

**“Dear Sir, Please excuse Johnny from the hearing today...”**

The scene is one frustratingly familiar to embattled employers. The disciplinary notice has been delivered to the employee inviting him to attend the disciplinary hearing. The Big Day has arrived with everybody squeezed into a tiny boardroom; everybody, that is, but the alleged offender.

A medical certificate is handed up to the Chairperson explaining that the employee is suffering from tension headache/ stress/ depression/ malaise and will not be attending the enquiry today. Does the Chairperson postpone the hearing in the face of protests of the line manager who seeks to finalise the matter? Or does he or she take the cue from the more cautious HR Manager who reminds the parties of the employee’s right to state a case in response to the allegations of misconduct?

The Supreme Court of Appeal (“the SCA”) and the Labour Appeal Court (“the LAC”) have recently, independently, expressed concern about the use of medical certificates to explain the absence of default of parties to disciplinary and CCMA proceedings.

**Supreme Court of Appeal:**

In *Old Mutual Life Assurance Co SA Ltd v Gumbi* [2007] JOL 19895 (SCA) the SCA were called upon to consider the fairness of the employee’s dismissal which took place in his absence. The employee - curiously enough - eschewed the remedies available to him for an unfair dismissal under the Labour Relations Act 66 of 1995. Instead the employee challenged the procedural fairness of his dismissal by relying on his common law right to a pre-dismissal hearing (See also *Modise and others v Steve’s Spar, Blackheath* 2001 (2) SA 406 (LAC)). The employer dismissed the employee when he failed to attend the enquiry but instead arranged to hand in a medical certificate explaining his absence. After his dismissal the employee made written representations regarding his dismissal in his absence. The employer agreed to withdraw the dismissal, but then charged the employee again and reconvened the hearing. At this (second) enquiry the employee was represented by a recalcitrant representative describing himself as a “public defender” (*nogal!*). The representative raised numerous objections ostensibly aimed at delaying or halting the proceedings. The SCA was not impressed by these objections calling it “spurious” and the conduct of the representative contemptuous.

Following an adjournment of the hearing to allow the representative opportunity to consult the employee, the representative returned - without the employee but armed with a medical certificate. The sick note explained that the employee was suffering from tension headache and enteritis. Not to be outdone the Chairperson dispensed impromptu medical advice (suggesting the employee take some headache tablets to allow the hearing to recommence later the day). However, it appears that the representative viewed the free advice to be worth

every cent paid for it and indicated that neither he nor the employee will be in attendance. The hearing continued in their absence and (unsurprisingly) resulted in the dismissal of the employee.

The employee found little sympathy at the Transkei High Court where the Judge held that he wilfully excused himself from the hearing. The Full Bench of the Court was willing to reverse this judgment (albeit by split decision) on the basis that the employee's absence was neither wilful nor voluntary. In addition, it held that the medical certificate could not be rejected where its authenticity or correctness was not disputed at the hearing.

On appeal the SCA stated the following:

*"...little evidential value can be attached to [the medical certificate presented by the employee]. It does not reflect an independent medical diagnosis of the illness or an opinion as to the fitness of the employee to perform his normal work, let alone his fitness to attend a disciplinary hearing."*

And

*"...the chairman of the inquiry justifiably doubted the reliability of the medical certificate and inferred that the employee was malingering. The question whether the employee was really so ill that he could not attend the hearing must also be assessed against his entire conduct towards the inquiry. I have already found that both his conduct and that of his representative at the hearing established clearly that he intended to prevent the hearing from being held. This must be considered together with the fact that he and his representative contradicted each other about the time at which he became affected by illness."*

The SCA upheld the appeal by the employer (with costs) and held that the employee and his representative are the only persons to blame for the employee's absence from the hearing.

### **Labour Appeal Court:**

The LAC had opportunity to consider the issue of medical certificates in *Mgobhozi v Naidoo NO & others* [2006] 3 BLLR 242 (LAC) or (2006) 27 ILJ 786 (LAC). The employee made an application to the Labour Court to review and set aside an arbitration award. The CCMA found that his dismissal was fair. The employee brought his review application outside the six-week period stipulated in Section 145 of the LRA and therefore had to apply for condonation. In his condonation application he alleged that he suffered from stress and depression, hence the reason for his late application for review. In support of his affidavit he attached two

medical certificates. The Labour Court was not impressed and did not condone his late filing of the review application.

The employee appealed to the LAC stating that the Labour Court erred in not accepting the medical evidence tendered in the medical certificates as proof of his incapacity, hence excuse his late filing of the review application.

The LAC held that the medical certificates annexed to the application for review constituted hearsay evidence as it was not accompanied by affidavits by the medical practitioners. For this reason alone the appeal had to fail, stated the LAC.

Notwithstanding that, the medical certificates did not adequately explain why the employee could not bring his application for review within the requisite period. The LAC also held that the explanations offered for the absence of confirmatory affidavits were grossly inadequate. In the absence of a suitable explanation or the employee's delay in instituting review proceedings, the appeal was dismissed.

In *Metal and Engineering Industries Bargaining Council v Strip Steel (Pty) Ltd* (unreported Metal and Engineering Industries Bargaining Council Arbitration Award Case Number WTRA141) the arbitrator applied the facts in *Mqobhosi*. The employer received an extraordinary number of medical certificates from a specific (and prolific) medical practitioner. Employees were then normally booked off sick for five days by the good doctor. The employer sent one of its security staff to visit the doctor, who promptly obtained a medical certificate without examination. It then consulted with a shop steward of the trade union and issued a notice advising that it would no longer accept medical certificates from the medical practitioner in question.

Despite the notice the employee submitted a medical certificate from the doctor and demanded payment for his absence due to ill health, as per the certificate. The employer refused and withheld payment for the period of absence. The Bargaining Council then issued a compliance order but the employer still refused to make payment. The matter was then referred to arbitration.

The arbitrator held that the employer acted correctly in withholding pay from the employee in the circumstances of the case. The employer was entitled to take steps to safeguard its business against the abuse of medical certificates. The steps taken by the employer were reasonable.

**Diagnosis:**

Medical certificates are not a *panacea* to cure all difficulties arising from an employee's absence. Where done in accordance with Section 23 of the Basic Conditions of Employment

Act 75 of 1997 (“the BCEA”) the employee generally is entitled to payment for the period of absence.

However, employees seeking to abuse this right should not expect much sympathy from the Labour Court or Civil Courts where the employees’ actions can reasonably be construed as *mala fide*. Where it is clear that the employee is delaying disciplinary proceedings or that the explanation proffered in the medical certificate does not explain the employee’s default, employers can rightly dispense sterner medicine. Employers should take care, though, to avoid adopting a blanket approach of, for example, not tolerating delays caused by employees’ absence from hearings due to illness. As always, the facts of the case should suit the decision taken. Consider for instance the purpose for which the certificate is tendered, the surrounding circumstances and whether it has to comply with formal rules such as those of the High Court, Labour Court or CCMA. This way the malingering employee can be discharged and the genuinely ill one admitted back into the employer’s (intensive) care.

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