



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

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: 24 October 2018

Delivered: 31 October 2018

Summary: The Applicant filed an application to admit into evidence further affidavits. Application dismissed as the evidence was available at the time of the filing of the application with no acceptable explanation why it was not placed before Court earlier. Consideration of the explanation and prejudice.

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 the Respondent designates a site other than Civitas at which the said members are to render 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 has developed somewhat of a history. It was initially 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. On 28 September 2018 the Respondents filed a notice to strike out certain averments in the Applicant's papers.
- [3] On 2 October 2018 judgment in the application to strike out was handed down and the matter was once again enrolled for urgent hearing on 24 October 2018. On this occasion the Applicant filed an application for an order admitting into evidence further affidavits. The Respondents opposed the said application.

The general principles

- [4] The ordinary rule of practice is that three sets of affidavits are allowed, namely, a founding, an answering and a replying affidavit. The court may, on its discretion, permit the filing of further affidavits and the relevant authorities indicate that leave will be granted for filing further affidavits only in

‘exceptional circumstances’¹ or in ‘special circumstances’² or if the court considers it advisable³.

- [5] In *James Brown & Hamer (Pty) Ltd (previously named Gilbert Hamer & Co Ltd) v Simmons*⁴ the Appellate Division held as follows:

‘It is in the interests of the administration of justice that the well-known and well-established general rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly applied: some flexibility, controlled by the presiding Judge exercising his discretion in relation to the facts of the case before him, must necessarily also be permitted’.

- [6] There must be a proper and satisfactory explanation as to why the facts or information contained in the additional affidavit were not placed before the court earlier and the court must be satisfied that no prejudice is caused to the other party that cannot be remedied by an appropriate order as to costs⁵.
- [7] It is trite that an applicant has to make out a case in the founding affidavit and the general rule is that the applicant must stand or fall by the founding affidavit and the facts alleged in it, although it is sometimes permissible to supplement the allegations contained in the founding affidavit. If the applicant merely sets out a skeleton case in the founding affidavit, any fortifying paragraphs in the replying affidavit will be struck out.
- [8] In *Bafokeng Rasimone Platinum Mine (Pty) Ltd v Commission for Conciliation, Mediation and Arbitrations and Others*⁶ the Court considered an application to permit an additional affidavit after the close of pleadings and held that:

- [4] When the matter was argued it became apparent that the issues that

¹ *Kasiyambhuru v Minister of Home Affairs* [1998] 3 All SA 166 (W); 1991(1) SA 643 (W) at 649-650 applying *Transvaal Racing Club v Jockey Club of South Africa* 1958(3) SA 599 (W) at 604.

² *Joseph and Jeans v Spitz* 1931 WLD 48.

³ *Riesenberg v Riesenberg* 1926 WLD 59.

⁴ 1963 (4) SA 656 (A) at 660 D-F.

⁵ Herbstein & Van Winsen, ‘The Civil Practice of the High Courts of South Africa’, Fifth Edition, Volume 1, page 433 – 444.

⁶ (2015) 36 ILJ 3045 (LC).

the applicant wished to raise in the additional affidavit had come to light after counsel had perused the application. All the material on which the additional affidavit was based was already before the applicant's attorneys by the time the supplementary affidavit was filed. Review applications by their nature give the applicant party ample time to consider the merits of its case before filing a supplementary affidavit. No reasons were advanced why the matters raised in the additional affidavit could not have been raised in the supplementary affidavit. The fact that an applicant subjects the record to more careful scrutiny after pleadings have closed and discovers further points it could have raised previously but did not, does not amount to exceptional circumstances justifying the reopening of the pleadings. The applicant argued that there would be no prejudice to the third respondent, because the court would obviously grant him an opportunity to respond if the additional affidavit was admitted. On this principle, an applicant could keep adding to its case *ad nauseam* and a respondent party would have to keep incurring further costs for each additional perusal of the record required to consider the new points raised as and when the applicant deigned to reconsider its case. Insofar as the admission of additional affidavits is a matter of fairness to both parties, there is nothing fair about allowing a party to add to its case in the absence of a very satisfactory explanation for the earlier omission.

[5]...Pleadings are intended, amongst other things, to identify the nature and parameters of a dispute. Care must be taken at the time of drafting to ensure that the full ambit of a party's case is canvassed.'

[9] Although the aforesaid judgment was given in the context of a review application, the application of the principles identified in respect of exceptional circumstances and prejudice is not limited only to review applications.

[10] In *Bafokeng Rasimone*⁷ the Court concluded that:

'There may be exceptional circumstances where issues come to light that a party exercising reasonable diligence in the preparation of its case could not

⁷ *Id* n 6 at para 5.

have been aware of, or where there is some other justifiable reason why a material issue is omitted. In this case no such reason has been provided to excuse omissions from the applicant's founding papers. I see no justification for the third respondent to be burdened months later with having to consider answering further matters that should have been raised at the time the supplementary affidavit was filed.'

The application to admit further affidavits

[11] In an application such as the present one, there are two main considerations namely; exceptional circumstances and prejudice. I deal with these considerations *infra*.

Exceptional circumstances

[12] There must be a proper and satisfactory explanation as to why the facts or information contained in the additional affidavits were not placed before the court earlier. The deponent to the Applicant's founding and replying affidavits, Ms Rikhotso, deposed to a supplementary affidavit in support of the application to admit further affidavits as evidence. Ms Rikhotso explained that the striking out of the specific content, as per the Court order of 2 October 2018, has the effect that the Court may deem the application wanting for a lack of evidence, specifically in relation to the health issues raised by the Applicant's members, as a result of the conditions at the Civitas building.

[13] The Applicant seeks to admit further affidavits deposed to by specific members of the Applicant that confirm the symptoms they experience and that give further evidence that the symptoms are related to the environment at the Civitas building.

[14] The Applicant's case is that the affidavits merely confirm that the issues raised in the founding papers are not hearsay, but are symptoms actually experienced by the Applicant's members in the building.

[15] There are a number of difficulties with the explanation tendered by Ms Rikhotso. It is evident that the facts the Applicant now seeks to place before this Court, existed and were known at the time of the filing of the application.

Ms Rikhotso's explanation as to why the facts were not placed before Court earlier, is that the founding papers were drafted on an urgent basis and that the concerns of the Applicant's members with regard to the Civitas building are well known to the Respondents and she was of the view that her experience of the members' conditions and the letter from Dr Andrews would suffice to prove the effect of the building's defects on the members. Ms Rikhotso stated that she only now realised that her view was mistaken.

- [16] I accept that where papers are prepared on an urgent basis, there may be exceptional circumstances where issues come to light that a party exercising reasonable diligence in the preparation of its case could not have been aware of, or where there is some other justifiable reason as to why a material issue was omitted.
- [17] This is however not such a case. *In casu*, Ms Rikhotso was of the view that her experience of the members' conditions and a letter from Dr Andrews would suffice to make out a case that the Respondents were not complying with their duty to ensure reasonably healthy and safe working conditions in the Civitas building. Some of the averments made by Ms Rikhotso amounted to hearsay and were struck out for that reason. It should have been evident from the onset that Ms Rikhotso's statements in respect of health issues that affected 'many' of the Applicant's members without stating who the 'many' members are and without any supporting evidence, would amount to hearsay evidence.
- [18] Ms Hassim for the Respondents, submitted that the explanation given by Ms Rikhotso that she was of the view that her experience of the members' conditions would suffice, is to be rejected as she made no attempt in the founding affidavit to set out what her experience of the members' conditions was, how she obtained the knowledge and why her version of the facts should be accepted in the absence of any evidence from the affected members.
- [19] I am not satisfied that the Applicant has provided a satisfactory explanation for the omission to place the facts and versions it now seeks to introduce before

Court earlier. There is also no exceptional circumstance present that justifies the permitting of further affidavits.

- [20] *In casu*, holes were poked in the Applicant's case and this application is no more than an attempt to plug those holes.

Prejudice

- [21] This Court must be satisfied that by permitting further affidavits, no prejudice is caused to the other party that cannot be remedied by an appropriate order as to costs.

- [22] The Applicant submitted that in the event that this Court does not admit the filing of the said affidavits, the Applicant would have to issue a fresh application which would serve only to burden the Court roll and result in unnecessary costs for all the parties in having to duplicate the papers as well as a further delay in the adjudication of the merits of this dispute.

- [23] In my view this can hardly be said to be a reason to admit further affidavits, more so in a case such as the present where the matter had already been allocated for hearing on the urgent roll on three different occasions. The Applicant has already burdened this Court roll and that *per se* is not a reason to admit further affidavits. If the Applicant has arrived at the point where it has to issue a fresh application, so be it.

- [24] Mr Beaton for the Applicant submitted that it is in the interest of justice to admit the further affidavits, considering the question of fairness to both parties, and the fact that the Respondents were afforded the opportunity to file a response to the further affidavits.

- [25] This aspect was considered in *Bafokeng*⁸ where the applicant also argued that there would be no prejudice to the respondent, because he would obviously be granted an opportunity to respond if the additional affidavit was admitted. The Court rejected the argument because on this principle, an applicant could keep adding to its case *ad nauseam* and a respondent party

⁸ *Supra*.

would have to keep incurring further costs for each occasion when the applicant deigned to reconsider its case.

[26] Ms Hassim submitted that the further affidavits should not be allowed because the said affidavits seek to introduce inadmissible evidence in the form of hearsay and opinion evidence. Reference is made to medical certificates attached to the affidavits to *inter alia*, show and confirm that the symptoms “were caused as a result of the stuffiness at work/lack of proper air circulation in my office and the dirty carpets.”

[27] In *Mgobhozi v Naidoo NO and Others*⁹ the Labour Appeal Court (LAC) considered the Law of Evidence Amendment Act¹⁰ 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.’

[28] In *Mgobhozi*¹¹ the Labour Appeal Court held that the medical certificates should not have been considered by the Labour Court. *In casu*, there are no affidavits deposed to by the medical practitioners and any evidence in respect of the medical certificates and the confirmation that the symptoms experienced were caused by the working conditions at the Civitas building, is hearsay and cannot be considered by this Court.

[29] To the extent that the deponents to the further affidavits stated that the only cause of their symptoms is the air quality and air circulation at their workplace and the conditions at the Civitas building, they express an opinion.

[30] 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

⁹ (2006) 27 ILJ 786 (LAC) at para 22.

¹⁰ Act 45 of 1988.

¹¹ *Id* n 9.

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.

- [31] 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 for example the age of a person (young, middle aged or old), the state of the weather during a particular event (hot, cold, rainy, sunny) or whether a person is tall, short, fat or thin. 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. The opinion of expert witnesses is relevant and admissible because experts, as a result of their specialist, technical skills or knowledge, are better qualified than a court to draw proper inferences on certain facts in issue. The expert can provide the court with specialist knowledge which falls outside the competence and experience of a court.
- [32] 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 issue¹². To the extent that a witness informs the Court of his/her own observations, the evidence is admissible. Insofar as an opinion is expressed, 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.
- [33] *In casu*, whether the Applicant's members' ailments are caused by the conditions at the Civitas building, is a fact in issue. The deponents to the further affidavits express an opinion as to the cause of their ailments or conditions and they present to the Court, the conclusion that the only cause of their symptoms is the air quality and air circulation at their workplace and the

¹² *The Law of Evidence in South Africa, Basic Principles*, Bellengere et al, Oxford University Press, 2014 at p 255 – 257.

conditions at the Civitas building. Ms Hassim submitted that only a medical doctor can provide evidence in respect of the ailments and only a mechanical engineer or other expert can confirm the issues raised in respect of the air conditioners, the flow of air, the quality of the air, etcetera.

- [34] The deponents to the further affidavits have not stated that they are 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. To the extent that expert evidence is required, this Court cannot attach any weight to the evidence presented as it is no more than an opinion expressed by a layperson.
- [35] This Court has a discretion to allow further affidavits, considering the explanation and prejudice. I am not inclined to allow further affidavits in circumstances where the Applicant failed to provide a satisfactory explanation for the omission to place the facts and versions it now seeks to introduce before Court earlier.
- [36] The Respondents would be prejudiced should the further affidavits be permitted as they would in all probability have to answer to the affidavits and incur further costs in doing so. It is evident that the affidavits the Applicant seeks to admit, contain inadmissible hearsay and opinion evidence and that allowing those affidavits, would not be in the interest of justice as it would not assist this Court at all to decide the main application. The further affidavits do not establish causation and do not cure the holes in the Applicant's case.
- [37] This Court has a broad discretion in terms of section 162 of the Labour Relations Act¹³ (LRA) to make orders for costs according to the requirements of the law and fairness. Ms Hassim submitted that this application is an abuse of process and should be dismissed with costs, to include the costs of two counsel. Mr Beaton submitted that the application is not an abuse of process but merely an attempt to fix the application after the Respondents' application to strike out was granted and that cost should be cost in the cause.

¹³ Act 66 of 1995 as amended.

[38] Considering the merits of this application and the arguments presented in respect of costs, I can see no reason to reserve the costs for determination at a later stage and I see no reason why the costs should not follow the result. I am however not inclined to grant the costs of two counsel as the opposition of this application did not justify appointment of two counsel.

[39] In the premises, I make the following order:

Order

1. The application to permit further affidavits is dismissed with costs, to include the cost of one counsel.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

Applicants: Advocate R Beaton SC

Instructed by: Finck Attorneys

Respondents: Advocate S Hassim SC with Advocate L Pillay

Instructed by: TRG Attorneys