THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: C190/2020

In the matter between:

JOHN HAYES	**Applicant**
And	
THE NATIONAL MINISTER OF POLICE N.O	**First Respondent**
THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE N.O	**Second Respondent**
THE PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL	**Third Respondent**
ISLE DE VLIEGER-SEYNHAEVE N.O	**Fourth Respondent**

Heard: 16 May 2023

Delivered : 18 May 2023

Summary: Section 158 (1) (h) of the LRA review application. It is a legality review, predicated either on lawfulness or rationality. The applicant alleges that the decision to disapprove his Temporary Incapacity Leave (TIL) is irrational and ought to be reviewed and set aside as such. The effect of approving the TIL is that a leave of absence should be treated as leave with pay. Accordingly, where an employee is paid in an instance where the employee ought not to be have been paid the State is entitled to make deductions from the emoluments of the employee in compliance with the provisions of section 38 of the Public Service Act, 1994 read with section 34 of the Basic Conditions of Employment Act, 1997 (BCEA). Should the employer

not comply with the provisions of the BCEA, the remedy of an employee is to seek an interdict and a refund of the amount unlawfully deducted.
Section 158 (1) (h) review powers cannot be invoked where a remedy exists in the LRA. Section 158 (1) (a) (i) (ii) of the LRA empowers the Labour Court to grant an urgent interim relief and an interdict.

Where the decision is predicated on a report of a medical nature, such a decision cannot be said to be irrational within the meaning of a legality review. The fact that a review applicant has not been able to source and obtain such a report does not axiomatically mean that the decision is irrational purely because the existing document has not been produced. It is the duty of an applicant for review to place before the review Court all the relevant documents to enable a Court to perform its review function.

An application brought in terms of section 145 of the LRA must be brought within a six weeks' period. A delay of seven months is excessive and it requires an adequate and reasonable explanation. Absent adequate and reasonable explanation, the prospects of success are meaningless. Held: [1] The application for review in terms of section 158 (1) (h) is hereby dismissed. Held: [2] The application for condonation of the late filing of the review in terms of section 145 (1) of the LRA is refused. Held: (3) The section 145 (1) application for review is dismissed for want of jurisdiction. Held: (4) There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] In terms of section 158 (1) (h) of the Labour Relations Act, 1995 (LRA)[1], the Labour Court is empowered to review any decision taken or any act performed by

[1] Act 66 of 1995 as amended.

the State in its capacity as employer, on such grounds as are permissible in law. In terms of section 145 (1) of the LRA, any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award within six weeks of the date that award was served. Section 145 (1A) of the LRA empowers the Labour Court on *good cause* shown to condone the late filing of the review application contemplated in subsection 145 (1) of the LRA.

[2] Effectively before me serve two applications rolled up into one. In the notice of motion, the applicant, Mr. John Hayes (Hayes) seeks a principal relief (reviewing and setting aside decisions taken on 17 December 2019 and 6 March 2020 respectively – disapproving the Temporary Incapacity Leave (TIL) applications) and an alternative relief (condonation for the late filing and reviewing and setting aside of a jurisdictional ruling made by an Arbitrator of the bargaining council on 20 October 2019). Although an intention to oppose was filed by the State Attorney, when the matter emerged before me it emerged as an unopposed application. Hayes had also launched an interlocutory application seeking to strike out any defence by the respondents. Given the view this Court takes at the end; it is unnecessary to entertain such an application. It however suffices to the state that the conduct of the State Attorney in this particular matter is not dissimilar to its detestable conduct when litigating on behalf of the State in this Court and other Courts. They simply ignored an order made by my sister Rabkin-Naicker J on 16 February 2022 compelling the respondents to provide certain documents.

[3] Nevertheless, this Court as mentioned, entertained the application as an unopposed one. Although for some unsound reason, Hayes asked this Court to consider the section 145 (1) review application as a ‘fall back’ application should he fail in the section 158 (1) (h) application, to my mind the two are discrete and are aimed at impugning discrete decisions. In this judgment they shall be treated as discrete applications.

Background Facts

[4] Hayes was employed by the South African Police Services (SAPS) until 1 January 2019, when he became medically boarded. On 7 October 1996, whilst on duty, Hayes fatally wounded a motor vehicle thief. On his version, shortly after the incident, he developed a post-traumatic stress disorder (PTSD). He consulted one Dr. George, a Psychiatrist who treated him for a while.

[5] It is apparent that at some point, Hayes applied for TIL for the years from 1999 up to and including 2017. He alleged that he suffered from a work related injury (PTSD). Some TIL applications were, on the version of Hayes, granted and others were refused. It is not clear from the papers as to when exactly those refused were so refused. However, Hayes alleges that 'final' decisions were taken on 17 December 2019 and 6 March 2020 respectively.

[6] It is apparent that the genesis of the present application was when a state debt was raised seeking to recoup salaries wrongly paid to Hayes whilst he was not paid sick leave. On 19 January 2017, Hayes raised the issue regarding a decision made by the Head Office with regard to his injury on duty. He demanded the stopping of the state debt and the reimbursement of all monies allegedly owed to him. Various correspondents was exchanged on the topic.

[7] On 6 May 2019, Hayes opted to, the midst, refer a dispute to the Public Service Coordinating Bargaining Council (PSCBC). The dispute was enrolled for arbitration on 14 October 2019. At arbitration, the SAPS raised a jurisdictional point. This dispute arouse because of the grievances Hayes lodged in May 2016 and during 2018 respectively lamenting the decision to refuse him TIL. The dispute was referred as a refusal to bargain and an interpretation of the collective agreement, PSCBC Resolution 07 of 2000 (Resolution). For reasons that Hayes ceased to be an employee in December 2018, Arbitrator I De Vlieger-Seynhaeve (Seynhaeve) declined jurisdiction in a written ruling dated 20 October 2019.

[8] On or about 25 June 2020, Hayes launched the present applications. As indicated above they remain unopposed.

<u>The grounds for review</u>

[9] With regard to the section 158 (1) (h) review application, Hayes contends that the decisions taken by the SAPS are irrational and falls to be set aside. With regard to the section 145 (1) review application, Hayes accepted the decision of lack of jurisdiction as being correct – an act of peremption, however, should he fail with the section 158 (1) (h) review application, he calls upon this Court to apply the objective rationality test on the ruling – act of approbating and reprobating at the same time.

Evaluation

[10] It is convenient in this judgment to consider the section 145 (1) review application first, particularly the condonation application. The ruling was served on Hayes in October 2019. The six weeks' period expired around December 2019. The application seeking to review the ruling was launched only in June 2020. This despite the apparent peremption on the part of Hayes. Undoubtedly, the delay involved herein is excessive and required a plausible explanation before it could be excused by a Court. In the founding affidavit, other than perempting his right to review and a *volte face*, Hayes does not provide a plausible explanation for the delay sought to be excused. He says nothing about the period from December 2019 up to and including June 2020. An applicant for condonation is obliged to explain each and every day of the delay[2]. Absent acceptable and reasonable explanation, prospects of success become irrelevant[3]. Accordingly, the condonation application falls to dismissed.

[11] The Labour Court lacks jurisdiction to entertain a review application launched outside the prescribed time period and the excess period has not been condoned[4]. Accordingly, the section 145 (1) review application falls to be dismissed for want of jurisdiction.

[12] I now turn to the section 158 (1) (h) review application. It is by now settled law that where the LRA provides for a remedy, section 158 (1) (h) should not be

[2] See *Mulaudzi v Old Mutual Life Insurance Company (SA) Limited and others* 2017 (6) SA 90 (SCA) at para 26.
[3] See *Collet v CCMA and others* [2014] 6 BLLR 523 (LAC).
[4] See *Nair v Telkom SOC Ltd and others* (JR59/2020) [2021] ZALCJHB 449 (7 December 2021).

invoked[5] It is apparent that the decisions that Hayes complains about are centered around the application and interpretation of a collective agreement. Clause 7.5 of the Resolution provides thus: -

> "7.5.1 **Temporary disability leave**;
>
> (a) An employee whose normal sick leave credits in a cycle have been exhausted and who, according to the relevant practitioner, requires to be absent from work due to disability which, is not permanent, may be granted leave on full pay provided that:
>
> (i) Her or his supervisor is informed that the employee is ill; and
>
> (ii) A relevant registered medical and/or dental practitioner has duly certified such condition in advance as temporary disability except where conditions do not allow.
>
> (b) The employer shall, during 30 working days, investigate the extent of the inability to perform normal official duties, the degree of inability and the cause thereof. Investigations shall be in accordance with item 10 (1) of Schedule 8 in the Labour Relations Act 1995.
>
> (c) The employer shall specify the level of approval in respect of applications for disability leave.

[13] In granting the temporary disability leave, an employer exercises a discretion subject to certain conditions. Absent such conditions, it is axiomatic that an employer may not grant such leave. Although it is unclear from Hayes' papers, it may be surmised that the refusal to grant the leave was based on the failure to meet any of the requirements of the clause outlined above. It must also be so that Hayes and the SAPS differed with regard to the interpretation of the clause, hence the referral of a dispute within the contemplation of clause 14 of the Resolution.

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[5] See *SABC* SOC *Ltd v Keevy and others* [2020) 6 BLLR 607 (LC).

[14] For the reasons outlined above, this Court refuses to afford a review remedy under section 158 (1) (h) of the LRA. Additionally, regard being had to the fact that the true dispute of Hayes is the disagreement with the decision to recoup and or not to pay back what has been deducted from his emoluments as the state debt his application does not fall within the purview of section 158 (1) (h) of the LRA. It must be stated that section 38 of the Public Service Act, 1994 (PSC) read with section 34 of the BCEA do authorizes the State to deduct from remuneration of an employee wrongly granted remuneration. If the SAPS is acting unlawfully, by breaching section 34 of the BCEA and 38 of the PSC, the remedy of Hayes is to seek an urgent relief and or an interdict. The Labour Court possess such powers under section 158 (1) (a) (i) (ii) of the LRA. For these reasons too, this Court refuses to invoke its discretionary powers under section 158 (1) (h) of the LRA. Hayes has other remedies in terms of the LRA.

[15] Assuming that this Court is wrong in its above view, a section 158 (1) (h) review is a legality review. Hayes alleges that the two decisions impugned by him are irrational.

[16] In relation to legality, in *Minister of Defence and Military Veterans v Motau*[6] the following was said:

[69] The principle of legality requires that every exercise of public power, including every executive act, be rational. For the exercise of public power to meet this standard it must be rationally related to the purpose for which the power was given…

[17] In *DA v President of the RSA*[7], Yacoob ADCJ, as he then was, stated the following about rationality:

[27] The Minister and Mr Simelane accept that the 'executive' is constrained by the principle that [it] may exercise no power and perform no function that conferred…by law and that the power must not be misconstrued. It is also accepted that the

[6] 2014 (8) BCLR 930 (CC)
[7] 2013 (1) SA 248 (CC)

decision must be rationally related to the purpose for which the power was conferred. Otherwise the exercise of the power could be arbitrary and at odds with the Constitution. I agree

[18] It has been confirmed that rationality and reasonableness are conceptually different. In *Albutt v Center for the Study of Violence and Reconciliation and others*[8], the following was said:

'The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine that means selected to determine whether they are related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution.

[19] This Court remains dubious that in refusing the TIL, the SAPS was exercising public power. Inasmuch as the determination whether an exercise involves public power is an opaque one, it does not follow that every conduct or action by the State involve public power. In *casu*, it is apparent that the power exercised by the SAPS emanates from the collective agreement. Aptly put, it was contractual power as opposed to public power. That notwithstanding, in the letter encapsulating the impugned decision of 17 December 2019, the SAPS specifically and categorically stated that the applications could not be considered favourably due to lack of medical evidence to justify Hayes' absence from duty at the material time of such decision being made. In terms of the empowering collective agreement on of the jurisdictional conditions to grant leave is the certification by a medical practitioner. There is nothing to suggest that the means used to at the time was not rationally

[8] 2010 (3) SA 293 (CC)

connected to suggest that the means used at the time was not rationally connected to the objective sought to be achieved by the collective agreement. If Hayes had met the jurisdictional requirements at the time, his remedy would have been to resubmit the application and support it with medical evidence as opposed to seeking a legality review. It was incumbent on Hayes to provide this Court with proper review record in order to test the rationality of the decision. For an example if there was medical evidence available at the time, the decision to ignore such medical evidence would ostensibly have been irrational.

[20] An applicant for review is obligated to provide a Court of review with the material that served before the decision maker, particularly where the rationality of the decision is impugned. Otherwise, how can a Court of review assess rationality or otherwise in the absence of the material that served before the decision maker? In my view, it is impractical for a Court of review to conclude that the means chosen by the decision maker is irrational in the absence of proper record. This Court does appreciate that Hayes sought and obtained an order to compel the SAPS to furnish the records. However, having failed to comply, the next step should have been to launch contempt proceedings instead of seeking to strike out a non-existent defence[9].Because an application to compel was sought and obtained that does not exempt an applicant for review to still present a full record. This Court was not told of any other steps, if any, taken to reconstruct the record, if the SAPS may have obliterated or lost the records. For that reason, too, Hayes must be non-suited.

[21] I now turn to the 6 March 2020 decision. According to the SAPS, the decision to disapprove the application for incapacity leave was informed by expert medical findings by an independent Health Risk Manager. Such findings were not made available in order to assist the Court in its task of assessing the rationality of the decision. It must be so that such medical findings do exist because the empowering collective agreement requires medical certification. The fact that Hayes attempted and “failed” to obtain such findings does not exonerate him from his duties as a review applicant – *dominus litis*. Hayes remains the *dominus litis* and in terms of the rule 7A of the Rules of the Labour Court he remains tasked to make the record of

[9] Other than the intention to oppose, no opposing affidavit was delivered in this matter. The veritable question is, which defence to strike out?

review available. Similarly, this Court is not in a position to assess whether absence of medical reasons could not rationally be used as a route to refuse the incapacity leave. Regard being had to the empowering collective agreement; it is ostensibly rational to refuse to grant an application for leave if the medical reasons are absent.

[22] Accordingly, for all the above reasons, the section 158 (1) (h) application was doomed to fail nevertheless. This Court does not find any evidence of irrationality.

Order

[12] In the results, I make the following order:

1. The application in terms of section 158 (1) (h) of the LRA is dismissed.

2. The application for condonation of the late filing of the section 145 (1) (a) of the LRA is hereby refused.

3. The application in terms of section 145 (1) (a) of the LRA is dismissed for want of jurisdiction.

4. There is no costs order.

GN Moshoana
Judge of the Labour Court of South Africa

Appearances

For the Applicant:	Mr J H Loots SC
Instructed by:	Combrink Attorneys Inc, Cape Town.
For the Respondents:	No appearance