

Employment Law

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SOUTH AFRICA

Doctor Who? The scourge of bogus doctors



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Doctor Who? The scourge of bogus doctors

Woolworths (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others (JA90/22) [2024] ZALAC 29 (13 June 2024)

The abuse of sick leave in South African workplaces is rife. This not only has a detrimental financial impact on employers but may also impact the efficiency and performance of a business. An absent employee places strain on other team members, who must pick up the slack, and may even require the use of a replacement, at an additional cost. Unfortunately, devious employees, often with the assistance of unscrupulous medical practitioners, have devised various means to work the system to their benefit. It goes without saying that the proper management of sick leave is important in any business.

The recent Labour Appeal Court case in *Woolworths (Pty) Ltd v CCMA and others (JA90/2022) [2024] ZALAC 29 (13 June 2024)* provides useful guidance to employers when considering a dismissal for abuse of sick leave.

Ms Maseko was employed at a Woolworths store in Emalahleni. She was dismissed for allegedly breaching company policy by submitting an irregular medical certificate in circumstances where the company believed that her absence from work was not because she was ill. Maseko referred a dispute to the Commission for Conciliation, Mediation and Arbitration.

Evidence led at arbitration

The evidence led by the company at the arbitration hearing was that the Emalahleni store had received an email warning of the issuing of suspicious medical certificates by a Dr Frempong. Maseko did not attend at work for four days in June 2018. A person claiming to be Maseko's sister-in-law called the store to inform them that she was not feeling well and would be absent from work. On 26 June 2018 Maseko submitted a medical certificate from Dr Frempong as proof of her illness. Store management reviewed Maseko's previous absences from work and found that in March 2016, she had submitted a medical certificate, also from Dr Frempong's practice and with the same signature. Store management then questioned Maseko about whether she had submitted a certificate from Dr Frempong before. She denied that she had done so and told them that she had previously submitted a certificate from a "Dr Zanele". When asked about who had called the store on her behalf, she claimed that it was her mother.

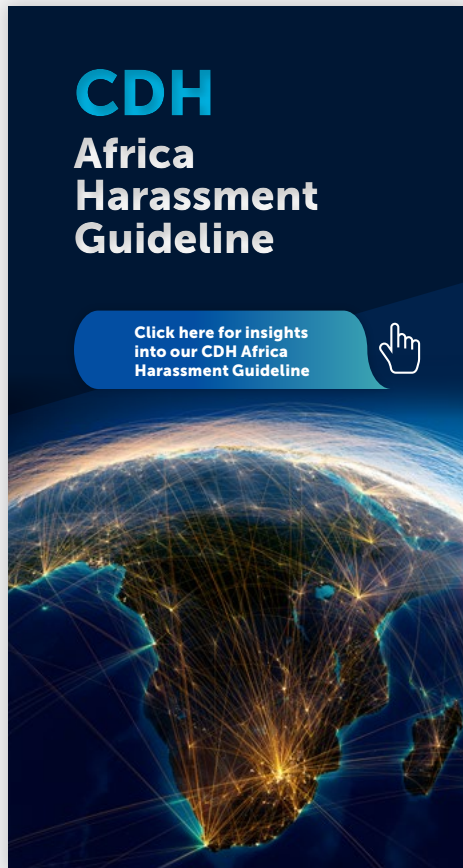
Internal investigation

Suspicious aroused, two members of store management, Mr Malaka and Ms Nkambule, went to Dr Frempong's practice to investigate the certificate issued by "Dr Zanele". They found a Zanele at the practice. However, she was not a doctor, but a nursing assistant to Dr Frempong.

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Dr Frempong also ran two separate surgeries in different areas. Zanele confirmed that she had issued the medical certificate in 2016. She also told them that she had issued a medical certificate to Maseko for three days' sick leave in June 2018. Maseko was dissatisfied with the period and decided to approach Dr Frempong directly for a medical certificate that would book her off for four days. Malaka secretly recorded this conversation.

Malaka and Nkambule then decided to visit Dr Frempong himself. While there, they observed what they believed to be people buying medical certificates from him. People would enter Dr Frempong's consulting rooms and return less than a minute later with medical certificates. While they were there, two gentlemen came in. They were asked, in relation to the issuing of medical certificates, how many days they wanted and were charged R250 for a medical certificate. When they met with Dr Frempong, he had a number of signed medical certificates on his table and a stamp. His table was untidy, and he was not dressed as a doctor. He was dishevelled and had long fingernails.

Dr Frempong confirmed to them that Maseko had seen him on 26 June 2018 and that he had signed the medical certificate that she had produced. Store management, however, concluded that Dr Frempong was not a real doctor and were of the view that Maseko had not been sick and that she was dishonest in claiming sick leave. The further evidence led by the company at arbitration was that Dr Frempong and Zanele had been arrested for illegally operating a surgery, dispensing medicine, and issuing sick notes.

At the arbitration hearing, Maseko's evidence was that she had seen Zanele, whom she believed to be a doctor, in 2016. Zanele had given her medication and issued her with a medical certificate allowing her to stay at home to recover. On 26 June 2018, she went to see Dr Frempong as she was not feeling well. When she submitted both medical certificates, she did not suspect anything to be amiss and her submission was in line with company policy.

When she was charged for misconduct, she went to see Dr Frempong who gave her documents to show that he was a qualified doctor. He also told her to see Zanele. She did not know that Zanele and Dr Frempong worked together as they worked from separate premises, and she had only then realised that Zanele was Dr Frempong's assistant and not a doctor. She denied that she had seen Zanele on 26 June 2018 or that she had only seen Dr Frempong because Zanele would only grant her three days' sick leave. She further explained that there was no discrepancy in her version about who had called to explain her absence from work. It had been her mother. Her mother's name was Sister. She denied that she had been dishonest about her absence from work.

Alleged medical qualifications

The person purporting to be Dr Frempong was also called as a witness. His evidence was that he qualified as a doctor in England at Cambridge University and that he was a fellow of the College of Surgeons who had qualifications in obstetrics and gynaecology and spent some time as a



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brain surgeon in England, America and Saudi Arabia. He was invited by MEDUNSA to work as a lecturer in neurosurgery, and at some stage he had worked as a locum for a doctor in Kriel. He had two offices in Emalahleni. He employed Zanele to work as his assistant at his second practice. When she had a patient, she would call him. He would leave about four signed medical certificates with her to issue to sick patients. She would then write the dates that should be reflected on the medical certificate. This, he averred, was a common practice amongst doctors. He denied selling sick notes or giving sick notes to people who were not sick. He saw Maseko on 26 June 2018 and issued the medical certificate for that day. He also averred that he was registered with the Health Professions Council of South Africa (HPCSA).

The Arbitrator's Finding

The arbitrator found that Maseko's dismissal was substantively unfair. He identified that the key issue before him was whether the certificate submitted by Maseko on 26 June 2018 was irregular. He found that there was no evidence to prove that Maseko was not ill in March 2016 and in June 2018. He concluded that the medical certificates submitted by Maseko were valid and regular, having been issued by a qualified and registered medical practitioner.

The Labour Court's Finding

Woolworths brought an application in the Labour Court to review the arbitrator's findings. It contended that the arbitrator had failed to appreciate the glaring and obviously dishonest version of Maseko and had failed to consider

the recorded evidence of Zanele, who had informed the company that Maseko had approached Dr Frempong in June 2018, only after she refused to grant her more than three days' sick leave. The Labour Court found that on consideration of all the evidence before the arbitrator, the submission that he had failed to consider the evidence before him and that his decision was not a decision that a reasonable decision maker could not reach was unsupported.

Before the Labour Appeal Court

Woolworths appealed the Labour Court judgment. The appeal was based on the arbitrator not properly considering the evidence of Malaka and Nkambule and ignoring the "untoward" happenings at Dr Frempong's surgery in respect of the issuing and purported buying of medical certificates. The Labour Appeal Court (LAC) did not accept this argument. It felt that if it accepted this argument it would mean that where a doctor conducted their medical practice in a dubious manner and illegally issued medical certificates to their patients, it would result in all employees who may be genuinely sick, and who may not be aware of the doctor's irregular activities, being subjected to a disciplinary process for using that doctor. Furthermore, the company did not present any evidence to show that Maseko knowingly obtained an irregular medical certificate and used it to validate her absence from work, that she tampered with the medical certificate, or that she misled the doctor about her illness. The LAC found that the charges against Maseko emanated from Malaka and

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Nkambule's dissatisfaction with how Dr Frempong chose to run his medical practice. The LAC also rejected the hearsay evidence about other people buying medical certificates at Dr Frempong's surgery, as it had nothing to do with Maseko (even if it were true).

The LAC found that, based on the evidence before him, the arbitrator's finding that there was no evidence to show that Maseko was not sick when she visited Dr Frempong's surgeries in March 2016 and June 2018 was unassailable, as was his acceptance of Dr Frempong's evidence about his qualifications and experience, since it was not challenged by the company in the arbitration hearing.

The LAC found that, at the very least, where an employer suspects that it is dealing with a bogus doctor, it should investigate its suspicions about the contraventions of standard operating procedures by that doctor, and if the suspicions are well founded, then it should warn employees against using that doctor. That investigation would necessarily include regulatory bodies such as the HPCSA. Employers would be wise to follow this advice.

Conclusion

On the facts, as presented in the LAC judgment, it may be argued that this is a case where the arbitrator came to an incorrect conclusion. This, however, blurs the line between an appeal and a review. The Labour Relations Act 66 of 1995 does not allow a dissatisfied party to appeal an arbitration award. The LAC emphasised that the test on review was not whether the arbitrator's decision was correct but whether, based on the evidence before the arbitrator, his or her decision was one which could be reasonably made. The grounds for review in the Labour Court are narrow. This case illustrates the importance of drafting appropriate allegations for a disciplinary enquiry (in this case focusing on the misconduct of the employee and not on the conduct of the doctor), properly presenting evidence at the arbitration hearing, and challenging the evidence presented by the other side.

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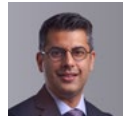
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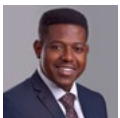
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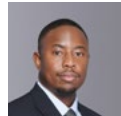
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