

A Revolutionary Picket Lands an Employee in Trouble: A Case of Broken Mutual Trust in the Workplace in South Africa

South African Revenue Services v Commission for Conciliation, Mediation and Arbitration
[2023] ZALCJHB 222

1 Introduction

Every contract of employment contains an implied duty that neither employer nor employee will, without proper reason, act so as to breach the duty to maintain mutual trust and confidence between them. If either party breaches the duty, the other party is entitled to take action against them. A breach by the employee may entitle the employer to terminate the contract of employment. For this reason, this case note on *South African Revenue Services v Commission for Conciliation, Mediation and Arbitration* ([2023] ZALCJHB 222) (*SARS v CCMA*) seeks to examine the impact of a breach of mutual trust and confidence by an employee who was booked off sick, but was later found on the picket line within this same period of sick leave. The case note begins with an explanation of the historical development of the implied term concerning mutual trust and confidence. South African common law and the implications of the Constitution of the Republic of South Africa, 1996 (the Constitution) for labour law are dealt with extensively with reference to the implied term of a duty to preserve mutual trust and confidence. The term is examined within the context of employment contracts and the mutual obligations imposed by common law on both parties.

2 Background facts

The matter concerned an employee, Mr Mathebula (the employee), who was employed as a junior investigator by SARS. On 7 September 2020, he sent a text message to his supervisor, Mr Mantsho, stating that he was not feeling well. He assured his supervisor that he would complete a sick-leave application once the network was functioning optimally. Soon thereafter, the employer approved the sick-leave application, and the employee was then relieved from work. The following day, the employee emphasised that he was still unwell, and this prompted the employer to advise the employee to seek further medical intervention. The employee conceded that if he did not recuperate, he would seek further medical attention with a doctor (*SARS v*

CCMA supra par 2). The following day, 9 September 2020, the employee consulted Dr Hlayiseka Chewane (the doctor) regarding his medical condition, and the doctor issued a medical certificate certifying that he had examined the employee. According to the doctor, the employee was unfit to resume duties from 9 to 11 September 2020 and would be fit to do so on 12 September 2020. Although it appeared difficult to establish the nature of the illness recorded on the medical certificate, it captured the following words: “absence due to medical condition”. While watching the news on television, the supervisor spotted Mathebula participating in a protest march called by the Economic Freedom Fighters (EFF) against Clicks (Pty) Ltd. The protest march was held on the two days for which he had applied and been granted sick leave. The conduct of the employee during the protest march prompted the supervisor to start gathering visuals from YouTube with a view to confronting the employee about the discovery he had made (*SARS v CCMA supra* par 8). The employee, following disciplinary proceedings against him, was found guilty as charged and was dismissed on 24 March 2021 (*SARS v CCMA supra* par 9).

3 Legal issue

The main issue in this case was whether the employee was so indisposed that he could not attend to his work (*SARS v CCMA supra* par 11). The case note examines what constitutes a breach of the common-law implied duty to preserve mutual trust and confidence in the Public Service in South Africa. The case note also determines what common-law obligations attach to parties in employment contracts.

4 Overview of the common-law position in an employment contract

The relationship between employer and employee is a contractual one. The employer benefits in the form of receiving services rendered in order to make a profit and provide services, while the employee benefits in the form of receiving a salary and other benefits as agreed. In order for an employee to render services, the employer must make it possible for the employee to perform the duties, and in exchange, the employee must perform the duties diligently, with reasonable care. Therefore, it is a relationship based on the implied common-law duty to maintain mutual trust and confidence, and the duty to take reasonable care between the parties in the employment relationship. The duty further requires employers and employees to treat each other with mutual respect and honesty in the performance of their contractual obligations, thereby discouraging unfair treatment (Du Bois “Developing Good Faith: Equality, Autonomy and Fidelity to the Bargain” 2022 *Constitutional Court Review* 223–259). An employment relationship is based on trust; SARS, as an employer, expects its employees to be truthful and honest. In this case, the employee created a false impression that he was too ill to come to work (*SARS v CCMA supra* par 20). The fact that the employee was seen at a protest march is sufficient evidence to expose the false impression that he was unfit to work (*SARS v CCMA supra* par 20).

It is important to note that the employment relationship, traditionally based on a master-servant relationship, has now evolved into a contractual employment relationship. The common-law obligations remain relevant and important, as they are part of the relationship, whether or not so expressed in the employment contractual agreement. The same applies to the positive obligation of mutual trust that has been highlighted in several cases. In the case of *Masetlha v The President of the Republic of South Africa* (2008 (1) BCLR 1 (ZACC)), Moseneke J held that an irreparable breakdown of the relationship of trust between the President and the head of the Agency constituted a lawful and rational basis for dismissal (*Masetlha v The President of the Republic of South Africa supra* 24). The court thus declared that a breakdown of mutual trust and confidence by an employee would be a legal basis for dismissal.

In the Report of the Enquiry into the Fitness of Advocate VP Pikoli to Hold the Office of the National Director of Public Prosecutions (Ginwala Commission 2008), it was indicated that while there may have been differences in understanding their respective roles, the government had not established on a balance of probabilities that there had indeed been an irretrievable breakdown in the relationship between Advocate Pikoli and the Minister (Ginwala Commission 96). Unlike in the *Masetlha* case, the Commission could not find any reason to believe that there had been a breakdown in the relationship. The relationship between employer and employee is based on trust. The trust comes from the implied duty to maintain trust and confidence in the common law, as well as the duty of care from both parties.

In *McBride v Minister of Police* ([2016] ZACC 30), Mogoeng CJ held that the manner in which the Minister had dealt with Mr McBride demonstrated without a doubt how invasive the Minister's powers are. What exacerbated the situation was that he acted unilaterally. This destroys the very confidence that the public should have that the Independent Police Investigative Directorate (IPID) should, without undue political interference, be able to investigate complaints against the police fearlessly and without bias (*McBride v Minister of Police supra* par 43). In this case, what is of utmost importance is that the court protected the independence of IPID from political interference. The suspension of the head of IPID would have resulted in unlawful action by the Minister, using powers not conferred on him, and thereby breaching the mutual trust and confidence between him and Mr McBride. In *Apleni v President of the Republic of South Africa* ([2018] 1 All SA 728 (GP)), it was held that the Minister had exercised powers that she did not possess, and her decision to suspend Mr Apleni was found to be unlawful (*Apleni v President of the Republic of South Africa supra* par 31). These two cases speak volumes about breaches of mutual trust and confidence where political interference impedes the performance of an employee's contractual obligations, and about how such breaches disrupt the functioning of state institutions.

The report titled "Fact Sheet on Grievance Resolution for the 2016/17 Financial Year" addressed to the National Assembly revealed that unfair

treatment was among the most common type of grievance in all reported grievance cases. The fact sheet showed that the number of unfair-treatment cases was high during the three financial years 2014/15, 2015/16 and 2016/17. The discussion above has focused on what may constitute unfair treatment and on how unfair treatment breaches the employer's duty to conduct the employment relationship based on mutual trust and confidence. Through case law, it has been demonstrated how unfair treatment affects employees' ability to perform their work in terms of their contractual obligations.

The Constitution in section 2 provides that the Republic of South Africa (RSA) is one sovereign and democratic state, founded on respect for human dignity. This case note examines breaches of the implied duty to maintain mutual trust and confidence that result in grievances relating to unfair treatment in the Public Service. The case note further investigates the causes of unfair treatment and examines the impact of a breach of the implied duty to preserve trust and confidence in the Public Service.

5 The effect of the implied duty to preserve mutual trust and confidence

The mutual trust and confidence required in the employment relationship can be undermined by an employer or an employee in many different ways (Raligilia and Bokaba "Breach of the Implied Duty to Preserve Mutual Trust and Confidence in an Employment Relationship: A Case Study of *Moyo v Old Mutual Limited*" 2021 *Obiter* 714–719). To a certain extent, the law provides remedies for both employers and employees. In the case of *SARS v CCMA* (*supra*), Judge Moshoane held that a reasonable decision maker, applying the accepted and trite standard of proof "on the preponderance of probabilities", would have come to the conclusion that the employee absented himself on the days in question in order to attend the protest action, and not that he was ill (*SARS v CCMA supra* par 13). In other words, the employee had undermined the duty to preserve mutual trust and confidence as expected of him in the employment relationship. According to submissions of the employee's legal representative, SARS failed to prove that the employee had the necessary intention to deceive, and as such, he was not guilty of dishonesty (*SARS v CCMA supra* par 19). However, Judge Moshoane dismissed this argument, and held that since the employee participated in a protest action while he was allegedly ill, the only inference to be drawn with regard to his state of mind was that, when he asserted and faked an illness, he must have intended to mislead SARS into excusing him from work so that he could attend the protest action (*SARS v CCMA supra* par 20).

Employers view a breach of trust and confidence as key to proving an intolerable breakdown in the employment relationship. The duty to preserve mutual trust and confidence was described in English law to be implied in all contracts of employment, and to mean that the employer shall not without reasonable or proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence

between employer and employee (Boyle “The Relational Principle of Trust and Confidence” 2007 4 *Oxford Journal of Legal Studies* 633–657). In *Asara Wine Estate & Hotel (Pty) Ltd v Van Rooyen* ((2012) 33 *ILJ* 363 (LC) par 21), the test for breach of the implied term was not reliant on the intention of the parties (reference was made to the case in *Pretoria Society for the Care of the Retarded v Loots* ((1997) 18 *ILJ* 981 (LAC)). The court in *Loots* held:

“[T]he enquiry [is] whether the [employer], without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or damage the relationship of confidence and trust between the employer and the employee. It is not necessary to show that the employer intended any repudiation of a contract: the court’s function is to look at the employer’s conduct as a whole and determine whether its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.”

The principles applicable to English law in dealing with the implied term are therefore similar to those applied by the South African courts. It may be deduced from the English law that the implied term is meant for the protection of employees. The imbalance of power in the employment relationship warrants protection for those with less power. It is, however, unclear what the law provides for the protection of employers or for employees who perform duties as managers in organisations. Managers who deal with unruly and misbehaving employees whose conduct does not directly subscribe to forms of misconduct, but which makes the lives of other employees and managers unpleasant at work, face a form of unfair treatment.

In the Public Service, employees are appointed at Senior Management Services (SMS) level, and they perform their duties on behalf of the State. The Public Service, as the biggest employer in South Africa, oversaw a wage bill of over R500 billion between 2016 and 2019. SMS members, as described above and by virtue of their appointment, represent the employer, and therefore make decisions and provide leadership on behalf of the State. In the execution of their responsibilities and engagement with employees, they are required to conduct themselves in an honest and trustworthy manner. Any conduct that is not appropriate or is unfair to an employee is likely to result in dissatisfaction that may be referred to as a grievance. The grievance process is therefore put in place for the employee’s recourse. A breach by SMS members of the implied duty to preserve mutual trust and confidence would lead to complaints of unfair treatment.

Management recourse against unfair treatment arising from the conduct of employees is the institution of the disciplinary process, which is described as a management function in the Public Service (Resolution 1 of 2003: Disciplinary Code and Procedures for the Public Service). In the *Masetlha* case, the court held that the irreparable breakdown of the relationship of trust between the President and the head of the Agency constituted a lawful and rational basis for dismissal (*Masetlha v The President of the Republic of South Africa supra* par 233). The importance of the case is that the employer’s remedial action in dealing with unfair treatment that grossly affected mutual trust and confidence in the relationship led to the termination of employment for the head of the Agency.

6 The impact of a breach of the implied duty to preserve trust and confidence

In an employment relationship, there are bound to be misunderstandings and conflicting behavioural patterns. Employees may view the employer's action as tantamount to a breach of the employment contract. However, where the conduct is less damaging to the relationship, employees may lodge grievances with the employer in the hope that the unfair conduct will stop. According to the Public Service Commission (PSC)'s "Fact Sheet on Grievance Resolution for the 2016/17 Financial Year", a high number of unfair-treatment grievances received by the PSC show that unfair treatment was the contributory factor in the number of grievances lodged in the Public Service. Unfair treatment is caused mainly by poor communication, personal attributes and failure to perform contractual obligations by either party.

The significance of a breach of the implied duty by the employer has been dealt with by the courts in the case of *Murray v Minister of Defence* ([2008] ZASCA 44). Mr Murray was a member of the National Defence Force, which is excluded by section 2 of the Labour Relations Act 66 of 1995 (LRA) (*Murray v Minister of Defence supra* par 1). Section 2(a) of LRA provides that this "Act does not apply to members of the National Defence Force" (*Murray v Minister of Defence supra* par 5). The court dealt with the development of the employment contract, as imported from English law (*Murray v Minister of Defence supra* par 8). It emphasised that the employer must not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust with the employee (*Murray v Minister of Defence supra* par 8).

In the *Masetlha* case, the breach by the employee of the duty to maintain mutual trust and confidence led to termination of his employment on the basis of irreparable breakdown of the relationship of trust between employer and employee. Employers may also terminate an employee's contract if the relationship is irreparably broken down and would affect the employer's business interests.

There are minor acts by employees that do not warrant disciplinary or corrective action, but which affect day-to-day engagements in the employment relationship. Such actions include passive participation in meetings, isolation from teamwork and a lack of interest in social activities. The policies and practices in the Public Service do not provide any reasonable recourse for resolution in such cases. It is only when an employee's conduct reaches the level of actual misconduct that employers have recourse to discipline. The obligation to preserve mutual trust and confidence dictates that both parties have an obligation; however, the case of *Malik and Mahmud v Bank of Credit and Commerce International SA* ([1997] UKHL 23) provides a description of what is regarded as the obligation of the employer to conduct itself in a manner not likely to destroy or seriously damage the relationship of confidence and trust with the employee without reasonable and proper cause.

Accordingly, employees have a duty to cooperate and are required not to conduct themselves in a manner that would destroy or seriously damage the relationship of trust and confidence in the employment relationship. Managers are also employees in their own right, and thus, where the conduct of employees does not warrant any corrective or punitive disciplinary action to be taken, they have only limited recourse. The law itself provides no recourse for unfair treatment, unless it is a matter of discrimination. In the Public Service, SMS members may be put on special leave owing to the stress caused by ill treatment received at the hands of employees. It remains unclear how managers as employees could hold the employer accountable for a breach of duty of mutual trust and confidence.

7 Conclusion

The case note examined the implied duty of mutual trust and confidence in the workplace, emphasising that both parties in the employment relationship must uphold this duty. It also highlighted the consequences of breaching the implied trust between employees and their employer. For instance, the case of *SARS v CCMA (supra)* demonstrates that an employee who booked off sick but was later found on the picket line during the same period of sick leave engaged in dismissible misconduct. Ultimately, both parties in the employment relationship should reasonably adhere to policies and the implied duty of mutual trust and confidence, as these concepts are fundamental to a healthy employment relationship.

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