



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: J 3321/18

In the matter between:

THE NATIONAL EDUCATION HEALTH AND

ALLIED WORKERS UNION (NEHAWU)

Applicant

and

THE MINISTER OF HEALTH

First Respondent

THE NATIONAL DEPARTMENT OF HEALTH

Second Respondent

Heard: 28 September 2018

Delivered: 2 October 2018

Summary: Urgent application to declare that the Applicant's members who have not been reporting for duty since 15 August 2018 have not breached their contracts of employment and that they are entitled to remuneration. The Respondents filed an application to strike out averments that constitute hearsay, opinion evidence and new matter.

JUDGMENT

PRINSLOO, J

Background

- [1] The Applicant seeks an order to declare that its members, employed by the Second Respondent (the Department) and who render services at the Civitas building (Civitas) and who have not been reporting for duty at the said building since 15 August 2018, have not breached their contracts of employment by failing to so report and that they be remunerated for the period from 15 August 2018 up to the date on which either Respondent designates a site other than Civitas at which the said members are to render their services or the date on which the National Institute for Occupational Health (NIOH) has certified that the recommendations contained in two reports by the NIOH, have been implemented.
- [2] The matter was enrolled on the urgent Court roll of 21 September 2018 when the parties agreed to postpone the matter to the urgent roll of 28 September 2018 and on the filing of further affidavits.
- [3] On 28 September 2018 when the matter was to be argued, the Respondents filed a notice to strike out certain averments in the Applicant's papers. Mr Beaton, for the Applicant, submitted that the application to strike out should be dealt with first so that the Applicant could be in a position to know what was left in its application and on which averments argument should be presented.

The application to strike

- [4] The Respondents applied for certain paragraphs in the Applicant's affidavits to be struck out on the basis that the averments therein constitute inadmissible hearsay evidence, opinion evidence and new material in reply. The Respondents submitted that the failure to strike out the specific averments, which I will deal with *infra*, will prejudice them.

Hearsay evidence

- [5] The Respondents took issue with averments made in the founding and replying affidavits and for certain averments to be struck out as they constitute hearsay evidence.

- [6] Issue is taken with averments made in respect of ailments. Specific issue is taken with portions of paragraphs 7.1.1 and 7.1.2 of the founding affidavit and paragraphs 5 and 6.1, 8, 15, 17 and 27 of the replying affidavit, relating to alleged ailments suffered by the Applicant's members and ailments suffered by Dr Andrews and their experiences in this regard. Ms Hassim for the Respondents submitted that the deponent referred to health issues that affected 'many' of the Applicant's members as at February 2018, without stating who the 'many' members are and without any supporting evidence. In respect of Dr Andrews' symptoms, Ms Hassim submitted that there was no affidavit from Dr Andrews to support this statement, nor was there any medical evidence or any report about these symptoms experienced by Dr Andrews to the Department.
- [7] In answer, Mr Beaton referred to paragraph 6.1 of the replying affidavit where Mr Mugagadeli's version has been set out, with a confirmatory affidavit appended to the replying affidavit. In paragraph 34 of the replying affidavit it is averred that Mr Mugagadeli obtained access to his office on 25 September 2018 and found three employees in his immediate proximity still suffered from the symptoms described in the founding affidavit. Mr Beaton submitted that Mr Mugagadeli did not say what their symptoms are, but stated what he saw and that was not hearsay. Mr Beaton also referred to paragraph 8 of the replying affidavit wherein the deponent referred to paragraph 9.4 of the founding affidavit where Ms Mohlahla confirmed, as per a confirmatory affidavit, that she frequents the doctor with various symptoms as a result of the unhealthy building conditions at Civitas. Insofar as paragraph 9.4 of the founding affidavit provides evidence of the symptoms, it is not hearsay. The deponent further stated that the Applicant's members consulted her and reported to her about the problems in Civitas, in her capacity as deputy secretary of the Gauteng Provincial Committee of the Applicant and as such she gained personal knowledge of their ailments and this does not constitute hearsay evidence.
- [8] Ms Hassim argued that in respect of the hearsay evidence, the Respondents will be prejudiced in that they have to come to Court to meet and defend a

case where there is no admissible evidence placed before Court. There is merit in this argument and the prejudice in this regard is obvious.

[9] Mr Beaton on the other hand argued that there is no prejudice as there is no hearsay in the Applicant's papers before Court.

[10] Hearsay evidence is defined¹ as evidence, the probative value of which depends on the credibility of any person other than the person giving such evidence.

[11] In *Mgobhozi v Naidoo NO and others*² the Labour Appeal Court considered the Law of Evidence Amendment Act and held that:

'Section 3(4) above makes it clear that hearsay evidence includes that given in writing by a person other than the person deposing to the affidavit that includes the evidence in question. The fact that the appellant on oath in an affidavit refers to the medical certificates of other witnesses does not rescue such affidavit from the stigma of hearsay. There obviously have to be affidavits from the doctors in question themselves'.

[12] In *Mgobhozi* the Labour Appeal Court held that the medical certificates should not have been considered by the Labour Court.

[13] *In casu*, the deponent, in her replying affidavit and in explaining the issues, stated that she gained personal knowledge of the ailments when the Applicant's members consulted her and reported to her about the problems in Civitas. This falls squarely within the definition of hearsay evidence. Furthermore, the deponent's reference to the letter from Dr Andrews wherein she stated that she suffers symptoms as a result of working in Civitas, does not rescue it from being hearsay.

[14] There is merit in the Respondents' complaint that the deponent does not state who the many members are and that there is no supporting evidence in this regard. The Applicant's averments in respect of the ailments of many members and the experiences of the members, are based on what

¹ Section 3(4) of the Law of Evidence Amendment Act 45 of 1988.

² (2006) 27 ILJ 786 (LAC) at para 22.

unidentified members told or conveyed to the deponent and that constitutes hearsay evidence. Averments containing hearsay are to be struck out with the exception of instances where the averments are confirmed by the member suffering from the alleged ailments and confirming the experiences as described by the deponent.

- [15] Issue is also taken with paragraph 7.8 of the founding affidavit to the extent that the deponent was not present at the meeting held on 10 August 2018. A proper perusal of the founding affidavit shows that there is no merit in this complaint. The deponent specifically stated in paragraph 7.7 that the meeting was attended by the Applicant, whom she represented, and it is clear that she attended the meeting.
- [16] The Respondents took issue with paragraph 30 of the replying affidavit to the extent that it relies on events with representatives of the Department of Labour. There is no merit in this complaint as reference is made to Messrs Mugagadeli and Mzolo, who were present and in respect of whom confirmatory affidavits are appended.
- [17] In summary, there is merit in the Respondents' complaints in respect of paragraphs 7.1.1 and 7.1.2 of the founding affidavit and paragraphs 5, 6.1, 8, 15, 17, 27 and 34 of the replying affidavit to the extent that averments in the said paragraphs constitute hearsay evidence relating to ailments and experiences of individuals or members of the Applicant that are not identified and not supported by any confirmatory affidavits. Where the averments are supported by confirmatory affidavits, they do not constitute hearsay evidence.

Opinion evidence

- [18] The Respondents took issue with several paragraphs in the Applicant's replying affidavit as opinion evidence insofar as they purport to provide medical expert evidence of the cause of any alleged ailment or purport to provide expert evidence.
- [19] Ms Hassim submitted that the Applicant's averments complained of all deal with the ailments of the Applicant's members and the conclusion that the

environment is unsafe and the building unhealthy. She submitted that only a medical doctor can provide evidence in respect of the ailments and only a mechanical engineer can confirm the issues raised in respect of the air conditioners, the flow of air, the quality of the air etcetera. The deponent made averments that Civitas has sick building syndrome, that the environment is unhealthy and unsafe and that the turning on of the air conditioning units in each room in Civitas would not address the problems raised by the Applicant.

[20] Ms Hassim argued that no one who deposed to any affidavit in the Applicant's case is qualified to express an opinion on the aforesaid issues. Only experts can express an opinion on the said issues and there is no expert evidence placed before this Court.

[21] Mr Beaton conceded that there was some opinion expressed in the Applicant's papers but he submitted that it is not a basis for this Court to strike out the averments, as argued by the Applicant. Mr Beaton submitted that the Court has to be satisfied, on a whole, that the symptoms and ailments complained of are there and that the problem with the airflow is the most probable cause of those. He submitted that the opinion evidence should not be struck out, but that the Court should give it appropriate weight.

[22] A witness' objective statement of fact about a directly observed event is relevant and admissible. A witness' opinion about it is irrelevant and inadmissible. As it has no probative value and cannot assist the Court in proving a fact in issue. The Court can draw its own opinion from the received facts and does not need to rely on the opinion of a witness. Opinion evidence however becomes relevant and admissible when it can assist the Court in deciding on a fact in issue. There are two instances in which opinion evidence becomes relevant and admissible. First, the opinion of a layperson is relevant and admissible on certain issues which fall within the competence and experience of laypersons generally and second, expert opinion evidence in the form of an appropriately qualified expert is admissible to assist the Court in determining facts in issue that require specialist knowledge not available to the Court. A layperson's opinion must be shown to be based on such person's

own observations of a fact in issue before the Court and will be admissible when it can assist the Court on a fact in issue³.

[23] Many of the paragraphs complained about, have been dealt with *supra* as part of the challenge to hearsay evidence and I do not deem it necessary to deal with averments that have already been struck out.

[24] To the extent that the Applicant's witnesses inform the Court of their own observations, the evidence is admissible. The Court itself must evaluate their evidence, draw its own conclusions from them and apply the law. Insofar as opinion evidence remains, the witness expressing an opinion must be competent to give an opinion about the subject in question and to the extent that the deponent or other witnesses for the Applicant are competent to give an opinion, this Court has to consider it. To the extent that expert evidence is required, this Court cannot attach any weight to the evidence presented by the Applicant that is not expert evidence.

[25] Ms Hassim submitted that the prejudice to be suffered by the Respondents is that expert evidence is required and that the Court cannot draw inferences from the facts as presented. In my view, this prejudice, if it exists, is prejudice the Applicant would face rather than the Respondents.

[26] I am not inclined to strike out the paragraphs listed by the Respondents (except the ones already struck out) as opinion evidence as I am of the view that this Court has to draw its own conclusions and can decide what weight to attach to the evidence presented.

New matter

[27] The Respondents submitted that new matter is raised in the Applicant's replying affidavit.

[28] In *De Beer v Minister of Safety and Security and Another*⁴ it was held that:

³ *The Law of Evidence in South Africa, Basic Principles*, Bellengere et al, Oxford University Press, 2014 at p 255 – 257.

⁴ (2011) 32 ILJ 2506 (LC).

It is trite law that an applicant must stand or fall by his or her founding affidavit. The applicant is therefore not permitted to introduce new matter in the replying affidavit. The courts strike out such new matter. New matter may be allowed in the absence of prejudice and in circumstances where the new matter amplifies and enlarges upon the case made out by the applicant in the founding affidavit. In this regard see *Union Finance Holdings Ltd v IS Mirk Office Machines IIA (Pty) Ltd & another* 2001 (4) SA 842 (W) and unreported case of *Nondwedwe Kama & others v Nombulelo Anoria Kama & another* case no 1357/20050 of the Eastern Cape High Court.

- [29] The Respondents seek to strike out paragraphs 6.2, 30, 34, 36, 37, 41 and 44 of the replying affidavit as new matter is raised in the reply in the said paragraphs.
- [30] Mr Beaton submitted that the averments contained in these paragraphs are responses raised in respect of allegations in the Respondents' answering affidavit and relate to issues raised in the founding affidavit and the answering affidavit and as such do not constitute new matter.
- [31] A perusal of the papers shows that paragraphs 6.2, 30, 34, 36, 37, 41 and 44 of the replying affidavit are indeed responses to averments made in the answering affidavit and to strike out the aforesaid paragraphs will defeat the purpose of filing a replying affidavit. The Applicant has not raised new matter in reply and it follows that the said paragraphs are not to be struck out.
- [32] This Court has a broad discretion in terms of section 162 of the Labour Relations Act⁵ to make orders for costs according to the requirements of the law and fairness. Considering that the parties are in a collective bargaining relationship, the interest of justice and fairness will, at this point of the litigation, be best served by making no order as to costs.
- [33] In the premises, I make the following order:

Order:

⁵ Act 66 of 1995 as amended.

1. The portion of paragraphs 7.1.1 and 7.1.2 of the founding affidavit and paragraphs 5, 6.1, 8, 15, 17 and 34 of the replying affidavit relating to ailments and experiences of individuals or members of the Applicant are struck out;
2. Paragraph 27 of the replying affidavit is struck out;
3. The parties may approach the Registrar of this Court to enroll the application on the urgent Court roll;
4. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Advocate R Beaton SC

Instructed by: Finck Attorneys

For the Respondents: Advocate S Hassim SC with Advocate L Pillay

Instructed by: TRG Attorneys

LABOUR COURT