REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Case no: PR 89/14

In the matter between:

UMICORE CATALYST SA (PTY) LTD	**Applicant**
and	
M D NOGANTSHI	**First Respondent**
CEPPWAWU	**Second Respondent**
COMMISSIONER	**Third Respondent**
SIYABONGI COKILE	
MOTOR INDUSTRY BARGAINING COUNCIL	**Fourth Respondent**

Heard: **4 August 2015**
Delivered: **11 August 2015**
Summary: Review – misconduct – alleged misrepresentation of doctor's visit.

JUDGMENT

STEENKAMP J

Introduction

[1] The first respondent, Mr Mzuvukile Noganthsi, went to the doctor on either Friday 31 May or Monday 3 June 2013. He was meant to work nightshift from 22:00 on Friday 31 May. He did not. He explained that he had to take his son, Lineo, to the doctor on Friday afternoon; that he then had to look after his son, who stayed with him that night (his mother living elsewhere); and he asked for and was granted "childcare leave" accordingly.

[2] Subsequently, the employer (the applicant) found out that the medical certificate issued by the doctor, Dr Pakiwe, reflected the employee, and not his son, as the patient. The company dismissed the employee for fraudulent misrepresentation.

[3] The employee referred an unfair dismissal dispute to the Motor Industry Bargaining Council (the fourth respondent). Conciliation failed. The arbitrator (the third respondent) found that the dismissal was unfair and ordered the company to reinstate the employee. The company seeks to have that award reviewed and set aside in terms of s 145 of the LRA.[1]

The award

[4] The arbitrator took into account the evidence of Mr Rosco Frost, the production superintendent; Ms Tanya Stevens, the payroll administrator; the chairperson of the disciplinary hearing, Mr Greg Clack; and Dr Sydney Patiwe, all of whom were called as witnesses for the company. The employee testified and did not call any witnesses.

[5] The arbitrator correctly pointed out that, where he is faced with two irreconcilable versions, he had to make findings on the credibility of those witnesses; their reliability; and the probabilities.[2]

[6] The arbitrator found Mr Frost and Ms Stevens to be credible and reliable witnesses. Having regard to their evidence, as well as that of the employee, it is common cause that, when confronted with the medical certificate naming him as the patient, the employee suggested that Ms

---

[1] Labour Relations Act 66 of 1995.

[2] *Stellenbosch Farmers Winery v Martell et cie* 2003 (1) SA 11 (SCA).

Stevens phone Dr Patiwe. She did so on 22 July 2013. According to her, Dr Patiwe told her that he saw the employee on 31 May and diagnosed him with gastro-enteritis and an upper respiratory tract infection (URTI).Dr Patiwe, on the other hand, did not mention URTI in his affidavit of 31 October 2013; neither does that diagnosis appear on the medical certificate that he issued.

[7] The arbitrator was also impressed by the employee as a credible witness. The same could not be said for Dr Patiwe. And, as the arbitrator correctly pointed out, the crux of the dispute "depends on the evidence of Dr Patiwe and the employee, who are the only two people who know exactly what happened between 31 May and 3 June 2013". The arbitrator noted that Dr Patiwe initially deposed to an affidavit on oath on 31 October 2013 in which he stated that he had consulted with the employee on 31 May 2013 and diagnosed gastro-enteritis. But in his evidence under oath at the arbitration hearing he said that he saw the patient late afternoon on 3 May 2013 and that the latter "begged him" to backdate the medical certificate to 31 May, which he did. The arbitrator found that highly unlikely, as the employee worked from 14:00 to 22:00 on Monday 3 June. Dr Patiwe also could not explain why his administrator would have submitted a medical aid claim for the son, Lineo, other than claiming it was "an administrative error". And Dr Patiwe testified that he last saw Lineo on 17 August 2012; yet, when confronted under cross-examination with a medical certificate for 26 March 2013, he conceded that he did see Lineo on that date. Yet he could not produce any clinical notes for the day. Having regard to all these discrepancies, the arbitrator noted that the administration in Dr Patiwe's surgery "leaves much to be desired" and that it was highly likely that he had made an error by issuing a medical certificate that he had examined the employee and not his son.

[8] The arbitrator preferred the evidence of the employee whose testimony was consistent throughout and whom he found to be a credible witness. The evidence of Dr Patiwe was insufficient to show on a balance of probabilities that the employer had proved the misconduct complained of. It is so that the employee had nearly exhausted his sick leave, but he had not done so yet, contrary to the employer's claim. The employee's

unchallenged evidence was that his son had a history of a “runny tummy”, probably diagnosed as gastro-enteritis by Dr Patiwe in respect of the son, Lineo, and not the employee. Taken together with the fact that the administrator at Dr Patiwe’s practice submitted a claim to medical aid for Lineo, the probabilities are that Lineo was the patient.

[9] Against this background, the arbitrator found the dismissal to be unfair and ordered the company to reinstate Mr Noganthsi.

Evaluation / Analysis

[10] The central issue is whether the employee did take his child to the doctor; or whether the doctor only saw him, Mzuvukile, as a patient, be it on 31 May or 3 June.

[11] The only witnesses who gave evidence at arbitration and who could shed light on the events as being present at the doctor’s rooms were the employee and the doctor.

[12] Dr Pakiwe was not a star witness. Even though he had seen the son, Lineo, on numerous occasions, he was adamant that the last time was in August 2012; yet he had to concede under cross-examination that he also saw him in March 2013. He referred to the son as “the baby”, seemingly unaware that Lineo was 11 years old. He could not explain why his own administrator would have submitted a claim to medical aid for Lineo on 4 June 2013, ascribing it simply to “an administrative error” and maintaining that he had seen only the father the previous day, Monday 3 June 2013. Yet he testified that he was involved in the process for submitting medical aid claims: “Ja, what’s happening is that the patient signs on the form né, and then we write the same date that is there. That I do myself and then it is sent to the medical aid by e-mail.” And that evidence under oath at arbitration contradicted his earlier evidence under oath on affidavit that he had seen Mzuvukile on Friday 31 May 2013.

[13] The employee’s evidence, on the other hand, although at times somewhat argumentative, was consistent throughout. Lineo fell ill at school on Friday 31 May. He took him to Dr Pakiwe that same afternoon. Lineo insisted on spending the night with him as he was not feeling well. That is why he

couldn't go to work on the night shift at 22:00. He did go to work on Monday 3 June, when he was working 14:00 – 22:00.

[14] It is common cause that the employee did indeed work 14:00 – 22:00 on Monday 3 June. That puts pay to Dr Pakiwe's testimony, who was adamant (in the arbitration, contrary to his earlier affidavit) that he saw the employee on the afternoon of Monday 3 June and that the employee asked him to backdate the medical certificate to Friday 31 May.

Conclusion

[15] The arbitrator applied his mind to the evidence before him. He carefully analysed the witnesses' credibility, their reliability, the probabilities, and the onus. He came to the conclusion that the employee's evidence was more reliable than that of Dr Pakiwe. That was a reasonable conclusion. It is not open to review.

Costs

[16] With regard to costs, I take into account that the employee has been reinstated and that the parties will have to forge a new relationship. I also take into account that there is an ongoing relationship between the company and the second respondent, CEPPWAWU. And lastly, the employee has been assisted by his trade union and did not have to incur legal costs personally. In these circumstances, I do not consider a costs order to be appropriate in law or fairness.

Order

The application for review is dismissed.

_____

Anton Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	John Grogan Instructed by Joubert Galpin Searle.
FIRST and SECOND RESPONDENTS:	Grant Doble of Cheadle Thompson & Haysom.