



MEDICAL CERTIFICATES FROM TRADITIONAL HEALTH PRACTITIONERS

There has been an ongoing debate as to whether or not an employer should accept a traditional health practitioner's certificate as proof of medical incapacity. Central to this debate, is the wording of the BCEA, and the status and supporting structures of the Traditional Health Practitioners Act 22 of 2007 ("THPA"). What follows below, is our analysis of the current relevant legislation.

Relevant legislation

Whereas a traditional health practitioner's medical certificate is acceptable in terms of Sectoral Determinations 12 (the Forestry Sector) and 13 (the Agricultural Sector), the balance of employers are hesitant to accept such medical certificates. In *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi* 2014 (1) SA 585 (SCA) the Supreme Court of Appeal ("SCA") found in favour of an employee who claimed she was unfairly dismissed because she attended training as a traditional health practitioner. Her belief was that a refusal to heed to the calling of her ancestors would result in something ill, including death, befalling her. The SCA did not address the issue of whether the traditional health practitioner's medical certificate should have been accepted by the employer for purposes of sick leave, as the respondent had asked for unpaid leave, not sick leave in terms of the BCEA.

The wording of section 23 of the BCEA, is rigid and clear regarding when an employee will qualify for sick leave in terms of section 22 of the BCEA. Section 23 of the BCEA sets out the requirements for a medical certificate to be valid for purposes of the BCEA, and states (own emphasis):

"23. **Proof of incapacity**

- (1) *An employer is **not required to pay** an employee in terms of section 22 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 medical certificate stating that the employee was unable to work for the duration of the employee's absence on account of sickness or injury.*
- (2) *The medical certificate must be issued and 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**".*

Put differently, an employer is entitled to request that the employee submit a valid medical certificate, and will not be required to pay the employee if the employee is unable to comply. Rule 16 of the Health Professions Council of South Africa (“HPCSA”) Ethical Rules of Conduct prescribes the information that needs to be contained in a medical certificate for it to be valid.

The requirements for a traditional health practitioner’s certificate to be a valid medical certificate, can be found in section 23 of the BCEA, which requires that: i) the traditional health practitioner needs to be certified to diagnose and treat patients, and ii) the practitioner must be registered with a professional council established by an Act of Parliament.

On 30 April 2014 the President signed the THPA, which was scheduled to come into effect progressively through promulgation in the Government Gazette. The THPA provides for the registration of ‘traditional health practitioners’ who performs a ‘traditional health practice’ based on a traditional philosophy that includes the utilisation of traditional medicine or traditional practice and which has as its object to, amongst others diagnose, treat or prevent a physical or mental illness.

It, therefore, appears that the statutory requirements of the BCEA have been met.

On 22 Augustus 2011 the Minister of Health issued Regulations in terms of the THPA, which established the Interim Traditional Health Practitioners' Council ('the Council'), which drives the implementation of the THPA. It is responsible for the main administrative and enforcement functions of the THPA. The Council is responsible for the registration of traditional health practitioners as provided for in section 6(2)(j) of the THPA through the structures put in place by the THPA. In addition, the Council accepts complaints against traditional health practitioners, which they proceed to investigate and take the necessary remedial actions. Section 21 of the THPA sets out the application procedure and peers has to attest to the capacity of practitioners on the basis of empirical evidence of performance. Once registered, the traditional health practitioner will be issued with a certificate and his or her name will be added to the register. The THPA neither outlines a clear set of criteria for granting a licence, nor mechanisms for monitoring traditional health practitioners. At present, the licensing procedures are potentially not impartial and might be prejudicial against more vulnerable parties, i.e. minority groups, as there are different types of traditional health practitioners who all have different approaches to the practice.

The Council has no website: Consequently, one cannot easily ascertain whether any traditional health practitioners have been registered in terms of the THPA. Furthermore, the Minister of Health has to date not published a register or any supplementary list of registered traditional health practitioners contemplated in terms the THPA.

The onus would be on the traditional health practitioners to prove to their patients or to enquiring employers that they are registered in accordance with the THPA. Until such time that the register or any supplementary list of registered traditional health practitioners has been published, this is likely to be challenging.

As it stands, any medical certificate issued by a traditional health practitioner that is registered with the Council is deemed to be valid. At this stage, employers will be obligated to accept a traditional health practitioners' medical certificate if issued by a registered traditional health practitioner.

The content of a valid traditional health practitioner's certificate

Further to the aforementioned statutory requirements, traditional health practitioners' medical certificates must be valid in respect of its content. The THPA, unlike Rule 16 of the HPCSA's Ethical Rules of Conduct, which contains guidelines relating to the issuing of valid medical certificates for medical practitioners, is silent with regards to the content and/or requirements of a valid medical certificate from a traditional health practitioner. In addition to the latter, no regulations have been promulgated by the Minister of Health to provide any guidance in this regard. It is, in part, the responsibility of the Council to issue guidelines concerning traditional health practice.

In our opinion, in the absence of any guidelines regarding the technical requirements for traditional health practitioners' medical certificates to consider as valid by the Council, the system is open to abuse of the issuing of non-compliant documents. However, once the register is published and guidelines pertaining to the technical requirements for traditional health practitioners' medical certificates are made available, medical certificates and practitioners' information may then be verified with the Council if there is any doubt regarding authenticity. As a result, it will be difficult to determine the validity of a certificate even if issued by a registered practitioner.

Concluding remarks

If the traditional health practitioner is registered in accordance with the THPA, he or she is certified to diagnose and treat as per section 23 of the BCEA, and any medical certificate issued by him or her, will be valid, unless such certificate does not comply with the technical guidelines to be published by the Council.

If the employee is not able to prove that the traditional health practitioner is registered in accordance with the THPA or the certificate does not confirm this, the employer has a discretion to either convert the number of days indicated on the certificate to annual leave, or to deal with the employee's absence on the basis of no-work-no-pay.

While the objects of the THPA may be commendable and aim to provide better protection against abuse of sick leave, whether the Council will have the necessary capacity to be able to carry out its mandate, which includes providing the structures for registration and monitoring traditional health practitioners, also remains to be seen. Given the size of the traditional health sector (currently estimated at over two hundred thousand practitioners) and the administrative challenges referred to above, it seems unlikely to take place soon.