Comply with workplace COVID-19 protocols or face dismissal: A stark reminder from *Eskort Limited v Stuurman Mogotsi and Others* (JR1644/20) [2021] ZALCJHB 53 (28 March 2021)

1 Introduction

COVID-19 has come to stay and likely to be part of every facet of our daily lives for the foreseeable future (Amoah and Simpeh "Implementation challenges of COVID-19 safety measures at construction sites in South Africa" 2021 *Journal of Facilities Management (JFM)* 125). COVID-19 is a respiratory disease caused by the SARS-CoV-2 coronavirus (Sallard; Halloy; Casane *et al* "Tracing the origins of SARS-COV-2 in coronavirus phylogenies: a review" 2021 *Environmental Chemistry Letters (ECL)* 769). This disease originated in Wuhan in China in 2019 and engulfed the globe in early 2020 (Sallard *et al* 2021 *ECL* 769). The World Health Organisation first declared it a public health emergency of international concern on 30 January 2020 and a pandemic on 11 March 2020 (Cucinotta and Vanelli "WHO Declares COVID-19 a Pandemic" 2020 *Acta bio-medica: Atenei Parmensis (Acta Biomed)* 157); see also *Democratic Alliance v Minister of Co-operative Governance and Traditional Affairs and Others* [2021] ZAGPPHC 168 (24 March 2021) par 3). We have come to learn that it spreads from person to person via respiratory droplets emitted when a carrier spits, coughs or sneezes or when you use your hand to touch your mouth, nose or eyes after coming onto contact with surfaces or materials with the virus (Cucinotta and Vanelli 2020 *Acta Biomed* 157; see also Amoah and Simpeh 2021 *JFM* 113).

A person who has contracted the disease usually presents with symptoms such as fever; loss of taste and smell; chest pains and breathing difficulties (World Health Organization "Q&A on coronaviruses (COVID-19)" available at https://www.who.int/news-room/q-a-detail/coronavirus-disease-COVID-19 (accessed on 2021-07-22)). Prevention and protective measures at a workplace may be classified in three main categories *viz.* organisational; environmental and personal measures (Cirrincione; Plescia and Ledda *et al* "COVID-19 Pandemic: Prevention and Protection Measures to Be Adopted at the Workplace" 2020 *Sustainability* 6-8). Organisational measures are taken by the employer (imposed by authorities) to minimise the spread in the workplace by admitting only a certain number of employees in the workplace or prohibiting entry to employees who exhibit symptoms etc (Cirrincione *et al* 2020 *Sustainability* 6-8). Environmental measures include the disinfecting of surfaces, equipment, objects and to ensure good ventilation in the workplace (Cirrincione *et al* 2020 *Sustainability* 6-8). Personal measures are taken by an individual employee and include

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measures such regular hand wash, wearing of masks at all times in the workplace and correct usage of personal protective equipment (PPE) (Cirrincione *et al* 2020 *Sustainability* 6-8).

South Africa was not spared of the virus and the untold distress it was about to unleash. The first positive case was reported by the Minister of Health Dr Zweli Mkhize on 5 March 2020 and confirmed by the National Institute of Communicable Diseases (NICD) on the website (see the announcement made at https://www.nicd.ac.za/first-case-of-COVID-19-coronavirus-reported-in-sa/ (accessed on 2021-07-19)). This meant that government had to take measures to prevent a domestic outbreak of the virus especially after the World Health Organisation (WHO) had declared it a pandemic (Cucinotta and Vanelli 2020 *Acta Biomed* 157). Dr Nkosazana Dlamini-Zuma, the Minister of Cooperative Governance and Traditional Affairs (COGTA), declared a national state of disaster in terms of section 27 of the Disaster Management Act 57 of 2002 (see *Democratic Alliance v Minister of Co-operative Governance and Traditional Affairs and Others* [2021] ZAGPPHC 168 (24 March 2021 par 4). The effect of this declaration was that certain restrictions were going to be put in place to regulate how people would interact in order to mitigate the risk of infection and transmission. The workplace was one of the countless casualties of the pandemic and therefore strict measures had to be put in place. It is against this truncated background that the case under discussion transpired.

Eskort Limited (the employer) conducts business in the butchery industry and sells directly to the public. In its endeavour to strictly enforce COVID-19 regulations in its workplace, it dismissed an employee (Mr Mogotsi) who worked as an assistant butchery manager, for misconduct relating to disregarding adopted workplace COVID-19 protocols and procedures. This case note discusses the Labour court's decision in *Eskort Limited v Stuurman Mogotsi and Others* (JR1644/20) [2021] ZALCJHB 53 (28 March 2021 hereafter *Eskort*) and underscores the importance for employees and employers to comply with the workplace COVID-19 protocols in their workplaces whilst the *status qou* persists. The note further highlights the impact of the policy intervention by the South African government.

2 Facts of the case

In Early July 2020, Mr Mogotsi was in contact with a colleague who later tested positive for COVID-19. After experiencing some symptoms, he himself took a COVID-19 test on the 5th of August and received his results on the 9th indicating that he had tested positive (par 6.4). Despite having taken a test and receiving results, Mr Mogotsi continued to come to work on the 7th; the 9th and the 10th of August where he personally handed in the copy of his test results (par 6.4). Upon investigation, a video footage showed Mr Mogotsi walking about in the workshop without a face mask on the 10th; hugging a fellow employee who happened to have underlying health conditions and in contact with other employees

who had co-morbidities (pars 6.7 and 6.8). All the employees had to go on self-isolation.

The employer had established an inhouse "Coronavirus site committee" of which Mr Mogotsi was a member. He had been instrumental in putting up COVID-19 awareness posters in the workplace and advising fellow employees on the health and safety protocols to be followed should they have contact with a positive case or test positive themselves (par 6.6). This meant that he knew exactly what was expected of him and could not plead ignorance.

The employer charged him with gross misconduct for failing to disclose that he had taken a test on the 5th of August and with gross negligence for coming to the workplace knowing he had tested positive on the 9th and 10th of August. A disciplinary committee found him guilty and the employer dismissed him. Mr Mogotsi then referred an unfair dismissal dispute to the CCMA for arbitration. The commissioner found that Mr Mogotsi was irresponsible and grossly negligent for coming to the workplace knowing his COVID-19 status (par 7.3). It was also noted the employer had a rule which required employees to inform the employer if they suspect that they were infected, and this implied that they had to inform the employer if they had taken a test (par 7.2). Mr Mogotsi was found guilty on this count. The Commissioner sought guidance from the employer's disciplinary code for an appropriate sanction and found that in the circumstances it called for a final written warning. The sanction of dismissal was substituted with reinstatement and a final written warning (pars 7.4 and 7.5). The employer then took this arbitration award to the Labour Court for review. The following section of the note deals with the proceedings at the Labour Court.

3 Proceedings at the Labour Court

The question before the Labour Court was whether the decision by the arbitrator was reasonable as expounded in *South African Municipal Workers Union obo Mosomo v Greater Tubatse Local Municipality* (JA 64/2019) [2020] ZALAC 53 (2 December 2020) at par 27 (par 8). The employer averred that the arbitrator was divested of jurisdiction by virtue of Mogotsi's plea of victimisation and that the arbitrator did not properly apply his mind to the evidence placed before him (par 8). With regards to the jurisdictional plea, the court held that the arbitrator was correct in determining the real dispute as a dismissal dispute and making a finding (pars 10 and 11).

The court agreed with the employer that the arbitrators award was unreasonable and therefore reviewable because the conclusion was disconnected with the evidence and the finding that Mogotsi's conduct was extremely irresponsible given the context of the pandemic and that such conduct amounted to gross negligence (par 9). These findings, in the court's view, should have resulted in the arbitrator confirming the dismissal. In line with *Sidumo and Another v Rustenburg Platinum Mines*

Ltd and Others (CCT 85/06) [2007] ZACC 22 par 78, the arbitrator should have taken into account the totality of circumstances when considering the appropriateness of dismissal as a sanction (par 17). The arbitrator should have considered the fact that Mr Mogotsi knew that he was in contact with a COVID-19 positive person and had experienced symptoms himself as early as 6 July but did not report this to his employer (par 17.1). The fact that Mogotsi came to work after receiving his COVID-19 positive result and endangered other employees with his carefree conduct, walking about without wearing a face-mask should have been considered (par 17.3). Also, the fact that Mogotsi was part of the "Coronavirus Site Committee" and therefore knew what was expected of him at all times should have weighed towards confirming dismissal as a proper sanction (par 17.2). Moreover, the court considered the aggravating factor that Mr Mogotsi concealed that he took a COVID-19 test and the date in which he received results justifies a breakdown in the trust relation that exists in an employment relationship (par 17.7).

The court commended the employer for taking disciplinary steps against employees who disregarded workplace COVID-19 procedures and protocols thereby compromising the health and safety of other employees. The court further beseeched other employers and employees to implement their COVID-19 workplace protocols strictly and to ensure that these are not merely just decorative posters that no one takes serious (pars 19 and 20). The employer's original sanction of dismissal was thus restored. The following part proffers some comments on the impact of COVID-19 in the workplace.

4 Comments

4 1 Ramifications of the pandemic in the workplace

With more than 10 million people working in the formal sector in South Africa, workplaces presented a site which could accelerate the spread of COVID-19 (George and George "Prevention of COVID-19 in the workplace" (2020) *South African Medical Journal (SAMJ)* 0-0). Workers converge in large numbers for long hours on a daily basis in environments where it would be difficult to implement all the preventative measures such social distancing; wearing of face masks; good ventilation; regular hand wash et.c by the World Health Organisation (WHO) (George and George (2020) *SAMJ* 0-0). The workplace was consequently not exempted from the impact of the COVID-19 pandemic. Some workplaces in the formal sector consequently migrated to remote working arrangements. But this modality is inapplicable in sectors such retail, where Mr Mogotsi was working; construction; health; mining and many others (see Naidoo and Jeebhay "COVID-19: a new burden of respiratory disease among South African miners?" 2021 *Curr Opin Pulm Med*; see also Amoah and Simpeh 2021 *JFM* 113).

From a global point of view, the ILO reported that there was an extraordinary loss of working hours in the first quarter of 2020 (ILO Monitor: COVID-19 and the world of work 29 April 2020 Third edition available at http://oit.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/briefingnote/wcms_743146.pdf (accessed on 2021-06-30)). There was a 4.5% global decline, which is equivalent to 130 million full time jobs which were lost. More than 2 billion people are working in the informal sector. Over half of these workers were under full lock-down in April 2020 and millions of others under partial lock-downs in different countries. All these workers were therefore not economically active in this period and other sporadic periods after April 2020. In fact, the ILO reports that a total of over 1.6 billion informal sector workers were adversely affected by the pandemic. These figures represent the devastation that both employees and employers suffered as a result of COVID-19.

4 2 COVID-19 as an occupational illness: a health and safety intervention in South African workplaces

As part of government response to the pandemic, the Minister of Labour and Employment gazetted directives on the 4th of June 2020 in terms of Regulation 4(10) of the Regulations R480 of 29 April 2020 issued in terms section 27(2) of the Disaster Management Act 57 of 2002 and later withdrew and replaced them with Consolidated Directions on Occupational Health and Safety Measures in Certain Workplaces published under Notice R.1031 in Government Gazette No. 43751 on 1 October 2020 (hereafter the directives). Virus transmission by an infected person in the workplace to other workers has been identified as an occupational hazard as defined in terms of the Occupational Health and Safety Act 85 of 1993 (hereafter the OHSA) both locally and in other jurisdictions (George and George "COVID-19 as an occupational disease?" 2020 110(4) *SAMJ* 260; Sandal and Yildiz "COVID-19 as a recognized work-related disease: The current situation worldwide" 2020 *Safety and Health at Work* 136). The identification of COVID-19 as an occupational disease is a positive development for workers as will be seen below.

The directives provide that employers who intended to resume operations after the heightened level of lock-down had to undertake risk assessment in their workplaces in consultation with trade union representatives and health and safety committees, if applicable, and develop plans detailing worker protective measures to be taken (clause 3). Among other administrative measures in the directive, employers had to appoint a COVID-19 compliance officer who would ensure that COVID-19 health and safety protocols are adhered to by both the employees and the employer (clause 4). Employers are further enjoined to report all positive cases arising out of their workplaces to the National institute for Occupational Health (NIOH) (clause 4). This also contributes to the daily statistics issued by the Department of Health and inform the direction of policy.

Clause 5 of the directives emphasise the requirement of social distancing as one of the non-pharmaceutical measures which every employer should implement. Employees who have tested positive for COVID-19 should not be allowed to enter the workplace until they've completed the mandatory 10 days of isolation depending on the symptoms they exhibited during this period (clause 6.4). By implication this directive means that employers may not therefore require employees to work during this period. This includes employees who present symptoms when screened at entry points, they too should not be allowed in the workplace and should be isolated if this is discovered after they are already inside (clause 6.3). Employees so affected should all be placed on paid sick leave funded by the Temporary Employer Relief Scheme. Clause 6.3 also places a duty on employers to ensure that employees are not discriminated against on the ground of their COVID-19 positive test as envisaged in section 6 of the Employment Equity Act 55 of 1998. In fact, employers are to assure their employees that their health information will be handled in compliance with the Protection of Personal Information Act 4 of 2013 (POPI Act) (clause 4.2(c)). Mr Mogotsi's plea of victimisation could well be considered under this framework. The court in *Eskort* correctly dismissed the plea because there was no evidence of discrimination or the improper handling of his health information by his employer.

Employers at workplaces such public libraries, shops and banks where the public has access are required to arrange the workplace to ensure that measures such as social distancing can be implemented. They must put barriers or shields at counters to minimise direct contact between employees and members of the public and ensure that symptom screening and hand sanitising takes place at entry (clause 9). It should be noted that the duty to provide a safe working environment is not absolute and does not guarantee safety (Van Kerken "The right of an employee to stop work in dangerous circumstances at the workplace: An international perspective on South African law" 1997 *Industrial Law Journal (ILJ)* 1198). Employees also have to shoulder the weight.

As much as a large part of the directives is directed towards employers, employees are similarly duty bound to adhere to all the protocols put in place in their respective workplaces (clause 13). Section 14 of the OHSA places a general duty on employees to take reasonable care for their own health and safety and the safety of other persons. This involves reporting to the employer, or anyone so authorised, any incident which may affect their health (section 14(e) OHSA). Employees are therefore legally required to inform their employer when they exhibit common symptoms or when they've tested positive for COVID-19. They may even refuse to work under circumstances where they reasonably foresee a risk of exposure to COVID-19 and they may not be disciplined or dismissed for this (clauses 14.1 and 14.7, see also Van Kerken 1997 *ILJ* 1198). The directives further trigger the application of the Compensation for Occupational injuries and Disease Act 130 of 1993 (hereafter COIDA) by allowing compensation claims for employees who

contract COVID-19 in the course of their employment (clause 6.3(v)). The concealment of a COVID-19 positive test by an employee should therefore be viewed with this legal framework in mind by an employer.

On the 11th June 2021 the minister of Labour and Employment published directives under Notice R.499 in Government Gazette No. 44700. These directives restate the contents of the October 2020 directives. An important addition however is that they provide guidance to employers who want to make vaccination of their employees mandatory (clause 3(1)(b) and Annexure C of the directive). Employees screening; COVID-19 testing and mandatory vaccination are discussed in the following part.

4 3 Screening and testing and vaccination at the workplace

Some of the principles which should underpin every employer's response to the COVID-19 pandemic are the moral imperative to create a safe and healthy workplace that does not harm employees mental and physical health and the employer's legal obligation within the framework of occupational health and safety legislation (George and George 2020 110(4) *SAMJ* 260). All employers are required to put measures to ensure that COVID-19 symptoms screening takes place at the workplace entry. This may entail the simple temperature testing or the completion of a short questionnaire and must be done in line with Department of Health guidelines.

Section 7(1) of the EEA prohibits medical testing of employees by the employer unless permitted or required by legislation or justifiable in light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job. This prohibition only applies to mandatory testing and not voluntary testing (*Irvin & Johnson Limited v Trawler & Line Fishing Union and Others* (C1126/2002) [2002] ZALC 105 (17 December 2002) par 33). This means that employers who intend to avail COVID-19 testing facilities for their employees may do so. However, employers who intend to implement mandatory testing must meet the justifiability criteria in section 7(1). It is submitted that an outbreak of a global pandemic of the COVID-19 proportion is a medical fact which may justify such a decision by the employers (see Brothwell "South African companies can test employees for the COVID-19 coronavirus – here's what you need to know" available at https://businesstech.co.za/news/business/370830/south-african-companies-can-test-employees-for-the-COVID-19-coronavirus-heres-what-you-need-to-know/ (accessed on 2021-07-21)). Employees COVID-19 status should be treated as medical information in terms of POPI Act and may not be disclosed without their consent (see *NM and Others v Smith and Others* (CCT69/05) [2007] ZACC 6 par 43 where the Constitutional Court cautions against the disclosure of medical information albeit HIV status in that case).

An employer who intends to implement mandatory vaccination at their workplaces must, as part of risk assessment, identify those employees that must vaccinated based on the risk of contracting COVID-19 through their work; their age or co-morbidities (clause 3(1)(a)). The risk assessment must evolve into a plan outlining vaccination measures the employer intend to take. (clause 3(1)(b)(iii)). This plan must identify the employees who will be vaccinated in the workplace as and when vaccine becomes available for them. When developing this plan, employers must take into consideration employees rights to bodily integrity and to freedom of religion, belief and opinion in sections 12(2) and 13 respectively of the Constitution of the Republic of South Africa, 1996. Annexure C of the directive provide that employees identified in terms of the plan must be informed of the right to refuse vaccination on medical or constitutional grounds. Employees who get vaccinated and suffer side effects afterwards should be given paid time off or lodge a claim for compensation in terms of COIDA.

Employees who refuse to get vaccinated may be referred for counsel by a health and safety representative or even medical evaluation. The employer must find a way reasonably accommodate these employees. This may include allowing them to work from home, work outside ordinary working hours or work in isolation. This means that no employee may be victimised or dismissed for refusing to be vaccinated. It should be noted this vaccination referred to in the directive is administered by the Department of Health and may take place at public or private health facilities. It is submitted that this process should be extended to workplaces with these capabilities.

4 4 The sanction of dismissal for disregarding COVID-19 workplace protocols

The advent of the pandemic requires stern individual and collective responsibility. Flagrant disregard of COVID-19 workplace protocols exposes employees to the risk of infection and should never be overlooked. The court in *Eskort* raised pertinent questions on what employers can do more than merely dismissing employees who disregard basic health and safety protocols (par 19). Employers should continuously sensitise their employees of the seriousness of adhering to the workplace protocols and disciplinary action should be visited upon those who break these. Is it submitted however that courts should also consider the psychological effect of the pandemic has had on employees. Of course, evidence of this would have to be placed before the court. Research done by the North West University WorkWell Research Unit has shown that COVID-19 exposes employees to mental health effects such as Post-Traumatic Stress Disorder (PTSD) with poor judgment as one of its symptoms and this has a direct impact on their work performance (Rothman and Grobler "COVID-19 and mental health in the South African workplace" 2020 *Mental Health Matters* 15-16). Employer's COVID-19 strategies and interventions should therefore be comprehensive and be able to pre-empt some of these intricacies.

5 Conclusion

Primarily, the judgment in *Eskort* chimes a clear reminder to both employers and employees to continue the fight against COVID-19 through implementation and strict adherence of COVID-19 workplace health and safety protocols. With this case in mind, this note has highlighted impact of COVID-19 on employees in both the formal and informal sectors. It has also noted government's response in respect of health and safety directives at the South African workplace and provided the legal framework that deals with the employer's duty to provide a healthy working environment and interventions such as symptoms screening, testing and vaccinating employees. The judgment in *Eskort* is therefore a welcomed development and hopefully it will inspire COVID-19 sceptics in the workplace to start adhering to workplace health and safety protocols.

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