THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Not Reportable

Case no: PR40-23

In the matter between:

TIMOTHY ABRAHAMS Applicant

and

COMMISSIONER VAN WYK *NO* First Respondent

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION Second Respondent

PHARMACARE LTD t/a ASPEN Third Respondent

Heard: 24 April 2024

Delivered: 25 April 2024 is deemed to be the date of delivery of this judgment.

Summary: Review deemed to be withdrawn for non-compliance with Practice Manual. Application to reinstate providing no proper explanation. No prospects of success in the review. Application dismissed.

JUDGMENT

DANIELS J

Introduction

1. The applicant, dismissed by the third respondent, referred a dispute concerning the fairness of his dismissal to the Commission for Conciliation, Mediation and Arbitration (the "CCMA") for conciliation, and when that failed, to arbitration. The CCMA found the dismissal to be fair.

2. This judgment relates to an application by the applicant to reinstate the review application, which was deemed to have been withdrawn by virtue of clauses 11.2.2 and 11.2.3 of the Practice Manual. The application is opposed by the third respondent.

3. The parties agreed that the application to reinstate should be heard despite the review application was late - for which there is a pending application for condonation. The order I propose to make, if the application is reinstated, is to make the reinstatement subject to condonation being granted for the review itself.

4. For ease of reference, the third respondent is hereafter referred to as "the employer", "the company" or "Aspen".

Material facts

5. The facts set out below does not purport to be a comprehensive rendition of all the facts. Where necessary, the facts set out below draws on the

pleadings filed, the agreed statement of facts (the "stated case"), as well as the transcript of the disciplinary hearing which was attached by the third respondent to its answering affidavit.

6. Mr. Timothy Abrahams ("Abrahams") was employed as a sales representative by the company. Abrahams was required to interact with fellow staff but also with potential clients / customers of the company. In the employer's jargon, Abrahams was categorised as a "customer facing" employee.

7. The COVID19 pandemic began during early 2020. During 2021 Aspen designed and implemented a COVID19 Policy for its workplace. The Policy provided for the mandatory vaccination of employees. The Policy categorised its employees into those who had been fully vaccinated, those who were partially vaccinated, and those who were totally unvaccinated. In addition, the Policy categorised employees into those who were "customer facing" (category A) and those who were not (category B).

8. The COVID19 Policy was designed by Aspen, who was acutely aware of its legal obligations (particularly those under section 8 of the Occupational Health and Safety Act No. 85 of 1993) to provide and maintain, as far as is reasonably practicable, a safe working environment. Of course, Aspen also wished to conduct its operations and business with the minimum disruption, and infection, to ensure the maximum amount of revenue and the minimum amount of expense.

9. Rightly or wrongly, COVID19 Policy was based on the acceptance of the employer that:

9.1. The risk of vaccinated individuals becoming seriously ill after infection with COVID19 is reduced by 90%,

9.2. Vaccinated individuals' risk of dying from a COVID19 infection is reduced by 95%,

9.3. Fully vaccinated individuals are less likely to spread the disease to others,

9.4. Immunity created through vaccination is superior to the natural / biological post infection immunity.

10. During 2021, particularly late 2021, the following events occurred:

10.1. Aspen offered its employees who did not wish to be vaccinated the option of applying for a mutual separation (voluntary resignation) with a severance package. The employee applied for the package, but his application was rejected.

10.2. Aspen required its workforce to declare whether they had been vaccinated and, if not, whether agreed to be vaccinated by 31 January 2022.

10.3. The employer required those employees who had been vaccinated to submit proof of their vaccination, and it required those employees who were unvaccinated to apply for an exemption from the Policy by 31 January 2022.

10.4. The employer communicated to its workforce that any false or misleading information submitted to it in relation to COVID19 would constitute a disciplinary offence.

10.5. Abrahams advised the employer that he had not been vaccinated and did not intend to be vaccinated. Accordingly, the employer began engaging Abrahams on his position, and it sourced medical and legal experts to assist it through the process.

10.6. As a result of his refusal to be vaccinated, the company placed Abrahams on unpaid leave (it is unclear when this occurred or the duration of the unpaid leave). Accordingly, during the period of the unpaid leave, the company lost a sales representative in the field.

11. Abrahams objected to the mandatory vaccination policy being applied to him. His objection was based on his fundamental rights to freedom of security of person and bodily integrity. Abrahams was concerned that the vaccination was not effective, but more importantly he was worried that the vaccination could adversely impact on his health.

12. Abrahams submitted an exemption application to the employer during December 2021 or early January 2022. The employer believed that his exemption application was without merit, although it is unclear if, or when, this was communicated to Abrahams.

13. Between December 2021 and March 2022, many engagements was held between Aspen and Abrahams to resolve the difficulties presented from the applicant's refusal to be vaccinated. As previously mentioned, during, or prior, to these engagements, the employer took advice from medical experts and labour law specialists. These engagements proceeded on the basis that the applicant was not vaccinated, and he would never agree to being vaccinated.

14. The employer proposed to Abrahams that, in the absence of vaccination, he would be required to submit a negative PCR test (at his own cost) to it every 72 hours. Abrahams rejected the proposal. His counter proposal - to split the costs – was rejected by the employer. Abrahams suggested that he be permitted to work remotely, which the employer rejected. Abrahams sought an indemnity from the employer that he would suffer no ill effects from the vaccination. The employer rejected this and instead advised him that the Government had already established a Fund for that very purpose. In any event, said the employer, if Abrahams fell ill because of the vaccination, he could access the Compensation for Occupational Injuries and Diseases Act No. 130 of 1993.

15. The employer, unable to reach consensus with Abrahams, decided to convene an incapacity hearing, before an external chairperson. The incapacity hearing was convened on 11 and 24 March 2022. On the second hearing date, on 24 March, Abrahams declared that he had in fact received the first vaccination on 27 January 2022, and he submitted a vaccination certificate to that effect. The chairperson ruled that the incapacity hearing was academic given the declaration by Abrahams that he had received the first of two required vaccinations.

16. The employer decided to charge Abrahams with gross dishonesty. In summary, the employer alleged that Abrahams was guilty of gross dishonesty (alternatively material misrepresentation) in that he failed to disclose to Aspen that he had received a COVID19 vaccination on 27 January 2022. Instead, during the period from 28 January 2022 to 24 March 2022, Abrahams declared, or represented, that he had not been vaccinated at all and would never be vaccinated. By conducting himself in this manner, Abrahams wasted the company's resources and time. Naturally the nature of the engagements (after 27 January) would have been very different had Abrahams revealed that he had been vaccinated, albeit partially.

Legal Issues and analysis

17. The Practice Manual constitutes a series of directives issued by the Judge President to provide access to justice, promote consistency, establish guidelines for the standards of conduct of those who litigate in the Labour

Court. It aims to improve the quality of service to the public and promote expeditious dispute resolution. The Practice Manual is binding on parties, though the Labour Court's discretion in interpreting and applying the Practice Manual remains intact.[1] It is necessary to set out some of its provisions:

> *Clause 11.2.2: For the purposes of Rule 7A(6), records must be filed within 60 days of the date on which the applicant is advised by the Registrar that the record has been filed.*
>
> *Clause 11.2.3: If the applicant fails to file a record within the prescribed period, the applicant will be deemed to have withdrawn the application…...*
>
> *Clause 11.2.4: If the record of the proceedings under review has been lost, or if the record of the proceedings is of such poor quality to the extent that the tapes are inaudible, the applicant may approach the Judge President for a direction for the further conduct of the review application….The Judge President will allocate …. may include the remission of the matter to the person or body whose award or ruling is under review."*

18. In *Tadyn Trading CC t/a Tadyn Consulting Services v Steiner*[2] the court took the approach that, although the Practice Manual does not provide for condonation for non-compliance with clause 11.2.2 this is inferred. An application to revive, or reinstate, a review application, must demonstrate

[1] *Samuels v Old Mutual Bank* (2017) 38 ILJ 1790 (LAC)

[2] (2014) 35 ILJ 1672 (LC) at para 13

that there are prospects of success.[3] A review that is deemed to have been withdrawn may therefore be reinstated by this court on good cause shown.

19. The term "good cause" has been defined in the context of rescission applications[4] in the following terms: (a) the absence of willfulness for the default, (b) that there is a reasonable explanation for the default, (c) that the application is *bona fide* and not brought with the intention of delaying, (d) that there is a *bona fide* dispute to be determined – this aligns with showing prospects of success (if the allegations alleged by the applicant in the founding affidavit are proven in due course there are reasonable prospects of success)

20. Our courts have emphasized that review applications are, by their very nature, urgent.[5]

Period of delay

21. In his founding papers, the applicant states that he received a communication from the Registrar's office on or about 7 March 2023 (on another occasion he refers to 11 March) that the record had been filed at court. On the applicant's version, the 60-day period (contemplated in clause 11.2.2) began on this date.

[3] See *Samuels* fn. 1

[4] *Mohube v CCMA and others* (2023) 44 ILJ 1683 (LAC).

[5] *Toyota SA Motors (Pty) Ltd v CCMA & others* (2016) 37 ILJ 313 (CC)

22. Using the prescribed method of calculating the 60-day period, per the Practice Manual itself, the record should have been filed on or about 11 June 2023. However, the record was filed on 14 July 2023, just over one month later.

23. The period of the delay while not insignificant, is also not excessive.

Explanation for the delay

24. During argument, applicant's counsel urged me to take into consideration that the applicant is a lay person, who relied heavily on his legal representative (an advocate at the Johannesburg Bar) who represented him at arbitration. When that individual disappointed him, the applicant relied on the kind assistance of others. The applicant does not explain how his difficulties with legal representation impacted on his failure to file the record in good time. In any event, with respect, legal skill and knowledge is not required to prepare and file a record within time.

25. The applicant's explanation for the late filing of the record is that, on 7 March 2023, the CCMA sent him a link from which to download the record. The link expired before he could download the record. The applicant then stated that, despite his efforts, the CCMA only sent him a new link on 11 July 2023. The explanation tendered is extremely vague and cannot possibly explain the period between 7 March and 11 July (over four months). The applicant does not take the court into its confidence. He fails

to provide any detail in relation to what occurred between 7 March and 11 July. There is no correspondence. There are no dates given as to when he contacted the CCMA. There are no names of whom was contacted at the CCMA. Had the CCMA conducted itself in the manner alleged one would have expected the applicant to send a letter or email complaining. It is unlikely that the CCMA would have taken four months to send a second link when it had been so diligent with sending the first link.

26. More importantly, the respondent vehemently disputed the applicant's version (that the first link expired, and a new link could only be secured four months later). The respondent produced documentation which showed that, in fact, the applicant had downloaded the record on 7 March (the first link sent an electronic message confirming that the link had been downloaded). The applicant did not file a replying affidavit to dispute this. I must therefore accept that this explanation was false. The applicant's explanation is therefore not *bona fide* and does not withstand scrutiny.

27. In the circumstances, there is no explanation at all for the period between 7 March and 11 July 2023.

28. In *Chetty v Baker Mkenzie*[6] the LAC summarized the trite principles in relation to condonation and stated as follows:

> "*However, the further principle applicable in conjunction with the broad approach of Melane is that <u>in the absence of a full and</u>*

[6] (2022) 43 ILJ 1599 (LAC) at para 10

reasonable (acceptable) explanation for the delay, the prospects of success are immaterial, and that if there are no prospects of success an application for condonation should be refused even if there is a good explanation for the delay. It is important that the explanation for the delay, considered objectively, must be "sufficiently cogent to warrant a consideration of the prospects of success." There are those explanations that do not meet the objective standard. In such cases the court would be justified in not considering the prospects of success, because they are immaterial, unless issues are raised that would justify the Court's interference. The explanation for the delay must thus be full and reasonably clear, logical and convincing to excuse the default." (Own emphasis)

29. The applicant has not provided the court with a full and reasonably clear, and logical explanation for the delay. For this reason alone, the application falls to be dismissed. I am not required to consider the applicant's prospects of success in the review application. Nevertheless, solely for the sake of completeness, I do so anyway.

Reasonable prospects of success?

30. Review applications are by their very nature narrow in scope and must be distinguished from appeals. To succeed in a review of a CCMA arbitration award, the applicant must show that the finding of the arbitrator is so unreasonable that no reasonable decision maker could have arrived at the

outcome.[7] In this matter, the award is anything but unreasonable. The award is comprehensive, detailed, and very well-reasoned. In fact, the award is so well drafted, it will likely even withstand the scrutiny applicable to *appeals*.

31. The applicant alleges that it was unfair for the arbitrator to proceed on a stated case, but he does not explain why it was unfair, or why he agreed to it. This ground of review has no substance. During argument, this court was informed that the applicant signed the stated case. At arbitration, the applicant was represented by an advocate. The applicant raised no objection to the stated case. The applicant does not contend that any of the facts in the stated case were incorrect. The applicant does not state that he attempted to call witnesses and was denied the opportunity to do so.

32. The grounds of review are vague and rely on broad allegations (with no detail or substance) such as the arbitrator was biased and failed to apply her mind to the evidence. In the circumstances, there are little or no prospects of success in the review. Nevertheless, solely for the sake of completeness, I will consider the applicant's case at arbitration:

    32.1. The applicant's defence, at arbitration, was that there was no policy which required him to disclose his status. However, this was

[7] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* (CCT 27/03) [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (12 March 2004)

contradicted by the documents, correspondence, and oral testimony. This version was also highly improbable.

32.2. It was common cause that: (1) the applicant was vaccinated on 27 January 2022, (2) during December 2021, the applicant informed Aspen that he was not vaccinated and did not intend to be vaccinated, (3) the applicant only advised Aspen on 24 March that he had been vaccinated in January.

32.3. The applicant did not contest the numerous engagements held with the employer between 27 January 2022 and 24 March 2022. He did not deny that the employer had used every tool at its disposal to try and persuade him to vaccinate.

32.4. Between 27 January and 24 March, over the space of two months, the applicant created the impression that he was not vaccinated and would never be. Among other things, the applicant applied for an exemption. He was placed on unpaid leave because of his refusal to be vaccinated. He signed document(s) indicating that he would truthfully and accurately disclose (to his employer) his approach (to vaccination) and status relating to COVID19.

32.5. During his disciplinary hearing, the applicant was afforded several opportunities to explain why he never informed the employer that he had been vaccinated (for instance, if he had said he was seriously ill after the first vaccination, this would have constituted a good reason

to refuse a second jab). Instead, the applicant offered no explanation at all. He simply maintained that there was no obligation upon him to do so. This was without merit. The applicant ignores the fact that there is a legal obligation on the employer to maintain a reasonably safe work environment. The employer has a duty to protect other employees from infection. Naturally, the employer wanted to avoid infections and ensure that the business was not unnecessarily interrupted. The applicant was aware that his meetings and engagements with the employer were designed to get him to agree to a vaccination. In these engagements the applicant persisted with his earlier approach that vaccination was not negotiable - whereas he had in fact been vaccinated.

32.6. The applicant argued that a partial vaccination is no vaccination at all. This is hollow, and smacks of insincerity. Logically, the fact that the applicant had been vaccinated once, meant that he was open to persuasion. If the employer was informed of the first vaccination it would have taken a different approach during the engagements. Finally, the applicant's approach begs the question: why did he finally reveal that he had been vaccinated if this was irrelevant?

33. An arbitrator is required to test the competing versions on the probabilities.[8] In my view, with respect, the applicant's version is highly

[8] *Stellenbosch Farmers Winery Group Ltd and another v Martell et cie and others* 2003 (1) SA 11 (SCA)

improbable and riddled with contradictions. The applicant's prospects of success in the review, and at arbitration, are, in my view, devoid of merit. There is no point in reinstating a review application with little or no prospects of success. Incidentally, there is no point in reinstating the review application where the applicant has no prospects of success at arbitration.

Conclusion

34. In the circumstances, there being no proper explanation for non-compliance with the Practice Manual, and there being little or no prospects of success in the review, I dismiss the application brought to reinstate the review. There is no order as to costs.

Reynaud Daniels
Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Adv E Barlow
Instructed by:	Van Eeden Attorneys
For the Respondent:	Adv Grobler
Instructed by:	Kirchmanns Inc