

28 AUGUST 2023

Employment Law ALERT

IN THIS ISSUE

SOUTH AFRICA

Taking liberties: Unmasking of an employee's sick leave trickery

In the recent judgment of *SARS v Benneth Mathebula and Others (JR 2243/21) [2023] ZALCJHB 222* (21 July 2023) the Labour Court was called upon to reconsider the fairness, or otherwise, of Mr Mathebula's dismissal from the South African Revenue Service (SARS) due to his dishonesty regarding his sick leave.

KENYA

Guardians of legacy: Corporate trustees and the new landscape of retirement benefit regulation

A corporate trustee is a corporate body whose work entails providing trustee services to pension schemes as well as institutions. As such, corporate trustees are responsible for the management and administration of pension schemes. Due to the significant role they play and the need to effectively regulate them, the Cabinet Secretary for National Treasury and Economic Planning issued the Retirement Benefits (Corporate Trustees) Regulations, 2023 (the Regulations).



CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

 FOR MORE
INSIGHT INTO
OUR EXPERTISE
AND SERVICES

SOUTH AFRICA

Taking liberties: Unmasking of an employee's sick leave trickery

In the recent judgment of *SARS v Benneth Mathebula and Others (JR 2243/21) [2023] ZALCJHB 222 (21 July 2023)* the Labour Court was called upon to reconsider the fairness, or otherwise, of Mr Mathebula's dismissal from the South African Revenue Service (SARS) due to his dishonesty regarding his sick leave.

Facts

During the early hours of 7 September 2020 Mathebula elected to absent himself from work as he was allegedly unfit for work. At the end of the workday, he informed his employer that his absence was as a result of him being unfit to attend work.

On 8 September 2020, Mathebula again informed his employer that he would be unable to attend work due to an undisclosed illness. Mathebula was further absent from work for the remainder of the week and, upon his return, produced a medical certificate for the period of 9 to 11 September 2020, excusing him from work.

Unbeknown to Mathebula at the time, his direct line manager had identified him on television, while watching the evening news, as a participant at a political protest rally during his period of absence from work due to his alleged illness. When confronted, Mathebula became defensive and questioned the source of his direct line manager's knowledge of his

whereabouts on 7 and 8 September, however he eventually relented and conceded his participation in the political gathering while on sick leave.

Mathebula's defence was simply that he was indeed ill during the period of his sick leave, notwithstanding his attendance at the political protest. To this end he had produced a medical certificate which his employer had accepted.

Mathebula was called before a disciplinary enquiry on the basis of his dishonest conduct and later dismissed. The decision of the chairperson was referred by Mathebula to the Commission for Conciliation, Mediation and Arbitration (CCMA) on the grounds of an unfair dismissal. It was found by the CCMA that Mathebula's dismissal was substantively unfair.

The Commissioner tasked with the Mathebula matter found that on the evidence of the medical certificate produced it was evident that Mathebula was ill on at least 9 to 11 September 2020.



SAVE THE DATE

Annual Employment Conference 2023



Wednesday, 25 October 2023



09h00 – 13h00

Further information to
follow soon.

SOUTH AFRICA

Taking liberties: Unmasking of an employee's sick leave trickery

CONTINUED

Furthermore, as illness is usually progressive it can reasonably be inferred that Mathebula was ill during the two days before his visit to a physician. That Mathebula came forward and admitted that he had indeed attended the protest action on 7 and 8 September and that a medical certificate served as proof of Mathebula's incapacity, led the Commissioner to find that Mathebula's intention was clearly not to mislead his employer. Furthermore, Mathebula argued that he was not required to be bedridden should he wish to make use of his sick leave entitlement.

Labour Court proceedings

The Labour Court rejected the reasoning of the Commissioner and decided to review and set aside the Commissioner's award on the basis that the outcome at the CCMA was not one which a reasonable decision maker would have arrived at.

The Labour Court's reasons were that in all probability Mathebula was not incapacitated due to illness but that he was in fact malingering in order to attend the protest action.

Having been able to clap hands and sing, "*it must follow that he would have been able to perform his contractual duties*".

The Labour Court took a dim view of Mathebula's reaction when first confronted with the allegation of dishonesty by his line manager. The court found that he ought to have been upfront with his supervisor once confronted.

A later attempt to explain his suspicions was "*feeble and actually further proves his lack of candour*".

The Labour Court concluded that Mathebula's dishonesty could be inferred when considering all the surrounding circumstances.

Illness, being a medical condition, can only be empirically and objectively confirmed by a medical expert. Although Mathebula's medical certificate was produced and accepted for the period of 9 to 11 September 2020, no empirical evidence was presented to prove that Mathebula was ill between 7 and 8 September 2020.

The Commissioner's findings in this regard amounted to nothing more than conjecture.

Conclusion

The grave consequence which followed Mathebula's misconduct was as a result of his dishonesty rather than his abuse of his employer's sick leave policy alone. This judgment serves as an important reminder to employees that a sick leave entitlement is not simply there for the taking and that employees are to act with the utmost honesty and integrity in this regard.

Honesty forms the foundation of the employee-employer relationship. Where the true purpose of sick leave is ignored by employees for disingenuous reasons, employees run the risk of disciplinary action.

Mathebula has applied for leave to appeal to the Labour Appeal Court. We will keep you informed of any further developments.

[Jean Ewang and Sashin Naidoo](#)

KENYA

Guardians of legacy: Corporate trustees and the new landscape of retirement benefit regulation

Employee retirement benefits are a crucial aspect of the employer-employee relationship. Kenyan law recognises the importance of providing financial security to employees after retirement. The primary legislation governing employee retirement benefits is the Retirement Benefits Act, 1997 (the Act), which is a framework that governs the establishment, administration, and regulation of retirement benefits schemes in Kenya.

Under the Act, employers are obligated to contribute to registered retirement benefits schemes on behalf of their employees. Employers, such as parastatals, also have the option of establishing their own retirement benefit schemes for the benefit of their employees.

In the Kenyan market, we have seen the creation of organisations that provide corporate trustee services to retirement schemes. A corporate trustee is a corporate body whose work entails providing trustee services to pension schemes as well as institutions. As such, corporate trustees are responsible for the management and administration of pension schemes. Due to the significant role they play and the need to effectively regulate them, the Cabinet Secretary for National Treasury and Economic Planning issued the Retirement Benefits (Corporate Trustees) Regulations, 2023 (the Regulations). In this article we briefly highlight the roles and

benefits of corporate trustees, and the new requirements imposed by the Regulations. It is important that employers and employees bear these regulations in mind to ensure that any corporate trustee that is recruited to protect their pension monies is qualified and approved.

The role of corporate trustees

Corporate trustees play a pivotal role in the effective management of retirement benefits schemes. The trustee acts as a fiduciary, obligated to act in the best interests of the scheme's beneficiaries.

The primary responsibilities of a corporate trustee include the following:

- **Asset management:** This involves managing the investments of the retirement benefits scheme. It entails making sound investment decisions to maximize returns while ensuring the security of the funds.



KENYA

Guardians of legacy: Corporate trustees and the new landscape of retirement benefit regulation

CONTINUED

- **Fiduciary duty:** Trustees have a legal obligation to act in the best interests of the scheme beneficiaries. They must exercise diligence, loyalty and prudence in managing the retirement fund. This includes avoiding conflicts of interest and ensuring transparency in their actions.
- **Governance:** Trustees are responsible for the overall governance of the scheme. They develop policies, rules and procedures that guide the administration of the retirement benefits. Regular communication with scheme members, including providing updates on fund performance and changes, is also part of their responsibilities. Such services are handled better by corporate trustees, which minimises compliance costs and enhances the efficiency of the scheme.

- **Benefit payments:** When employees retire or reach the age of eligibility, trustees are responsible for processing and disbursing their retirement benefits in accordance with the scheme's rules. This requires careful record keeping and co-ordination with relevant parties. Corporate trustees often have systems in place to aid the process of collecting and holding records of information with regards to scheme members, transactions, and investments.

Benefits of corporate trustees

- **Expertise and professionalism:** Corporate trustees are typically experts in managing pension and retirement schemes. They employ people that have experience in investment management, legal compliance and regulatory matters. This ensures that the retirement benefits scheme is managed professionally and in compliance with relevant laws and regulations.
- **Impartiality:** Corporate trustees act as independent third parties, ensuring impartiality in managing the scheme. This helps build trust among employees, as they perceive the scheme as being managed objectively and in their best interests.
- **Reduced conflicts of interest:** When a third-party trustee manages the retirement benefits scheme, conflicts of interest are minimised. A corporate trustee therefore makes decisions solely based on the scheme's objectives rather than being influenced by company interests.
- **Risk management:** A corporate trustee brings risk management expertise to the table. They can help design investment strategies that align with the risk tolerance of employees while aiming to provide stable returns over the long term.

KENYA

Guardians of legacy: Corporate trustees and the new landscape of retirement benefit regulation

CONTINUED

New developments in the regulatory landscape

The Regulations outline the registration process for corporate trustees, imparting insights into their responsibilities and qualifications. The Regulations further provide a comprehensive framework that ensures corporate trustees maintain a high standard of professionalism and service delivery.

The Regulations outline the qualification process and how the suitability of a corporate trustee is to be determined. As such, any person seeking to serve as a corporate trustee is required to apply for registration with the Retirement Benefits Authority (the Authority). The application must be accompanied by various documents, including board resolutions, the incorporation certificate, academic qualifications of top management, financial statements, and the memorandum

and articles of association. These documents collectively ensure that only entities that fulfil stringent criteria become corporate trustees.

Companies that are already acting as corporate trustees need to be aware of this requirement and comply. The Regulations mandate each corporate trustee that was already in operation on the date of the commencement of the Regulations to comply with its provisions within 12 months to avoid penalties for non-compliance.

The Regulations further introduce specific conditions that a corporate trustee must meet, emphasising aspects such as incorporation under relevant laws; having a minimum capital of KES 10 million; qualified personnel, including having people who are academically and professionally qualified in matters relating to banking, insurance, law,

accounting, actuarial studies, finance, economic or investment of scheme funds; having at least four Kenyan nationals in the board of directors; and having adequate professional, technical and operational capacity. These criteria aim to ensure that corporate trustees possess the necessary foundation to effectively manage trust funds and obligations.

The Regulations entrust corporate trustees with a significant burden of responsibilities, including adhering to trust laws, ensuring confidentiality with regards to all information, documentation and data obtained from a scheme, appointing qualified service providers, managing scheme funds, and prudent investment policy creation. Their duties span financial diligence, administrative precision and regular communication with stakeholders. This therefore engenders a professional approach to trust management, thereby safeguarding beneficiaries' interests.

KENYA

Guardians of legacy: Corporate trustees and the new landscape of retirement benefit regulation

CONTINUED

A corporate trustee who either breaches conditions attached to the certificate of registration, gives false or misleading information in the course of its business, fails to perform its fiduciary duties, or becomes insolvent or goes into liquidation, may be suspended by the Authority. Where the default is incapable of remedy or the corporate trustee fails to undertake remedial action within a specified period, then the Authority shall give such a corporate trustee at least 28 days to make representations as to why it should not be deregistered.

Conclusion

In conclusion, corporate trustees are indispensable for effective employee retirement benefits management. The recent regulatory advancements exemplified by the Regulations further underscore the significance of competence and accountability in the corporate trustee domain. As guardians of legacy, corporate trustees play a pivotal role in orchestrating the legacy's trajectory, upholding the trust's vision and ensuring the beneficiaries' enduring prosperity.

**Njeri Wagacha,
Rizichi Kashero-Ondego and
Billy Oloo**



Cliffe Dekker Hofmeyr

2023 RESULTS

Chambers Global 2014 - 2023
ranked our Employment Law practice in
Band 2: Employment.

Aadil Patel ranked by
Chambers Global 2015 - 2023
in Band 2: Employment.

Fiona Leppan ranked by
Chambers Global 2018 - 2023
in Band 2: Employment.

Imraan Mahomed ranked by
Chambers Global 2021 - 2023
in Band 2: Employment.

Hugo Pienaar ranked by
Chambers Global 2014 - 2023
in Band 2: Employment.

Gillian Lumb ranked by
Chambers Global 2020 - 2023
in Band 3: Employment.

OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:



Aadil Patel

Practice Head & Director:
Employment Law
Joint Sector Head:
Government & State-Owned Entities
T +27 (0)11 562 1107
E aadil.patel@cdhlegal.com



Anli Bezuidenhout

Director:
Employment Law
T +27 (0)21 481 6351
E anli.bezuidenhout@cdhlegal.com



Jose Jorge

Sector Head:
Consumer Goods, Services & Retail
Director: Employment Law
T +27 (0)21 481 6319
E jose.jorge@cdhlegal.com



Fiona Leppan

Director:
Employment Law
T +27 (0)11 562 1152
E fiona.leppan@cdhlegal.com



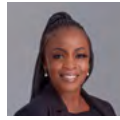
Gillian Lumb

Director:
Employment Law
T +27 (0)21 481 6315
E gillian.lumb@cdhlegal.com



Imraan Mahomed

Director:
Employment Law
T +27 (0)11 562 1459
E imraan.mahomed@cdhlegal.com



Phetheni Nkuna

Director:
Employment Law
T +27 (0)11 562 1478
E phetheni.nkuna@cdhlegal.com



Desmond Odhiambo

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E desmond.odhiambo@cdhlegal.com



Hugo Pienaar

Sector Head:
Infrastructure, Transport & Logistics
Director: Employment Law
T +27 (0)11 562 1350
E hugo.pienaar@cdhlegal.com



Thabang Rapuleng

Counsel:
Employment Law
T +27 (0)11 562 1759
E thabang.rapuleng@cdhlegal.com



Hedda Schensema

Director:
Employment Law
T +27 (0)11 562 1487
E hedda.schensema@cdhlegal.com



Njeri Wagacha

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E njeri.wagacha@cdhlegal.com



Mohsina Chenia

Executive Consultant:
Employment Law
T +27 (0)11 562 1299
E mohsina.chenia@cdhlegal.com



Jean Ewang

Consultant:
Employment Law
M +27 (0)73 909 1940
E jean.ewang@cdhlegal.com



Ebrahim Patelia

Legal Consultant:
Employment Law
T +27 (0)11 562 1000
E ebrahim.patel@cdhlegal.com



Nadeem Mahomed

Professional Support Lawyer:
Employment Law
T +27 (0)11 562 1936
E nadeem.mahomed@cdhlegal.com

OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:



Asma Cachalia

Senior Associate:
Employment Law
T +27 (0)11 562 1333
E asma.cachalia@cdhlegal.com



Rizichi Kashero-Ondego

Senior Associate | Kenya
T +254 731 086 649
T +254 204 409 918
T +254 710 560 114
E rizichi.kashero-ondego@cdhlegal.com



Jordyne Löser

Senior Associate:
Employment Law
T +27 (0)11 562 1479
E jordyne.loser@cdhlegal.com



Leila Moosa

Senior Associate:
Employment Law
T +27 (0)21 481 6318
E leila.moosa@cdhlegal.com



Christine Mugenyu

Senior Associate | Kenya
T +254 731 086 649
T +254 204 409 918
T +254 710 560 114
E christine.mugenyu@cdhlegal.com



JJ van der Walt

Senior Associate:
Employment Law
T +27 (0)11 562 1289
E jj.vanderwalt@cdhlegal.com



Malesale Letwaba

Associate:
Employment Law
T +27 (0)11 562 1710
E malesale.letwaba@cdhlegal.com



Biron Madisa

Associate:
Employment Law
T +27 (0)11 562 1031
E biron.madisa@cdhlegal.com



Faryn Nana

Associate:
Employment Law
T +27 (0)11 562 1051
E faryn.nana@cdhlegal.com



Kgodisho Phashe

Associate:
Employment Law
T +27 (0)11 562 1086
E kgodisho.phashe@cdhlegal.com



Tshepiso Rasetlola

Associate:
Employment Law
T +27 (0)11 562 1260
E tshepiso.rasetlola@cdhlegal.com



Taryn York

Associate:
Employment Law
T +27 (0)11 562 1732
E taryn.york@cdhlegal.com

BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.

Dx 154 Randburg and Dx 42 Johannesburg.

T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.

T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI

Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.

T +254 731 086 649 | +254 204 409 918 | +254 710 560 114

E cdhkenya@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.

T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

©2023 12594/AUG