

Legal update 4 of 2023: Case law on fraud and misconduct in the workplace

Introduction

This update deals with cases relating to whether an employer can deduct damages from the pension benefits of an employee who committed fraud and whether going to a wedding while on sick leave can lead to dismissal from employment.

Summary

Case 1: *Umgeni Water v Naidoo and Another* (11489/2017P) [2022] ZAKZPHC 80 (15 December 2022)

Can an employer deduct damages from the pension benefits of a former employee who used a fake qualification to secure that employment?

- **The finding:** Yes, the employer can claim damages for any losses suffered because of the fraud committed by an employee who was appointed based on fake qualifications.
- **Practical application:** Section 37D(1)(b) of the Pension Funds Act allows deductions from a member's pension or provident fund benefits which are due to the employer for damages caused to the employer by reason of any theft, dishonesty, fraud, or misconduct.

Case 2: *NEHAWU obo Matras v Commission for Conciliation, Mediation and Arbitration and Others* (JR1970/17) [2021] ZALCJHB 285 (8 September 2021)

Can a person be dismissed by their employer for attending to private matters while on sick leave?

- **The finding:** Yes, as this counts as dishonesty on the part of the employee, which is a ground for dismissal.
- **Practical application:** Being dishonest about being unable to work due to illness while attending to private matters constitutes misconduct by the employee, which is a ground for dismissal from employment.

Case 1: *Umgeni Water v Naidoo and Another* (11489/2017P) [2022] ZAKZPHC 80 (15 December 2022)

- **The facts**

In 2008 the employer, Umgeni Water Department, advertised a position for a process control technician under its development programme for graduates. A prerequisite for acceptance into the programme was that the candidate has at least a bachelor's degree in engineering. Mr Naidoo applied for that position and represented that he had a B.Sc. degree in Engineering from the University of KwaZulu-Natal (UKZN). He submitted a copy of the degree and academic record which the employer did not at the time verify with UKZN. He was appointed and as a condition of his employment, became a member of the Umgeni Water Provident Fund ('the Fund').

In 2016, Mr Naidoo applied for the position of process technician. The minimum entry requirements were the same as those for the graduate programme. This time, the employer used a private company to verify the qualifications of the applicants. This company could not find any record of Mr Naidoo having studied at and graduated from UKZN.

The employer notified Mr Naidoo of the finding and asked him to provide tangible evidence that he did in fact attend UKZN and that he did obtain the degree he said he did. This could be in the form of his original academic record, graduation photographs or pictures with family on his graduation day. Mr Naidoo undertook to provide the information.

Mr Naidoo told the employer that he lost his academic results, but found them soon thereafter. Mr Naidoo also said he had photographs of his graduation day, only to later state that he did not attend his graduation ceremony and did not have the pictures.

The employer contacted UKZN directly and was told that Mr Naidoo did not hold a qualification from the university. The employer then granted Mr Naidoo time off to rectify the alleged 'mistake' UKZN had made. On his return, Mr Naidoo did not provide any additional information or clarity concerning his qualification, but instead tendered his resignation to the employer, which it did not accept as disciplinary proceedings against Mr Naidoo had already begun. On 29 November 2016, Mr Naidoo tendered his resignation again, with immediate effect as he claimed to have contracted a serious illness which rendered him unable to work. The employer accepted this resignation.

The employer applied to the High Court to have Mr Naidoo's provident fund benefits withheld in terms of section 37D(1)(b)(ii) of the Pension Funds Act ('the Act'), for the damages it suffered due to Mr Naidoo's fraud.

Mr Naidoo acknowledged the amounts he had been paid for his employment but insisted that he was not liable to repay these amounts as he provided a service to the employer in exchange for remuneration. He further argued that because of that, the employer recovering the amounts paid to him would be unjustified enrichment.

The employer's response was that they could not have been unduly enriched by the services of an unqualified engineer as everything that Mr Naidoo received through his employment, from the training to his salary, were based on fraud and allowing him to keep what he received from the employer would be rewarding him for his fraud.

Additionally, while Mr Naidoo submitted an academic record showing six consecutive years of study, a letter was presented from the dean of the Faculty of Engineering sent to Mr Naidoo on 9 February 2006 offering him a chance to be re-admitted to the faculty after his appeal. Mr Naidoo could not explain how this letter related to the academic record he submitted. Furthermore, the marks on the academic record he submitted compared to that from UKZN directly were very different. Mr Naidoo later admitted that these were the results of two different students. However, both had his name on them, making it clear that one academic record must have been forged.

- **The finding**

The Court found both the witness for the employer and UKZN to be reliable.

The Court found that Mr Naidoo had unsatisfactory responses which appear to demonstrate an indifference on his part to the serious allegations levelled against him. It added that it had no doubt that he was an untruthful witness and concluded that Mr Naidoo did not have a B.Sc. in Chemical Engineering from UKZN. He therefore falsely represented his qualifications with the intention of securing employment with the employer, who would have otherwise not offered him the position. In so doing, Mr Naidoo acted fraudulently.

The Court referred to the case of *Lazarus Estates Ltd v Beasley*, in which it was held:

'No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved it vitiates judgments, contracts and all transactions whatsoever . . .'

The Court added that once the employer proved the fraud and the damage suffered by it because of the fraud, it became entitled to repayment of the amounts paid to Mr Naidoo and was therefore entitled to the relief afforded in section 37D(1)(b)(ii) of the Act.

The Court ordered that R2 203 565.04 with interest running from the date of demand to the date of final payment be deducted from Mr Naidoo's benefit in the Fund. It also ordered Mr Naidoo to pay the employer's costs on an attorney and client scale

More detail on case 2

Case 2: *NEHAWU obo Matras v Commission for Conciliation, Mediation and Arbitration and Others* (JR1970/17) [2021] ZALCJHB 285 (8 September 2021)

- **The facts**

The applicant, Mr Matras, was employed by Mediclinic. In 2012, he informed his employer that he was ill and could not report to work from 1 June 2012 until 3 June 2012. He submitted a medical certificate which he obtained from a medical doctor. Mr Matras received an SMS from his supervisor in which she told him that she believed he was booked off sick so that he could attend a family wedding in George. The supervisor's suspicions came from a conversation she had before with Mr Matras where he spoke about taking leave to attend a wedding in George around the same dates as those of his sick leave.

When he returned from sick leave, Mr Matras was charged with misconduct due to his dishonest behaviour in submitting a sick certificate to cover his absence from work to attend to private matters.

Following a hearing, Mr Matras was found guilty of the charges and was dismissed. He applied to the Commission of Conciliation Mediation and Arbitration (CCMA) to have his dismissal overturned. The CCMA issued a ruling that Mr Matras' dismissal was substantively and procedurally fair.

Mr Matras then applied to the Labour Court of South Africa, Johannesburg (the Court) on the basis that the Commissioner of the CCMA (the Commissioner) committed a gross irregularity by not applying her mind to the evidence before her, resulting in the decision not being one that a reasonable decision-maker could have reached. Mr Matras added that the medical certificate he produced was not and could not be disputed without his employer calling the doctor to confirm that he was in fact sick. As this did not happen, Mr Matras argued that the Commissioner relied on circumstantial evidence and her own assumptions in deciding that he did in fact go to George to attend a wedding, for which he was never charged.

- **The finding**

The Court explained the test for review which is found in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC), which is whether or not the outcome or result of the arbitration award is substantively reasonable. For Mr Matras' review application to succeed it had to be shown that the Commissioner's decision *fell outside the band of reasonable decisions that she could have come to, taking into account all material that was properly before her*.

The Court found that the question of whether a medical certificate is acceptable as evidence was settled in *Mgobhozi v Naidoo NO & Others* (2006) 27 ILJ 786 (LAC) where the Labour Appeal Court found that medical certificates are actually hearsay evidence of a person's incapacity and must be treated as such. The Court emphasised that the onus to substantiate the medical certificate and call the doctor as a witness to the proceedings therefore rested on Mr Matras and not on his employer.

Mr Matras asking the Court to only consider his medical certificate and that it was not disputed would be unnecessarily and incorrectly limiting the powers and duties of the Commissioner in analysing her evidence. The Court explained that the Commissioner in fact had to weigh up the hearsay evidence of the medical certificate, Mr Matras' evidence and his witnesses, as well as his employer's evidence and witnesses on the events that unfolded, and the documentary evidence that supported this evidence to discharge her duty as arbitrator on the matter. It found that she discharged this duty in a logical and careful way.

On the question of the Commissioner relying on circumstantial evidence, the Court found that the Commissioner was clearly faced with two conflicting versions of evidence before her and had to analyse the evidence to determine which version was more likely to have happened. The Commissioner had to consider the reliability of the witnesses by looking at whether they had first-hand knowledge of the events; any interest or bias they may have, any contradictions or inconsistencies, coherent evidence with other witnesses and the credibility of the witness including his demeanour.

The Court emphasised that circumstantial evidence must be considered holistically and not as individual pieces of evidence. From the Commissioner's detailed analyses of the evidence, it was clear that she considered the evidence in totality despite the conflicting versions of the evidence presented to her.

Even if her conclusion that it was obvious to her that Mr Matras was dishonest and the only reasonable inference that could be drawn from the totality of the evidence was that Mr Matras did in fact go to George was incorrect, it does not make her arbitration award so unreasonable that the Court had to review it.

The Court concluded that there was no evidence that would justify the Court reviewing and setting aside the Commissioner's arbitration award and dismissed Mr Matras' application.

Nobuhle Hadebe

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