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The Legality of Traditional Healers' Sick-Notes in South Africa

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ABSTRACTTheSouth African law relating to sick leave is regulated by the Basic Conditions of Employment Act 75 of 1997. This statute gives an allowance that one may be absent from work as a result of sickness, and in order to avoid abuse of this law, it further states that such an employee has to provide a medical certificate from a medical practitioner as evidence of the alleged incapacity.South Africa being a country of diverse cultures and beliefs, employers have had employees producing medical certificates from traditional healers.The purpose of this paper is to analyse whether these kinds of medical certificates should be legally accepted or not, that is to check whether employers are obliged to accept these certificates. This paper has been motivated by the controversial judgment of the case of *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi and others*, where the Labour Appeal Court ruled in favour of the medical certificates from the traditional healers.

INTRODUCTION

Traditional healers are practitioners who heal using traditional African medicines. Their patients consult them with the belief that they are able to access advice and guidance from the ancestors through possession by an ancestor, or channeling, throwing bones or by interpreting dreams.This kind of healing is attached to belief and culture of both the traditional healer and the patient. Although there are different kinds of traditional healers in South Africa, they all have a common medium of the intervention of ancestral spirits during the process of healing.

South Africa is a rainbow nation having as one of its constitutional rights, the right to practice one's culture.[1]This implies that one is free to consult whoever one wants to consult in the event of one being sick, and this choice is mainly influenced by that person's belief and culture. This, however, does not mean that the labour laws should be compelled to tolerate the absence of employees from work owing to performance or involvement in cultural practices or rituals. The Basic Conditions for Employment Act is the law that regulates labour relations in South Africa.

METHODOLOGY

Qualitative method was used in this research. Books, legislations and cases were consulted throughout this work. This method is the one relevant for this research.

RESULTS

The purpose of this research is to show the constitutional validity or the legality of sick notes issued by traditional healers in South Africa. Both the students and scholars would benefit from the findings of this research as it concerns one controversial yet interesting topic which is part of a lot of South Africans' lives. This work shows that there is a demarcation line that people should observe between their consultation with traditional healers and the present labour laws. It is a good example of how the limitation clause works.[2] The findings of this article will also help in reducing the abuse of law by the people.

DISCUSSION

A Brief Discussion on the Law Regulating Traditional Healers in South Africa

Currently, the traditional healers in South Africa are regulated by the Traditional Health Practitioners Act.[3] When this Act was passed, it had as one of its mandates the establishment of the Council of Traditional Health Practitioners which is supposed to be responsible for the regulating and registration of traditional practitioners in South Africa. However, since the Act[4] came into force in February 2008, it was only five years later[5] that an interim council was inaugurated. As such, it would be until that time when

the regulations are finalised, that the traditional healers will have to register with the council which would then result in having only those medical certificates issued by the registered traditional practitioners to be accepted by the employers.[6]

This implies that before such a time that the council make regulations on the traditional healers' practice; no sick notes should be issued by traditional practitioners. The council has as its objective the promotion of public health awareness by also ensuring the quality of health-care services offered by traditional healers. The council also has to compile and maintain a professional code of conduct for traditional health practice which would ensure that the universally accepted health-care norms and values are complied with.[7] Based on this current status of the council of traditional healers, one can say that as the council is still on the process of formulating the rules regulating the profession, traditional healers should at least wait until such a time that those rules and conducts are passed before they can issue sick notes to their patients to take to their respective workplaces.

The Constitution and the Recognition of Traditional Healers

The South African Constitution[8] recognises the freedom to participate in one's culture of choice.[9] This right is further stretched to section 31 of the Constitution which reads as follows:

31 (1) "Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community

To enjoy their culture, practice their religion and use their language, and

To form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

(2)The rights in sub-section (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

One cannot help but notice the emphasis put on the fact that in practicing or participating in one's culture, one has to be cautious of not violating any other provisions of the Bill of Rights. This implies that there must be a good relationship between one exercising his freedom to participate in a culture of his choice and the rest of the rights embodied in Chapter 2 of the Constitution.[10]

For the purposes of this paper, it is pertinent to check on the relationship between the participation of an individual in a culture of his choice[11]and the right to access to health-care services.[12] This implies that one can extend his right to participate in a culture of his choice by choosing to consult with a traditional healer just as long as he does not violate the right to access to health-care services. Section 27, which guarantees the right to access to health-care services, does not stop by affording people the right to access to health-care services; it further puts a duty on the state to make sure that reasonable legislative and other measures within its available resources are taken in order to achieve the progressive realisation of this right. When correctly analysed and interpreted, the state should not just concentrate on the quantity of the health-care facilities available to the people,but has to thoroughly check on the quality of the health-care services that its people are accessing. The health-care accessed by the people of South Africa should be one that is reliable, accredited and evidence-based. All these can be found in the health care services with qualified nurses and medical doctors, but the question that leaves much to be desired is whether the traditional medicines and health care systems satisfy the internationally agreed norms regarding safety, quality and efficacy.

Qualifications of Becoming a Traditional Healer

It is an undisputable fact that the "profession" of a traditional healer differs in many aspects from other professions. In order for one to qualify into any profession, he/she has to go to school in most cases end up in an institution of higher learning where they are equipped with the knowledge on how to attain their goals. This means that anyone can choose and follow any profession as long as he meets the requirements stipulated in that profession. The same cannot be said of traditional healers. Most of them claim that for one to become a traditional healer, he/she must have had a calling from his/her ancestors,[13] most of whom they say they recognised the calling by being sick or being tormented by the spirits of their ancestors.[14] Those who receive their calling in this way contend that one

has to follow the calling or continue being sick or even die. This implies that becoming a traditional healer is not by one's choice, but by the choice of the ancestors. This is evidenced by the reasoning of the case of *Kleivits v Mmoledi*,[15] where the commissioner said that, "the respondent was faced with two evils and she chose the lesser evil. In fact, she found herself in a situation of necessity where the only recourse was to break the employer's rules in order to save her life…"[16]

Some traditional healers hold on to the belief that becoming a traditional healer is associated with one's gift. During the launch of the book on the calling of one of the traditional healers,[17] Ndlovu expressed his wish to dismiss the myth that anybody could become a sangoma[18] (traditional healer). He said that only people with a calling and who could answer that calling could become traditional healers. In the book, it was narrated how Ndlovu had to spend five hours under water as one of the rituals before qualifying as a sangoma. This implies that there is no uniform training available for people who want to become traditional healers. The training differs from one person to the other and from one's ancestors to the other.

This alone opens a loophole in the whole practice of traditional healers, since traditional healers do not work only according to their expertise but are instructed and guided by their ancestors.[19] It is obviously not possible to prove what one's ancestors said to him/her. Therefore, there is a problem of authenticity on the diagnosis from traditional healers.

Basically, what can be deduced from the operations of the traditional healers is that they do not require a formal education in order to perform their duties. In some scenarios, like in South Africa, they should be given certificates in order to accredit them. These certificates should not be interpreted as a confinement of their credibility.

The Legality of Sick Notes from Traditional Healers

Sick leave in South Africa is dealt with in terms of the Basic Conditions of Employment Act 75 of 1997, herein referred to as the BCEA. Section 22 of the BCEA is the one that deals with sick leave in general. Section 23 is about providing proof that one was indeed absent from work because of sickness. Section 23(2) stipulates that an employee must produce a medical certificate signed by a medical practitioner or any other person who is certified to diagnose and treat patients and who is registered with a professional council established by an act of parliament.

It is worth noting that a medical practitioner is a person entitled to practice as a medical practitioner in terms of section 17 of the Medical, Dental and Supplementary Health Service Professionals Act.[20]Traditional healers are not included in terms of this Act. It is thus; clear that section 23 of the BCEA contains two requirements that should be met in order for a medical certificate to be valid. The first requirement is that it has to state that the employee was not able to perform his normal duties as a result of illness. The second requirement is that such a medical certificate should be issued by a medical practitioner.[21] From what has been said above it is clear that traditional healers are not medical practitioners and they cannot issue valid medical certificates. It is thus, the writer's submission that the Labour Appeal Court erred in its judgment of the case of *Kievits kroon Country Estate (Pty) Ltd v Mmoledi*.[22] Since the enactment of the Traditional Health Practitioners Act,[23] the Act has not yet been fully proclaimed. This implies that any provision of a medical certificate from a traditional healer would be immature if not illegal.

Traditional healers are, therefore, not legally allowed to issue medical certificates in terms of the law that regulates sick leave in South Africa.[24] This means until such a time that the highest court of South Africa[25] declares section 23 of the BCEA unconstitutional (if ever it does), the only medical certificates that should be allowed as valid are those from the medical practitioners.

An Analysis of the Case of *Kievits Kroon Country (Pty) Ltd v Mmoledi and Others*

This case involved an employee (Johanna Mmoledi) who was employed as a chef by Kievits Kroon Country (Pty) Ltd. The employee asked for a month's unpaid leave so as to attend a course that was going to enable her to become a sangoma. The employee had previously asked for her work shifts to be changed so that she could attend some sessions of traditional healer's course without affecting her employment.

The employer had accommodated the first request as it did not affect the employee's work. The second request of being away for a month was not accommodated by the employer. It was said that the employee did not have sufficient leave days at her disposal. The employer, was however, prepared to grant Johanna Mmoledi one week unpaid leave. This did not satisfy Mmoledi. So she went ahead and took a month's leave without her employer's consent. She had left two letters on the human resources manager's desk. The first letter was written by a traditional healer who indicated that the employee would be absent from work because she was undergoing treatment or training. The second letter was informing Kievits Kroon of the graduation ceremony of Johanna Mmoledi and also asking for some off days to be given to Mmoledi so that she completes her initiation school ceremony to become a traditional healer.

When the employee returned to work, she was subjected to a disciplinary hearing and thereafter dismissed. The reason for dismissal was that the employee had not submitted a medical certificate in terms of the BCEA. The employee's contentions that she had to undergo training were not entertained and it was said that the employee could not attend the training which was not related to her employment during work hours. The employee then referred the matter to the Commission for Conciliation, Mediation and Arbitration (CCMA) on the grounds that the dismissal was unfair. At the hearing, the traditional healer gave evidence that Mmoledi was very ill and she could have died or suffered serious misfortune if she had not honoured the ancestral calling. The case was found in favour of the employee and the commissioner held that the appellant was justified in choosing a course that was going to save her life. It was further said that any person would have acted in the same manner to save his or her life.

The respondent (the employer) tried to review the judgment in the Labour Court but was not successful. The employer then appealed to the Labour Appeal Court. The Labour Appeal Court also did not rule in favour of the employer. It, however, referred to the Constitutional right to culture, religion and belief. It was further said that some of these cultural beliefs and practices are strongly held by those who subscribe in them and regard them as part of their lives. The judge went on to say that those who do not subscribe to the other's cultural beliefs should not trivialize them, by for example equating them to a karate course.

The reason for the decision at the CCMA can be criticised. The Commissioner based his decision on that if Mmoledi had not attended the training, she could have died. This statement cannot be supported or proved by anything else other than the oral evidence of the traditional healer. It is just a mere belief of someone who wanted to attend this kind of training, and can be challenged as evidence which is not credible. Even if another traditional healer could be called upon to support this statement, he could not. The diagnosis of a traditional healer is never evidence-based. In the case of *Dlongolo v Prima Industrial Holdings (Pty) Ltd*,[26] where Mr. Dlongolo was charged with desertion prior to producing a sick note from a traditional healer stating that he was very ill from failing to owe allegiance to ancestors. It was held that there is a concern that it is highly impossible, even by another traditional healer, to objectively verify findings by one traditional healer.

Section 23 (1) of the BCEA stipulates that a medical certificate should state that one is unable to perform his normal duties because of the illness. A simple statement that the employee suffers from a certain disease or illness does not satisfy the requirement of section 23. In the case of Johanna Mmoledi, the "sick note" simply stated that Johanna was being tormented by her ancestors. It never stated that she could not come to work because of that illness. This on its own before looking at the validity of the sick note does not warrant one to claim that she qualifies to be off duty. It is just a note informing the employer that one is sick but it does not show that there is a factual link between the sickness and the absence from work.

In the case of *Department of Correctional Services and Another v Police and Prisons Civil Rights Union*[27], an employee failed to comply with an employer's dress and grooming code, which included the cutting of employees' dreadlocks. Those employees attributed their dreadlocks to their Rastafarian religion and attested that the employer's policies prejudiced their right to practice their religion. One of the respondents further justified his dreadlocks to be a way of obeying his ancestors' call to become a sangoma. The Labour Appeal Court accepted that the duty to accommodate is limited and that employ-

ers are entitled to take into account their own legitimate interests. In the case of *Kievits Kroon v Mmoledi*, the employer may be said to have tried by all means to accommodate Johanna Mmoledi as he even went to an extent of changing the work shifts for her sake. Also, the employer mentioned that by the time that Mmoledi took a leave they were short-staffed and it was a busy period. This is clear indication that the employer's refusal to grant Ms. Mmoledi leave was to safeguard his own legitimate interests.

From what has been said about the acceptance of sick notes from traditional healers, it is clear that the law has not yet put an obligation on the employers to accept sick notes from traditional healers. However, in various circumstances the employees are just fortunate that their employers seem to be more accommodative of African cultures and beliefs than the legislatures, as many of them seem to be prepared to accept certificates from traditional healers.[28] This kind of acceptance was evidenced in the case of *MEWUSA obo Tshepo/Highveld Steeland Vanadium (2007)* where a collective agreement was reached between an employer and the Union to allow employees to take leave on cultural grounds. This however, should be taken as a privilege and not as a right by the employees as the law currently does not cover the acceptance of medical certificates from traditional healers.

Culture and Belief

Those who advocate the recognition of medical certificates from traditional healers argue that a lot of African people believe and trust in traditional healers; as such these certificates should be recognised. This proposition is subject to criticism. It is true that some decades ago a lot of Africans used to worship and believe in their ancestors, which then made it easy for them to consult and believe in traditional healers. However, in the present age, a lot of people are drifting away from the worship of ancestors instead they are now worshipping God and attending church services instead of gods (ancestors).This on its own demeans and devalues the belief and trust put on traditional healers. If the argument is that sick notes or medical certificates from traditional healers should be accepted by employers where an employee was absent from work because of the right to religion and culture; it therefore follows that even an employee who has been absent from work attending a deliverance service at church should also be allowed to bring a sick note from his pastor that he was possessed by demons and had to be delivered. Section 15 of the Constitution allows everyone the freedom of religion, belief and opinion.[29]

By affording people all these rights embodied in Chapter 2, the Constitution had the aim of liberating the people, not that the people should abuse the Constitution and turn it into a document that could be manipulated whenever people felt like legalising a certain act. It is in situations like these that the limitation clause comes into use. Section 36 of the Constitution stipulates that the rights in the Bill of Rights may be limited.[30] The traditional healers are after all not medically qualified, which means the South African Labour Law should not be obliged to recognize medical certificates from medically unqualified doctors. People must be afforded the right to consult with traditional doctors whenever they feel like. However, this right should be restricted. It should not be allowed to affect the labour laws. One's belief or culture should not be allowed to affect his or her fellow workmates or employers. One can consult with a traditional healer or attend church service during his own time, but the consequences of such a belief, religion or culture should not be allowed to cause changes or impact in that person's workplace.

The right to freedom of religion, belief and opinion was limited in the case of *Prince vPresident of the law Society*, *Cape of Good Hope*.[31]In this case, the Law Society refused to register the contract of community service of a Rastafarian; owing to the provisions of the Attorneys Act 53 of 1979 which stated that for one to be registered he was supposed to be a "fit and proper person". Prince was found not to be a "fit and proper person" as he had two previous convictions for possession of dagga and he had made his intentions clear that he would continue using dagga in future. Prince argued that his use and possession of dagga was constitutionally protected as an exercise of his freedom and religion.[32] On appeal the Constitutional Court held that Prince's right to freedom of religion, belief and opinion was limited in terms of section 36 of the Constitution. The court held that making an exception in the use and possession of drugs for the purposes of Rastafarians was not feasible. It further stated that there would be con-

siderable difficulties in policing the system given the private nature of much religious consumption of the drug and the absence of an established, formally organised structure for the religion.[33]

Different views cannot be advanced in the case of medical certificates from traditional healers. In as much as people can practice their cultural rights of consulting with traditional doctors, they cannot expect employers to accept medical certificates from these traditional healerswho do not even have established policies that regulate them yet. Thus, the right to practice one's culture is limited just like other rights.

CONCLUSION

To conclude, employers are not legally obliged to accept medical certificates from traditional healers as these are not yet regulated by law. The interim council of traditional healers was only inauguratedin February 2013.

This proves that traditional healers are not yet at par with medical practitioners, the two professions are totally different. The profession of medical practitioners is evidence-based. If one practitioner issues a medical certificate, it can be supported by evidence, whereas this is not the case for traditional healers. Accepting medical certificates from traditional healers would just be opening floodgates to malpractices that would just turn the work environment into total disarray.

RECOMMENDATIONS

It is essential for employers to know that the Constitution accords the people the right to enjoy their culture and practice their religion but this does not mean that they are presently compelled to accept sick notes from traditional healers

The only law that is currently regulating sick leave is the Basic Conditions of Employment Act.

NOTES

1. S30 of the Constitution
2. S36 of the Constitution
3. Traditional Health practitioners Act 22 of 2007
4. The Traditional Health practitioners Act
5. 12 February 2013
6. Marus Lia 2014. Traditional health practitioners enter the 21st century. *TheknowledgehubforHR-Professionals*, April 10, 2010 <http: //www. hr-pulse. co.za> (Retrieved 05 April 2014) 7www. edoc.co.za. (Retrieved 06 March 2014)
8. Act 108 of 1996
9. Section 30 of the Constitution provides that, " Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights"
10. The Bill of Rights
11. In this case an individual's right to consult with a traditional healer
12. Section 27(1) of the South African Constitution
13. Pretorius E 1999. Traditional healers. *TheSouthAfricanhealthreview*, 1999 <http://www.hst.org.za> (retrieved 07 August 2014)
14. Bernard PS 2003. Ecological implications of water spirit beliefs in Southern Africa: the need to protect knowledge, nature and resource rights. *USDAForestserviceproceedingsRMRS*-P-27: 149-154
15. Kievits Kroon Country Estate (Pty) Ltd v Mmoledi and others 2014 (1) SA 585 (SCA)
16. Paragraph 14
17. Reeder M 2011. *A Sangoma's* story: *The calling of Elliot Ndlovu*. Penguin: Johannesburg, South Africa.
18. Sangoma- this is a Zulu word for a traditional healer who relies on divination for healing. The word is however, commonly used to refer to all traditional healers in South Africa
19. Official Home Page of Unbranded Truth 2012. From <www.unbrandedtruth.com>(retrieved 07 November 2012)
20. Act 56 of 1974
21. Official Home Page of the South African Labour Guide 2014. From <http://www.labourguide.co.za> (Retrieved 07 August 2014)
22. 2014 (1) SA 585 (SCA)
23. Act 22 of 2007
24. The Basic Conditions of Employment Act
25. The Constitutional Court
26. (1993) 4 (11) SALLR 7 (IC)
27. (2011) 32 ILJ 2629 (LAC)
28. Nyasulu Sanelisiwe 2010. Is an employer's refusal to accept a sick note from a sangoma, legally valid? *Garlicke Bousfield*, September 10, 2010, P.1.
29. Section 15 (1) says that, " everyone has the right to freedom of conscience, religion, thought, belief and opinion"
30. Section 36 (1) provides that, "the rights in the Bill of Rights may be limited only in terms of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including-
    The nature of the right
    The importance of the purpose of the limitation
    The nature and extent of the limitation
    The relation between the limitation and its purpose; and
    Less restrictive means to achieve the purpose
31. 1998(8) BCLR 976 (C)
32. Currie I, De Waal J 2005. *The Bill of Rights Handbook*. Juta and Co. Ltd.

[33] The expert evidence showed that Rastafarians had not yet imposed a centralized organization structure on its adherents

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