DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

17/07/23
DATE

SIGNATURE

THE JUDICIARY · REPUBLIC OF SOUTH AFRICA ·

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 616/18

In the matter between:

EPIBIZ (PTY) LTD	**Applicant**
and	
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**1st Respondent**
COMMISSIONER LUCKY D MAHLANGU *N.O.*	**2nd Respondent**
LORRAINE JORDAAN	**3rd Respondent**

Heard: 17/08/2022
Delivered: 17/07/2023

Summary: **Review application-whether the arbitrator's award is the one a reasonable decision maker ought to have reached. The award stands to be reviewed and set aside. Held: (1) The review application is upheld. (2) Award under case number GAEK 2571-17 handed down on 28 November 2017, and varied on 31**

January 2018 is reviewed and set aside and it substituted by the order that the Third Respondent's dismissal was substantively and procedurally fair. (3) There is no order as to costs.

JUDGMENT

SETHENE AJ

Introduction

> *"It should be mentioned that an employer is not expected to tolerate an employee's prolonged absence from work for incapacity due to ill health. And it may, if it is fair in the circumstances, exercise an election to end the employment relationship."*[1]

[1] If the employer's efforts to get the employee to return to work are frustrated by the employee and her representatives, it is found in this case. If incapacity due to ill health justifies dismissal, this is the case in point. In the premise, it stands to reason that the employer is entitled to dismiss the employee for prolonged illness called "Consultation".

[2] In this review application which is in terms of section 145 of the LRA[2], Epibiz (Pty) Ltd ("the applicant/employer/Epibiz") is aggrieved by the arbitration award issued by Commissioner Lucky D Mahlangu under the auspices of the CCMA[3]. The applicant contends that the arbitration award

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[1] Kievits Kroon Country Estate (Pty) Ltd v Mmoledi and Others (2014) 35 ILJ 406 (SCA) and para 31

[2] Labour Relations Act 66 of 1995, as amended.

[3] Commission for Conciliation, Mediation and Arbitration

is not one a reasonable arbitrator could make having regard to the the evidence placed before the arbitrator. Mrs Lorraine Jordaan ("the employee/Mrs Jordaan/Third Respondent") contends otherwise. Her contention and/or opposition to this review application postulates that the Commissioner/Arbitrator/Second Respondent was correct to find that her dismissal by the employer was procedurally and substantively unfair. In this regard, the employee is also in concert with the arbitrator's decision to award her compensation. Both the first and second respondents filed a notice to abide

Salient background facts

[3] The employment relationship between the employer and employee commenced on 4 August 1989. The employee was duly employed as the employer's Credit Manager.

[4] On 20 May 2016, the employer suspended the employee with all emoluments pending the investigation into allegations of misconduct. At the conclusion of investigation, the employer proffered six charges against the employee. The disciplinary hearing against the employee was duly convened on 15-16 August 2016, and following due process, on 17 August 2016, the employee was found not guilty on all charges.

[5] Following the employee's acquittal, the employee was requested in writing by the employer to return to work on 24 August 2016. The employee did not return to work. Instead, she furnished the employer with a medical certificate issued by Dr HJ Smit dated 16 August 2016 in which the following is recorded:

"MEDIESE SERTIFIKAAT/MEDICAL CERTIFICATE

Ondergeteken sertifiseer dat/ Undersigned hereby certifies that:

Mev L Jordaan

Deur my ondersoek is op/ was examined by me on

16/08/16

16/08/16 datum van laste ondersoek
Date of last examination

Volgens my kennis/soos my meegedeel was hy/sy onbekwaaam
According to my knowledge/ as I was informed he/she was unfit

vir werk vanaf tot en met
for work from **15.08.16** up to & including **30.08.16**

weens SIEKTE/OPERASIE/BESERING
due TO ILLNESS/OPERATION/INJURY

Aard van siekte/ operasie/ besering/ Nature of illness/
operation / injury

Consultation

16.08.16

Handtekening/ Signature Datum / Date

(The printed words are in ordinary script and the handwritten insertions are in bold)

[6] On 29 August 2016, a day before the expiry (30 August 2016) of the above medical certificate, the employee was back at the same medical doctor's rooms for another medical certificate. The medical certificate issued is similar in words as the first one, the difference is only the dates. The nature

of the illness is again "Consultation". On this occasion, the employee was booked off-sick effective from 28 August 2016 up to 30 September 2016.

[7] On 29 September 2016, a day before the expiry (30 September 2016) of the second medical certificate, the employee was back at the same medical doctor's rooms and was issued with another medical certificate. The employee was booked off-sick effective from 29 September 2016 to 29 October 2016 and the nature of illness is recorded as "Stress and Insomnia".

[8] On 28 October 2016, a day before the expiry (29 October 2016) of the third medical certificate, the employee was back at the same medical doctor's rooms and was issued with another medical certificate. The employee was booked off-sick effective from 28 October 2016 until 28 November 2016, and the nature of illness is recorded as "Consultation".

[9] On 12 September 2016, the employee consulted with Ms Lorraine Mitchell (Ms Mitchell), who regards herself as a *"qualified clinical social worker with more that 19 years' experience and have been working mainly in the field of families and children, anxiety, depression and suicidal ideation across various settings within this sector. I have been in private practice for three years."*

[10] According to Ms Mitchell, at the time she consulted with the employee, she had not completed her two Masters degrees in Mental Health in Social Work and Clinical Social Work.

[11] In Ms Mitchell's report dated 13 September 2016, she states that the employee described to her events that led to her suspension, disciplinary hearing and her acquittal thereof. According to Ms Mitchell, the employee spoke of the shock she experienced when she was furnished with a notice of suspension. The employee was according to what she related to Ms Mitchell traumatised by the disciplinary hearing process after working for

the employer for twenty-seven years. As a result, she was battling to sleep, had no appetite, was emotional, had nightmares and experienced anxiety and symptoms of depression. In Ms Mitchell's recommendations, she stated that the employee *"will find it difficult if not impossible to return to her workplace without intensive therapeutic and pharmacological support."*

[12] Ms Mitchell went further to recommend that *"due to Mrs Jordaan's age and present emotional state and physical condition, I would also ask if an alternative option could be sought so as to ensure that Mrs Jordaan need not return to work but that she is financially able to provide for herself."*

[13] On 31 October 2016, Ms Mitchell wrote yet another assessment report. In Ms Mitchell's recommendations, she stated the following:

> *"Although we have been working with techniques and coping tools to assist Lorraine deal with these symptoms it is still my recommendation that Lorraine is not able emotionally and psychologically to return to her place of work at this time. Lorraine is displaying ongoing symptoms of post-traumatic stress disorder and, in my opinion, only once all of this is behind her and she does not have to return to work and once the process has been completed, will she be able to effectively begin her healing process."*

[14] Following the employer's perusal of Ms Mitchell's assessment reports, the employer's representative, Mr Anton Coetzee (Mr Coetzee) addressed an email to the employee's consultant, Mr Chris McNamara (Mr McNamara) on 3 November 2016, stating the following:

> *"The writer places on record that we have invited you as elected representative of Mrs Jordaan (both verbally and in writing) to enter into discussions and consultations with ourselves as the elected*

representatives of Epibiz and Marprozep in order to determine what should be done with regards to your client's continued employment.

You have ignored this request and merely indicated that the matter has been resolved with a director of Epibiz in his personal capacity and on behalf of Epibiz. It would appear that the relevant management of both Epibiz and Marprozep (whom your client has previously cited as co-employers) is unaware of such commitment and you are requested to forward a copy of such signed agreement to the writer at your earliest convenience.

Notwithstanding the above, you have now again forwarded a medical certificate booking your client off until the end of November 2016. This medical note again merely states the nature of your client's illness is "Consultation".

In the light of your refusal to meet with the writer and the comments contained in your client's own "Clinical Assessment Report" dated 13 September 2016, it would appear that your client is, on her own version, not capable to return to work within a reasonable time period or at all due to (according to the same report) her medical condition as well as her age.

The employer(s) has now been without your client's services for almost three months and cannot reasonably be expected to keep her position available indefinitely.

In the absence of meeting with the employer(s) you are hereby given a final opportunity to make written representations or submit reasons as to why your client's services should not be terminated either on the grounds of incapacity due to illness or due to the fact that she has reached the normal retirement age or both.

Any such submission or representations should be sent to the writer by the close of business on Friday 4 November 2016 failing which the employer(s) will be left with no alternative but to make a final decision based on the content of your client's medical certificates and "Clinical Assessment Report".

Kind regards
Anton Coetzee"

[15] On 4 November 2016, Ms Belinda Stirling from Stirling Attorneys addressed a letter to Mr Coetzee indicating that her law firm was acting for and on behalf of Mrs Jordaan and MOE Awareness (Pty) Ltd. The latter is an advisory company owned by Mr McNamara which renders services on employment matters. In the said letter, Stirling Attorneys indicated that they have been instructed to respond to Mr Coetzee's email dated 3 November 2016. Further, they have been instructed to arrange to meet with their clients and will respond to the contents of the email and receive further instructions.

[16] On 11 November 2016, Stirling Attorneys addressed a letter to Mr Coetzee responding to the email received from Mr Coetzee acting on behalf of the employer. In sum, Stirling Attorneys indicated their instructions as follows:

16.1 Mrs Jordaan met with Mr J Thompson, a director of Epibiz on 15 October 2016, and the said director stated that he would ensure that Mrs Jordaan is treated fairly and her emoluments would be duly advanced to her. *(The said meeting was recorded without the knowledge and permission of Mr Thompson)*;

16.2 It is apparent that the report dated 31 October 2016, prepared by Ms Mitchell, the Clinical Social Worker established that Mrs Jordaan is not emotionally and psychologically ready to return to her place of work at this time;

16.3 Mrs Jordaan's suspension from the workplace after 27 years of dedicated service and her disciplinary hearing on 15 August 2016, caused her anxiety and was diagnosed by Ms Mitchell as having traits of post-traumatic stress disorder;

16.4 Schedule 8(10) of the LRA stated that before dismissing an employee for incapacity due to ill health the employer was obligated to investigate the alternatives short of dismissal; and

16.5 Mrs Jordaan was accordingly injured at work and the proposals short of dismissal were that Mrs Jordaan work from home and alternatively, her employment be terminated by mutual agreement.

[17] On 28 November 2016, Mr Thompson, who is one of the directors of Epibiz addressed a letter to Mrs Jordaan terminating her employment premised on the consideration of Ms Mitchell's reports and the fact that the employee was declared medically unfit to continue to work. In the said letter, it was also indicated that due to the nature of Mrs Jordaan's work, performing it from home would not be possible.

[18] Aggrieved by her dismissal, Mrs Jordaan referred her dispute to the CCMA and it is the arbitration award issued by the CCMA that is sought to be reviewed and set aside by Epibiz.

[19] It must be borne in mind that during the period of the employee's absence from work, the employee proposed to the employer to assist her in making a claim for compensation in terms of COIDA[4] as she was "injured" on duty.

[4] Compensation for Occupational Injuries and Diseases Act 130 of 1993. Section 38 makes provision for claims for compensation in an instance an employee has been injured on duty. The employee must notify the employer of the accident and following a due process, compensation can be claimed by an employee with the assistance of the employer.

The employer refused and reasoned that by agreeing to such, it would be party to a fraudulent claim. When that failed, the employee asked that she be retrenched, the employer refused to retrench her as it sought clarity to the employee's medical condition called "Consultation". Another request from the employee was that a claim should be lodged with the Workmens Compensation Fund. That request too, was rejected as the employer did not want to lodge a fraudulent claim for the benefit of the employee.

The award

[20] In the arbitrator's reasoning and conclusion, he found that the employer did not follow the procedure set out in Schedule 8(10) of the Code of Good Practice-Incapacity: ill-health or injury. Further the arbitrator found that based on submissions of medical certificates and reports by the clinical social worker, the employer knew the condition of the employee and ought to have been prudent and considerate in approaching her situation. In this regard, the arbitrator further found that the employer "was hasty when it decided to terminate the employment relationship." Consequently, the arbitrator deemed the employee's dismissal procedurally and substantively unfair and awarded compensation.

Grounds for review

[21] The grounds for review advanced by the employer are summarised as follows:

21.1 Arbitrator committed irregularities in the conduct of arbitration proceedings;

21.2 The arbitrator misconstrued relevant questions of law and of fact;

21.3 The arbitrator failed to take into account material evidence placed before him which showed that the employee's dismissal was procedurally and substantively fair.

Evaluation, Analysis and Law

[22] It is now trite law what role a reviewing court must perform when called upon to review and set aside an arbitration award in terms of s 145 of the LRA.

[23] In ***Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA***[5], the Labour Appeal Court held that "a reviewing court must ascertain whether the commissioner considered the principal issue before him/her, evaluated the facts presented at the hearing and came to a reasonable conclusion."

[1] In ***Herholdt v Nedbank Ltd***[6] (Congress of SA Trade Unions as amicus curiae) the SCA made it clear that the review of an arbitration award is permissible if the defect in the proceedings falls within one of the grounds in Section 145(2)(a) of the LRA. The following was stated:

> *"For a defect in the conduct of the proceedings to have amounted to a gross irregularity as contemplated by s145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as*

[5] (2014) 35 ILJ 943 (LAC) at para 16

[6] 2013 (6) SA 224 (SCA); (2013) 34 ILJ 2795 (SCA).

the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable."

[24] Did the arbitrator misconstrue the questions of law and fact in this dispute? The arbitrator spectacularly misconstrued the question of law in respect of Schedule 8(10) of the LRA. Schedule 8 (10) of the LRA was never contemplated for the nature of illness referred to as "Consultation". Further, nothing in the said schedule makes reference to "stress and insomnia" or to "post-traumatic disorder" as injuries contemplated in the said schedule. The employee's version that was accepted by the arbitrator is that it is due to her being suspended, charged and disciplined that caused her medical condition. Even if the employee's version is accepted, Schedule 8(10) of the LRA is inapplicable in the circumstances of the employee.

[25] The arbitrator misconstrued the law as that it was open to the employer to suspend, charge and discipline the employee if there was *prima facie* evidence of misconduct. In ***County Fair Foods (Pty) Ltd & Others v CCMA***[7], *the appeal court had this to say:*

"It remains part of our law that it lies in the first place within the province of the employer to set the standard of conduct to be observed by its employees and to determine the sanction with which non-compliance will be visited, interference therewith is only justified in the case of unreasonableness and unfairness."

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[7] (1999) 20 ILJ 1701 (LAC) at para 11. Also see Slagment (Pty) Ltd v Building, Construction and Allied Workers' Union 1995 (1) SA 742 (A) at 755B-C where it was held: ***"It is within the province of the employer who holds a disciplinary enquiry to determine its form and the procedure to be adopted, provided always that they must be fair. Fairness requires, inter alia, that the employee should be given an opportunity of meeting the case against him: the employer must obey the injunction audi alteram partem"***

[26] In respect of facts, in the arbitration, uncontroverted evidence was presented by the employer that it made various attempts to request the employee to return to work. In the said attempts, it was the employee and her representatives who refused to come to the party and frustrated the employer's attempts to properly ascertain the real reasons for the employee's prolonged absence from work. In this regard, the employer, according to documentary and *viva voce* evidence placed compelling evidence before the arbitrator to demonstrate that it made efforts to comply with Schedule 8(10) of the LRA. However, all the employer's efforts were frustrated by the employee and her representatives. In ***Old Mutual Life Assurance Co SA Ltd v Gumbi***[8], the appeal court had this to say at para 16:

> *"In our law a contractual condition is deemed to have been fulfilled where a party deliberately frustrates its fulfilment. By analogy this may be the position in a statutory setting."*

[27] The employer, in vain wanted clarity on the nature of the illness called "Consultation". During the cross-examination of the employee, the record indicates that she was asked to explain the illness called "Consultation" to no avail. For ease of reference, the cross-examination of the employee is recorded on that aspect as follows:

*"**RESPONDENT REPRESENTATIVE**: I am asking you what consultation means.*

***MRS LORRAINE JORDAAN**: I am not a doctor. You can ask my doctor that…*

***RESPONDENT REPRESENTATIVE**: Okay. You don't know what the word says, but you still hand it in as a doctor's note.*

***MRS LORRAINE JORDAAN**: Yes."*

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[8] [2007] 4 All SA 866 (SCA); [2007] 8 BLLR 699 (SCA); 2007 (5) SA 552 (SCA)

[28] From the record, it is apparent that the employee herself could not explain her illness recorded in the medical certificates she obtained from her medical doctor. The treating doctor did not depose to an affidavit to substantiate the nature of illness recorded in the medical certificate. Further, the treating doctor was not called by the employee to give oral evidence in the arbitration proceedings. In any case, it is trite law that a medical certificate or a sick note from a treating medical doctor remains hearsay evidence if the said certificate is not accompanied by an affidavit from the said doctor. This principle was made clear by the appeal court in ***Old Mutual.*** In expanding on this principle, the appeal court in ***Mghobozi v Naidoo and Others***[9], the following was said at para 28:

> *"The absence of affidavits from the doctors means that the court is deprived of any elaboration of the widely and vaguely stated symptoms attributed to the appellant. The nature of the medication and the efficacy thereof is also not explained."*

[29] In the circumstances, I see no reason in law why the two reports by the clinical social worker should not be regarded as hearsay evidence in the absence of the affidavit from Ms Mitchell premised on ***Old Mutual*** and ***Mghobozi***.

[30] Did the arbitrator fail to consider material evidence placed before him? He did, premised on the record of arbitration proceedings. The arbitrator failed to take into account that the employee conceded under cross-examination that it was not possible to perform her official duties from home and she constantly had to be in contact with her colleagues and various clients as employer's Credit Manager. To perform her duties, she conceded that she needed working documents, files and accounts. The said documents are confidential, relate to creditors and debtors and were assets of the

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[9] [2006] 3 BLLR 242 (LAC)

employer. The concession of this material fact clearly indicates that with the employee's prolonged absence from work, the employer had no alternative but to terminate her employment premised on the nature of her illness called "Consultation".

[31] The employee further conceded that during her prolonged absence from work, the employer kept on paying her salary. In this regard, it was unreasonable and economically not viable for the employer to keep advancing a salary to a person who was no longer committed or keen on continuing with the employment relationship. For that reason, the employer had substantive reason to terminate her employment due to the nature of her illness that warranted her prolonged absence from work to render services to the employer. Besides, not once according to the evidence on record did the employer request that she be allocated work to perform during her prolonged absence from work to demonstrate to the employer that she could seamlessly work from home.

[32] I find it rather odd that on 15-16 August 2016, the employee attended the internal disciplinary hearing. She remained in attendance until the disciplinary proceedings were concluded. However, in the medical certificate, the employee was declared unfit to attend work effective from 15 August 2016, when she only consulted her medical doctor on 16 August 2016. For the nature of illness called "Consultation", the employee was declared unfit to work for fifteen (15) days up until 30 August 2016.

[33] On 29 August 2016, the employee was again at her doctor's rooms and she was declared unfit to work effective from 28 August 2016, when there is no evidence that she even saw her doctor on the said day (28 August 2016).

[34] In the evidence on record, the employee stated that seeing people from her work caused her anxiety and yet when she was visited by Mr Thompson on 15 October 2016, and there was no sign of anxiety or any

of that sort. Instead, the employee secretly recorded the conversation she had with Mr Thompson without alerting him of the secret recording or seeking his permission to record their conversation. The said meeting occurred in the comfort of the employee's home.

[35] To my mind, once the employee was found not guilty of misconduct and was asked to return to work, one expects that with victory, the victor graduates from a state of suspended animation to ride the crest of the wave. However, with this employee, it was strangely the opposite. She represented herself in the arbitration proceedings and her cross-examination of the employer's witnesses including Mr Thompson, was commendable.

[36] In the premise, and in terms s 145(4) of the LRA, the decision of the arbitrator is not the one a reasonable decision maker ought to have reached having properly considered the evidence presented to him. The award stands to be reviewed and set aside as the third respondent's dismissal was procedurally and substantively fair.

Conclusion

[37] The issuance of medical certificates by medical doctors needs some legislative intervention. Medical certificates or sick notes, are instruments used daily in some instances to perpetuate exaggerated or feigned illness. An employee who was too sozzled over the weekend cannot attend to work due to *"babalaz"* or hangover, simply goes to his or her medical doctor to obtain a medical certificate or sick note. A student ill-prepared for his or her examination resorts to the same tactic to be afforded an opportunity to write at the later stage.

[38] In sum, the integrity of medical certificates or sick notes cannot always be guaranteed as in certain instances a critical perusal of the medical

certificate evinces no nature of illness but symptoms that do not render an employee incapacitated to perform work or follow disciplinary proceedings. At times, medical certificates or sick notes can be fraudulent. For instance, in ***Woolworths v CCMA and Others***[10], the employee presented to the employer a medical certificate from his medical doctor that declared him too-ill to attend to work. However, on the day the employee was said to be too-ill to work, he was out enjoying a game of rugby. The appeal court found that the dismissal of the said employee was substantively fair.

[39] Understand: medical doctors must always be conscious of their civic duty to the society and the rule of law. They must always remain conscious of their Hippocratic Oath and routinely stay true to its terms and spirits. It is not the role of a medical doctor to be an accomplice in an enterprise calculated to deceive and defraud the employer.

[40] In the result the following order is made:

Order

1. The review application is upheld;

2. The arbitration award handed down by the Commissioner under case number GAEK 2571-17 issued under the aegis of the CCMA, is reviewed and set aside and is substituted by an order that the dismissal of Mrs Lorraine Jordaan was procedurally and substantively fair; and

3. There is no order as to costs.

SMANGA SETHENE
Acting Judge of the Labour Court of South Africa

[10] (PA 12/2020) [2021] ZALAC 49

Appearances:

For the Applicant:	Adv G Meyer
Instructed by:	Bagraim Sachs Attorneys
For the Respondent:	Adv LJ Leeuw
Instructed by:	Stirling Attorneys