⁴

[11] The arbitrator's reasoning is in line with the LAC's classification of disputes over the provision of benefits which may be the subject of an unfair labour practice arbitration under section 186 (2)(a), if one assumes that under the policy for granting TTD benefits to an employee, it was SAPO which

³ (2013) 34 ILJ 1120 (LAC)

⁴ At 1135.

decided whether the employee would be granted the benefit. This assumption is addressed below.

[12] The applicant added a further refinement to its complaint that the claim of the applicant did not concern a benefit, namely the employer was seeking to recover salary paid to Kriek whilst her TTD application was pending. Therefore it argued the complaint was essentially about a salary deduction and concerned remuneration which is not a dispute that can be entertained under the unfair labour practice jurisdiction. In my view this argument is a somewhat desperate one. It is patently clear that the reason Kriek had referred the dispute was that the employer was deducting monies *because* it had refused her TTD benefits application. In other words, the deduction was consequent upon the refused application and if that refusal proved to be unfair, it would be appropriate to redress the negative consequences of the original decision. I do not think that because the prejudice occasioned by the refusal of Kriek's TTD application manifested itself in the form of salary deductions, that the underlying dispute is defined by that consequence. It remains essentially a dispute about the alleged unfair refusal to approve the TTD benefits application. Moreover, in the section of the CCMA referral form containing 'summary of facts of the dispute' it was clearly stated by Kriek that the facts concerned "Refusal of temporary total disability benefits."

[13] This brings us to the question of how the decision to refuse Kriek's application for TTD benefits was finally taken. Kriek correctly contends that is a matter of fact, and therefore the commissioner's finding on this is to be tested on the basis whether it was one that no reasonable arbitrator could have reached. In the introduction to his evaluation in his award, the arbitrator stated:

"19. The issue to decide is whether the applicant qualified to receive the TTD benefits in terms of the Centre policy as recommended by the PHS panel. This TTD benefit constitutes additional paid sick leave provided by the respondent. The respondent decides whether an employee qualifies will not for the TTD benefits."

[14] In the arbitration proceedings, one of the jurisdictional challenges raised by the applicant was that the benefit arose out of the Sanlam "Income

Continuation Insurance Policy” and that the arbitrator was been asked to interpret the provisions of that scheme, which lay outside his remit as an arbitrator. At that stage, it was never contended by the applicant that the decision to refuse Kriek TTD benefits was the decision of a third party.

[15] However, in its review application the arbitrator claims that it was “simply wrong” of the arbitrator to conclude that it took the decision. In the supplementary affidavit the applicant expanded on this claim:

“4....This finding is simply wrong. It is the insurer in this case SANLAM, which decides whether an employee of the insured qualifies for such benefits and the period therefore.

5. This is stated expressly in the policy document (Income Continuation Insurance Policy) which was handed in at the arbitration hearing before the Commissioner and which he claimed he could not have considered. I refer in particular to clauses 3.3; 3.5; 3.7; 3.8; 3.9; 3.10 and 3.11 of that policy.

6. Hence the decision which the first respondent employee complained amounted to an unfair labour practice could never be such as it was a decision taken by SANLAM, not the applicant employer. In failing to appreciate this, the Commissioner not only ignored all the evidence and arguments presented to him by the applicant on this issue, dealt with in my founding affidavit, but he could not even have read the clauses of the policy document referred to above.

7. In addition, the Commissioner fails to deal with the applicant's contention, either in his *in limine* ruling or his final award, that the granting of TTD in terms of the Sanlam policy does not amount to a “benefit” as defined in section 186 (2)(a) since it is not claimable by the first respondent is a matter of right *ex contractu* or *ex lege*. As stated in my founding affidavit and as the evidence before the Commissioner reveals, the contract in question is between applicant and SANLAM; not the applicant and the first respondent.

8. I am advised that these fundamentally erroneous findings amount to a gross irregularity in the proceedings and renders the award liable to be set aside on these grounds alone. They are so unreasonable that it leads to the inference that the Commissioner either failed utterly to consider the evidence and arguments presented by the applicant on this issue; or so misconstrued the nature of the enquiry that he was required to undertake;

to such a degree that he failed either to apply his mind to the matter or was biased against the applicant when doing so."

- [16] In the heads of argument submitted by the applicant in support of its original *in limine* points before the arbitrator, it cited the rules of the Post Office Retirement Fund established in terms of section 10 of the Post Office Act, 44 of 1958 ('The Post Office Act') and the following section of the rules of the fund appearing in GN 1107, government Gazette 28228, 25 November 2005:

"7. DISABILITY

7.1 if at any time prior to his NORMAL RETIREMENT DATE a MEMBER other than a DEFINED BENEFIT MEMBER becomes disabled, as a result of an accident, a disease or an illness, to the extent that he cannot pursue his occupation for which she is qualified by his training and experience, the MEMBER shall; provided he is not declared PERMANENTLY DISABLED, become entitled to disability income in terms of a separate group disability scheme instituted by the EMPLOYER."

- [17] The applicant went on to say that the policy referred to in 7.1 is known as the "Income Continuation Insurance Policy, which is underwritten by Sanlam Life Insurance Ltd" (emphasis added). At this juncture, it must be mentioned that two policy documents were canvassed at the arbitration. One document was the "Income Continuation Insurance Policy", which is the insurance contract between SAPO and Sanlam Life Insurance ('Sanlam policy'). The other document was the SAPO policy on extended sick leave applications ('SAPO policy'). The Sanlam policy effectively governs the payment, *inter alia*, of claims for TTD income benefits, which are made to SAPO in respect of employees who qualify to be insured in terms of the policy. However, the underwriting policy does not deal with the process of approving the payment of TTD benefits to individual employees, but only with the conditions under which Sanlam will pay the employer in respect of an employee who satisfies Sanlam's requirements for TTD.

- [18] It is the SAPO policy which deals with the procedure for approving employee applications for TTD benefits and it makes no reference to the underwriting Sanlam policy except in defining Total Disability as follows:

“Sanlam defines total disability as: a condition where the insured directly and exclusively as a result of bodily injury or an illness is continuously and totally prevented from following the regular occupation that he/she followed immediately before, provided that the condition:

- Is not attributed to the insured's having negligently or wilfully exposed himself/herself to danger, except in the interest of the law or to protect his/her or another's life or property; and
- Is not attributable to intentional self-inflicted injury; and
- Cannot be substantially removed by surgery or any other medical treatment which, taking into account the risk and the prospect of success of that treatment, the insured can reasonably be expected to undergo.”

(emphasis added)

[19] Dr C Mpata testified for SAPO on the approval process. She was responsible for overseeing SAPO's employee wellness and health and occupational health programme nationally. She did so with reference to the SAPO policy document. In essence her evidence was that the initial assessment of an employee's entitlement to TTD benefits was outsourced to an organisation known as Proactive Health Solutions ('PHS'). That assessment would then be discussed at a monthly meeting of a medical panel comprising a doctor, occupational therapist and a physiotherapist and a recommendation made which Dr Mpata said she would forward to “the Group Executive who is having the delegation or approving our recommendations.” There was no suggestion in Dr Mpata's evidence that Kriek's application was refused by Sanlam or that the medical panel and PHS did anything more than make recommendations.

[20] In the circumstances, there was more than ample evidence to support the arbitrator's conclusion that it was SAPO that took the decision to refuse her application for TTD benefits. It should also be mentioned that it is apparent from the transcript that when the *in limine points* were argued before the arbitrator handed down his ruling on 24 August, SAPO's legal representative more than once contended that the arbitrator was effectively being asked by Kriek to review a decision of the employer

having regard to the Sanlam policy, which he had no power to do. Nowhere in his representations did the applicant's representative make the slightest suggestion that the decision was not made by the employer.

[21] Consequently, the remaining issue concerns the substantive merits of the arbitrator's award on whether the refusal of Kriek's application amounted to an unfair labour practice.

The substantive merits of the refusal of TTD benefits

[22] The arbitrator concluded that Kriek had been unreasonably refused TTD benefits by analysing the reasons given by the applicant for doing so and finding them wanting. The reasons advanced for refusing the benefit were that: "evidence of sick leave abuse; there was no medical justification to justify the prolonged absence, and, her absence was ascribed to an injury on duty." More specifically, the panel recommendation in commenting on the medical statement for the period of the application was the following:

"

- In addition to evidence of sick leave abuse, it should be noted that the panel acknowledges that for the period in which she applied for TTD, Ms Kriek was diagnosed with a genuine medical condition that required hospitalisation.
- It was also noted that Miss Kriek was allegedly threatened at work in August 2009 and that she consulted with her general practitioner who treated her. She consulted with a psychologist and psychiatrist in Feb 2010 and March 2010 respectively. Ms Kriek used her 18 days of normal sick leave during this period (the optimum number of days to be off sick from work for condition is 28 days-as recommended by MDA). She exceeded these recommended days and there was no medical justification to justify the prolonged absence from work due to illness.
- It was also noted that the absence due to illness was ascribed to "injury on duty" this is not covered by the temporary total disability insurance, the employer has to apply to the

workmen's compensation (it is advised that the employee contact risk for applications)"

When making the recommendation to decline the application, the panel further stated that "even if the employee were to qualify for TTD it will be declined based on history of sick leave abuse".

[23] The arbitrator found that:

23.1.1 Even though the applicant had applied for compensation for injury on duty for the incident which she claimed precipitated her Post Traumatic Stress Disorder ('PTSD'), that claim was never finalised or registered and he concluded that there had been no injury on duty. Moreover, the applicant itself did not accept that an IOD incident had occurred and the arbitrator was also of the view that even if it had occurred it was not a cause of illness that disqualified a claim for TTD benefits under the policy.

23.1.2 The TTD policy did not require the employee to demonstrate a life-threatening situation.

23.1.3 In the absence of Kriek being properly cross-examined about her alleged abuse of sick leave, her own evidence was sufficient to refute that claim. Moreover she had been booked off sick by her psychiatrist as a result of a genuine illness and Dr Mpata could not explain why the medical report of the psychiatrist did not satisfy the requirement of a comprehensive medical report.

23.1.4 The applicant was absent on account of illness which qualified her in terms of the policy for TTD benefits and none of the exclusions in the policy applied.

[24] The applicant claims that the arbitrator's reasoning is flawed to such an extent that the court should set aside his findings on the following grounds:

24.1 The arbitrator failed to analyse the conflicting evidence of the expert witnesses, bearing in mind that the onus remained on Kriek to prove that she was suffering from the illness for which she claimed TTD,

namely PTSD. The arbitrator had incorrectly taken the view that the employer had to justify its decision to refuse TTD benefits, which amounted to a reversal of the onus.

24.2 The arbitrator failed to consider the conflicting evidence as to whether Kriek had been subjected to a life-threatening incident although such a finding was necessary in order to conclude that she was suffering PTSD. In regard to whether Kriek was required to prove that the cause of her illness was PTSD and that in turn required her to prove the existence of a life-threatening situation, it needs to be mentioned that the incident which allegedly prompted the PTSD syndrome was that on 13 August 2009, Kriek and another employee were involved in an incident in which the other employee had verbally threatened to kill Kriek.

24.3 He failed to consider that there was no evidence presented by Kriek contradicting SAPO's contention that she had exceeded her sick leave entitlement to such an extent that it amounted to an abuse of sick leave.

[25] On the question of a reversal of the onus, the arbitrator's analysis of the evidence proceeded along the lines of taking the employer's reasons for refusing the benefit and assessing whether the employee had established that those reasons were unjustifiable. That does not seem to me to amount to a reversal of the onus. On the contrary, he accepted that the employee had to disprove the reasons relied on by the employer for refusing the benefit.

[26] Dr S Prinsloo, the psychiatrist who had diagnosed the applicant as suffering from PTSD in March 2010, following the incident in August 2009 said that Kriek had returned to work in November 2010 contrary to her recommendation. During the period of incapacity which included the period for which Kriek had applied for TTD benefits, namely March to July 2010, Kriek was incapacitated and under treatment. At this juncture it should be mentioned that the medical condition which allegedly incapacitated Kriek was described in by Dr Prinsloo as "Post Traumatic Stress Disorder and Major depressive Disorder." Thus it was not based on

PTSD alone. In Dr Prinsloo's view there was no abuse of sick leave. Throughout this period Dr Prinsloo and Mr Breedt continued to treat Kriek.

[27] SAPO's witness was Dr Sliggant, a psychologist who only consulted Kriek in November 2011. Based on his examination, he essentially disbelieved the analysis that Kriek was suffering PTSD triggered by the event in August 2009, but agreed that her mental condition was not good when he examined her. He did concede that if her reported symptoms were correct she would not have been able to function and that even if she had not suffered from PTSD, she had suffered from a generalised anxiety syndrome which could incapacitate her.

[28] It is fair to say that the arbitrator did not feel that it was necessary for him to reach a conclusion whether Kriek was suffering from PTSD, as such. He concluded his assessment of the expert evidence in robust terms:

"Parties took issue with the applicant's past psychological history but the bottom line is that the applicant was at present mentally not in a good state and she "required treatment".

He further commented that the delay in taking disciplinary action against all concerned arising from the incident which allegedly triggered the PTSD in Kriek. Obviously, the arbitrator seems to have based his decision on his appraisal of Kriek's condition at the time of the arbitration. If I were to decide this matter simply on the basis of the arbitrator's finding on the expert evidence, there is a logical difficulty with his approach. Essentially, he was tasked with determining if, in the light of Kriek's condition at the time when she applied for TTD benefits, she ought to have qualified for them, not whether she would qualify for the benefits at the time of the arbitration hearing.

[29] On the face of it, this was a misdirection on his part. However, it is now trite law that the arbitrator's reasoning in arriving at an outcome is only one factor to consider and that in a review application dealing with the reasonableness of the award, the court must also consider in the light of all the evidence whether the outcome is one that no reasonable arbitrator

could have arrived at.⁵ This applies even if the arbitrator misdirects himself.⁶ I will return to this issue later.

[30] Turning back to the question whether the arbitrator's conclusion that the failure to approve Kriek's TTD benefit application was an unfair outcome that no reasonable arbitrator could have arrived at on the evidence, I am of the view that it was a plausible conclusion on the evidence if not necessarily the only plausible outcome. The crux of the matter turns on two issues in my view.

[31] The first is the claim that Kriek abused her sick leave. Whilst Kriek bore the onus of establishing that she had not abused her sick leave, in so far as the applicant wished to rely on evidence to rebut her evidence that should have been put to her and not simply presented by Dr Mpata. The respondent also did not tackle Dr Prinsloo's evidence to the contrary. In the light of this, I cannot say that no reasonable arbitrator could have reached the conclusion that she did not abuse her sick leave entitlements, relying primarily on Kriek's evidence in that regard.

[32] The second issue is whether or not there was sufficient evidence before the arbitrator to plausibly support a conclusion that Kriek was continuously and completely prevented from performing her regular occupation that, at the time of the application for TTD benefits. At the time the panel recommended the refusal of the application, the only medical opinion before it by anyone who had consulted with Kriek were the opinions of Dr Prinsloo and Mr Breedt. Although Dr Prinsloo only saw the applicant over

⁵ See **Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae) (2013) 34 ILJ 2795 (SCA)** commenting on the effect of the judgment in **Sidumo & another v Rustenburg Platinum Mines Ltd & others 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC)**, at 2802, par [

"On this approach the reasoning of the arbitrator assumes less importance than it does on the SCA test, where a flaw in the reasons results in the award being set aside. The reasons are still considered in order to see how the arbitrator reached the result. That assists the court to determine whether that result can reasonably be reached by that route. If not, however, the court must still consider whether, apart from those reasons, the result is one a reasonable decision maker could reach in the light of the issues and the evidence."

⁶ **Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate (2015) 36 ILJ 968 (LAC)** at 974, para [15].

six months after the alleged trigger event, Dr Prinsloo did so at the time the applicant was allegedly in need of TTD benefits, whereas the applicant's expert witness only consulted with Kriek more than two years later. In terms of the SAPO policy, PHS could in the course of making its assessment examine the patient. There was no evidence this was done. Dr Prinsloo's prognosis at the time was that there was no short term prospect of improvement.

- [33] The applicant's expert witness, despite being of the opinion on the basis of a personality test that Kriek may have exaggerated her PTSD symptoms, nonetheless concluded that by the time he saw her, she suffered from a Generalised Anxiety Disorder that was so severe she would "not function effectively in the workplace".
- [34] Having regard to the reasoning in the recommendation of the panel, much seemed to depend on the fact that the panel regarded Kriek's absence as being excessive in relation to the standard 28 day average which was acknowledged as a norm in such cases. However, there was no indication of any medical grounds set out in the reasons for the recommendation based on Kriek's medical condition, as such, and it was not the panel's finding that Kriek was not suffering from PTSD or a major depressive disorder. In fact the panel acknowledged her condition required her to be hospitalised for the period she had applied for TTD benefits. If there had been some medical basis for doubting Dr Prinsloo's or Mr Breedt's diagnosis at the time, the decision to decline her application would clearly have been more difficult for Kriek to attack. Essentially, it seems the only evidence of Kriek's condition showed that she remained incapacitated during the period in question, as evidenced by the contemporaneous reports submitted by Dr Prinsloo and her psychologist, Mr C Breedt.
- [35] Considering the above, I do not think that on the evidence, it would be unreasonable for an arbitrator to have concluded that there was insufficient reason for refusing the benefit and that it was unfair to have done so.

Cost award

[36] Notwithstanding the fact that the review must fail in the main, I agree that the punitive cost award was unwarranted. It appears to have been mainly based on the arbitrator's assumption that SAPO had dragged its heels in taking disciplinary action against the person who allegedly threatened Kriek, but a consideration of the efforts made by SAPO to deal with the grievance, it appears that the evidence in this regard was not one-sided and the applicant also did not co-operate in trying to speed matters up. It cannot be said that SAPO acted in bad faith in defending the decision, as it is doubtless difficult sometimes to be confident that claims based on mental illness such as a major depressive condition or post-traumatic stress disorder are genuine.

[37] I am satisfied that the punitive award was excessive in the circumstances, though I believe that SAPO put Kriek to unnecessary expense by forcing her to contest the decision despite obvious weaknesses in its justification for the decision. Consequently, the cost order ought to be set aside and amended.

Costs and variation

[38] The applicant had to go to considerable expense to obtain redress and there is no reason in this instance why she should have to bear all her costs.

[39] I note that in the relief awarded, the arbitrator failed to quantify the amount that should be repaid to Kriek and the determination of that amount is not obvious on the face of the award as it requires evidence or the agreement of the parties on the number and amounts of deductions made from her remuneration. In that respect, the arbitrator did not finalise the relief and it should be remitted to the CCMA for variation of the award.

Order

[40] The application to review the arbitration award of second respondent dated 22 March 2013 succeeds to the extent that the cost order issued in

paragraph 30 of the award is set aside and substituted with the following order:

“[30] The respondent is to bear the costs of the applicant and the costs of the applicant’s expert witness.”

[41] The award, as amended by this order, is remitted back to the third respondent to be set down before a commissioner solely to determine the total amount deducted from the first respondent’s salary in consequence of the applicant’s refusal to grant the first respondent TTD benefits for the period 6 March to 5 July 2010 which ought to be refunded to her and to issue a variation order to that effect.

[42] The applicant must pay the first respondent’s costs of opposing the application.



Lagrange J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:

M Euijen assisted by D A Smith instructed
by Goldberg & De Villiers Inc

FIRST RESPONDENT:

C Unwin of C Unwin Attorneys