

Employment Law

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SOUTH AFRICA

Sick leave and the sick note:
Entitlements and abuse



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Sick leave and the sick note: Entitlements and abuse

With flu season upon us, sick leave is on the rise. Therefore, it is imperative that employers familiarise themselves with the sick leave entitlements set out in the Basic Conditions of Employment Act 75 of 1997 (BCEA).

Sick leave entitlements

According to the BCEA, an employee is entitled to up to six weeks of paid sick leave within a 36-month cycle. However, during the first six months of employment, an employee's entitlement is limited to one day's paid sick leave for every 26 days worked.

Managing sick leave

To ensure workplace safety during flu season, it is important for both employers and employees to mitigate the spread of disease. Equally important is assessing the extent of an employee's incapacity to justify sick leave. Employers offering hybrid work options should allow ill employees with minor symptoms to work flexible hours or from home if they are not significantly incapacitated.

One effective way to regulate sick leave and ensure accountability is by requiring a medical certificate, or "sick note". Employers may request a sick note if an employee is sick for one day, more than two consecutive days, or more than twice in an eight-week period.

Sick leave abuse

The misuse of sick leave and abuse use of sick notes is a growing concern. Increasingly, employees are responding to everyday workplace pressures and challenges by exaggerating minor issues, leading to a notable rise in sick leave. Recent cases, such as *Epibiz (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2023] 44 ILJ 2226 (LC) and *Hans v Montego Pet Nutrition* [2024] 2 BALR 196 (CCMA), shed light on the issue of sick leave abuse by employees fabricating illnesses.

The Epibiz case

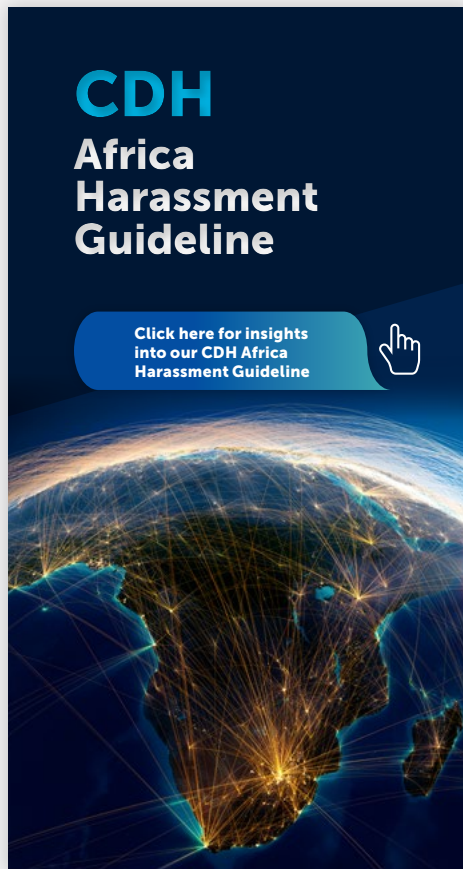
In *Epibiz*, a credit manager was placed on precautionary suspension during a misconduct investigation but was later cleared of all charges. Instead of returning to work, the employee obtained multiple sick notes citing "consultation" as the reason for her absence. Due to this abuse of sick notes, the employer ultimately terminated her employment.

The employee referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). The CCMA found the dismissal to be both procedurally and substantively unfair. However, upon review, the Labour Court overturned the CCMA's decision, ruling that the dismissal was procedurally and substantively fair.

In the circumstances, the Labour Court found that sick notes furnished by the employee's doctor constituted hearsay evidence and note that the integrity of sick notes cannot always be guaranteed – as in certain instances, a critical perusal of the sick note reveals no nature of illness but symptoms that do not render an employee incapacitated to perform work.

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**The Hans case**

In *Hans*, the CCMA had to determine whether an employee's attendance at a rugby match, during which he was seen consuming alcohol while on sick leave, warranted his dismissal. The employee had been with the company for approximately six years before his dismissal on grounds of misconduct related to dishonesty.

A central issue was whether there was a rule governing the conduct of employees while on sick leave and whether dismissal was an appropriate sanction.

The employer's witnesses testified that the employee was aware of the company's sick leave policies, having attended the initial induction sessions and signed attendance registers confirming his understanding. Despite the employee's denial of awareness of these policies, the Commissioner found that the employee, given the duration of his employment, should have been aware of and adhered to the sick leave policies. Thus, the Commissioner concluded that the employee had indeed violated these policies.

In determining the fairness of the employee's dismissal, the Commissioner referred to *Woolworths (Pty) Ltd v the Commissioner for Conciliation, Mediation and Arbitration and Others (PA12/2020) [2021] ZALAC 49 (10 December 2021)*, where the Labour Appeal Court held that dismissal is justified in instances of sick leave abuse, which is considered dishonest conduct, as an **"employee is required to act with integrity and abide by the company policies, procedures, and codes"**.

Ultimately, the CCMA found that the employee's abuse of sick leave warranted his dismissal and was fair.

Key takeaways

Employers are reminded to ensure that:

- employees are made aware of and are able to access their sick leave policies;
- policies are updated regularly; and
- disciplinary actions taken for sick leave abuse are fair, consistent, and in accordance with company policies.

Moreover, employers should consider Rule 16(1) of the Ethical and Professional Rules of the Health Professions Council of South Africa, in terms of which a medical practitioner shall grant a sick note only if such sick note contains the following information:

- the name, address, and qualification of such practitioner;
- the name of the patient;
- the employment number of the patient (if applicable);
- the date and time of the examination;
- whether the certificate is being issued as a result of personal observations by such practitioner during an examination, or as a result of information which has been received from the patient and which is based on acceptable medical grounds;



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- a description of the illness, disorder, or malady in layman's terminology with the informed consent of the patient: provided that if such patient is not prepared to give such consent, the practitioner shall merely specify that, in his or her opinion based on an examination of such patient, such patient is unfit to work;
- whether the patient is totally indisposed for duty or whether such patient is able to perform less strenuous duties in the work situation;
- the exact period of recommended sick leave;
- the date of issue of the certificate of illness; and
- the initial and surname in block letters and the registration number of the practitioner who issued the certificate.

Furthermore, employees should consider whether they are in fact incapacitated from doing their work when claiming sick leave and are reminded of section 23(1) of the BCEA.

In this regard, an employer is not required to pay an employee if the employee has been absent from work for more than two consecutive days or on more than two occasions during an eight-week period and, on request by the employer, does not produce a sick note stating that the employee was unable to work for the duration of the employee's absence on account of sickness or injury.

Hugo Pienaar and Marco Neto

Chambers Global 2024 Results

Employment Law

Chambers Global 2014–2024 ranked our Employment Law practice in:

Band 2: Employment.

Aadil Patel ranked by Chambers Global 2024 in **Band 1:** Employment.

Fiona Leppan ranked by Chambers Global 2018–2024 in **Band 2:** Employment.

Imraan Mahomed ranked by Chambers Global 2021–2024 in **Band 2:** Employment.

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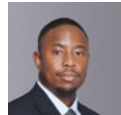
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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

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.

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