



IN THE LABOUR COURT OF SOUTH AFRICA

Case no: J 423-20

In the matter between:

**NATIONAL EDUCATION HEALTH & ALLIED WORKERS
UNION (“NEHAWU”)**

APPLICANT

obo members providing essential services

and

MINISTER OF HEALTH

FIRST RESPONDENT

DEPARTMENT OF HEALTH

SECOND RESPONDENT

MINISTER OF LABOUR

THIRD RESPONDENT

MEC FOR HEALTH : GAUTENG

FOURTH RESPONDENT

MEC FOR HEALTH : LIMPOPO

FIFTH RESPONDENT

MEC FOR HEALTH : MPUMALANGA

SIXTH RESPONDENT

MEC FOR HEALTH : NORTH WEST

SEVENTH RESPONDENT

MEC FOR HEALTH : FREE STATE

EIGHTH RESPONDENT

MEC FOR HEALTH : EASTERN CAPE

NINTH RESPONDENT

MEC FOR HEALTH : NORTHERN CAPE

TENTH RESPONDENT

MEC FOR HEALTH : WESTERN CAPE

ELEVENTH RESPONDENT

MEC FOR HEALTH : KWAZULU NATAL

TWELFTH RESPONDENT

Heard: 8 April 2020

Judgment delivered: 11 April 2020

JUDGMENT

WHITCHER J

Introduction

- [1] On 8 April 2020, notwithstanding a withdrawal of the matter, I dismissed this application with costs¹ on the basis that the applicant had failed to make out a case on the law and facts.
- [2] The purpose of this judgment is to provide a short summary, followed by detailed reasons for my order.
- [3] The applicant's case, brought on an urgent basis, principally concerns the alleged obligations and omissions of the Minister of Health in relation to provision of Personal Protective Equipment (PPE) to health workers in the fight against the Coronavirus pandemic (Covid-19). Relief was however also sought against the other respondents. In the main, the applicant claims that the Minister has failed to ensure that health workers are provided with PPE, has failed to issue guidelines for the use of PPE and has failed to meaningfully engage the applicant about these issues. The relief sought in the notice of motion includes an order directing the respondents to meaningfully engage the applicant on these matters, and, pending same, the court must interdict and declare unlawful any disciplinary action which may be taken against the applicant's members in relation to a refusal to work in the absence of PPE's. Finally, the applicant requests this court to direct the Minister of Labour to exercise his powers in terms of section 21 of the Occupational Health and Safety Act, 1993 ("OHSA") to prohibit the performance or those duties that endanger the health and safety of employees.
- [4] At the outset, I must state that this Court (and the respondents) acknowledge that all health workers remain in the frontline of the fight against Covid-19 (and, I dare say, heroically so) and fully agree that they are entitled to PPE so that they are not exposed to avoidable risks. Further, even if not in law, the applicant is an important social partner and component in the work of the respondents against the virus. However, this is a legal dispute, and the applicant provided no legal or

¹ I awarded costs in favour of the first respondent only, in light of the considerable amount of ground work it employed in opposing this application.

evidentiary basis for its case. Nevertheless, as will be shown further on, the Minister of Health and MECs provided comprehensive data and documentary evidence which disproves the factual claims made by the applicant. They demonstrated that:

- (a) South Africa's strategy is to prevent the spread of the pandemic, rather than to play catch up after the event; a sensible response given South Africa's vastly unequal population, where access to healthcare for the majority cannot be guaranteed;
- (b) Although there is a national shortage of PPE, the specific hospitals identified by the applicant either have no shortage at all, and if they do, it is not of the type that would warrant this application because it can be resolved by making the relevant inquiry and administratively by simply placing additional orders, or shifting resources from the hospitals which have more stock;
- (c) They have instituted a range of measures to deal with shortages of PPE and such measures are actually continuing;
- (d) They have issued guidelines on the use of PPE;
- (e) They have taken steps to meaningfully engage trade unions, including the applicant on measures to mitigate the virus, and
- (f) The applicant knows about the above initiatives.

The withdrawal of the application

[5] On Friday, 3 April 2020, the applicant filed this application on an urgent basis, to be heard on Tuesday, 7 April 2020. The applicant required the respondents to file their opposing papers by 4pm on Sunday, 5 April 2020. The respondents, for good reason, only managed to file same Monday night, 6 April 2020.² As a consequence the parties agreed that the matter would be heard at 2pm on Tuesday, 7 April 2020 to give the applicant an opportunity to consider a reply.

² The opposing papers are substantial.

However, at 2pm the applicant asked for the matter to be adjourned to 8 April 2020. Despite opposition from the respondents, I granted the application. On the morning of 8 April 2020, the applicant attempted to withdraw its application, with no tender of costs.

- [6] After hearing argument on the matter, I agreed with counsel for the respondents that a determination on especially the factual allegations is in the interests of justice.³ The allegations raised by the applicant, by their very nature and at this particular time, deserve evaluation and determination so that all parties to this dispute – and the public at large – are not left with an impression that a ‘technicality’ interrupted the truth emerging on whether doctors and nurses at public facilities have sufficient PPE.⁴

Shortage/No Supply of PPE

- [7] Is there evidence that the Minister and MECs are failing to provide PPE in the hospitals and clinics cited by the applicant? I set out the pertinent factual allegations together with the Minister of Health’s response⁵ province by province. I determined it important to set them out in detail.

Limpopo

- [8] The applicant alleges that at Kennedy Phalanda Hospital, doctors, nurses, assistant nurses, porters, cleaners and administrators are not provided with N95 masks.

³ The Court has a discretion notwithstanding the withdrawal of a matter after the commencement of proceedings to continue to decide the matter on the merits after proceedings have commenced. The question of injustice to the other parties is germane to the exercise of the Court’s discretion. In *Karoo Meat Exchange Ltd v Mtwazi 1967 (3) SA 356 (C) 1967 (3) SA 356* the Court reasoned that injustice would be done if the plaintiff, on a whim, could withdraw the proceedings in circumstances where the reputation of the defendant has been attacked. See also: *Higgins v Ryan, NO and others 1978 (1) SA 216 (R)*.

⁴ There were various technical issues with the application.

⁵ The Minister of Health’s response encompassed the replies of each individual Health MEC Respondent, except the MEC for Health in the Western Cape, who was separately represented. The Minister of Health states in his affidavit that its contents are also the product of his personally interviewing every Health MEC and Head of Department but for the Western Cape.

[9] The Minister of health replies that there are no records of such a hospital existing in Limpopo province. The Minister further asserts that there is currently stock of PPE across all facilities in Limpopo. In particular, he states there is a sufficient 'buffer' amount of masks in the province.

KwaZulu-Natal

[10] The applicant alleges that at Madadeni Regional Hospitals; Dundee District Hospital and EMS, nurses, assistant nurses, doctors, porter, cleaners and administrators are not provided with gowns and the department of health has not provided an explanation for this violation of safety standards.

[11] In reply, the Minister distinguishes between masks used by frontline staff and those used after a positive COVID-19 diagnosis has been made. He concedes high usage of both items but states that claims of shortages are exaggerated in that, on 3 April 2020, more than 100 000 ordinary masks were delivered to Kwazulu-Natal, sufficient to meet demand.

[12] He further states that 7500 units of specialised masks used when dealing with infected patients (known as N95s) have also been delivered to Kwazulu-Natal.

[13] He asserts that there has been no reported pressure on the demand for gowns in Kwazulu-Natal. However, he avers that the provincial health MEC has put into place measures to ensure that where facilities have an oversupply, these are redistributed to those facilities that do not have sufficient supply. The Minister states that there is sufficient stock of all other COVID-required PPE.

[14] The Minister disputes the claim that, at Dundee, Madadeni and EMS hospitals, there is a shortage of gowns (a term used to describe both aprons and specialized body-suits). He concedes that while there is no existing shortage, there is pressure on the supply of gowns which has been mitigated by orders for new supply and deliveries are pending.

[15] Importantly, the Minister states that, "notwithstanding any pressures on supply of PPE, no health worker is expected to treat any Covid-19 patient without the necessary and required PPE."

Free State

[16] The applicant alleges that at Manapo, Elizabeth Ross, and Dithlabeng Hospitals nurses, assistant nurses, doctors, porter, cleaners and administrators, have not been provided with gowns and no reasons have been given for this.

[17] The Minister of Health answers that COVID-19 patients are not treated at these three hospitals. They are instead treated at Universitas and Pelonomi hospitals. He avers that these hospitals are properly stocked up with all the PPE equipment that they may require.

Mpumalanga

[18] The applicant alleges that at Mathibe, Mkhondo, Mamatlale, Middleburg and EMS Hospitals no gowns and masks have been provided to address COVID-19 safety concerns. The reasons given by the Chief Executive Officers of these facilities, is that "*they are under-resourced*" (original emphasis).

[19] The Minister states that surgical masks have been provided to staff at Mamatlale and Middleburg Hospitals. The same applies to N95 masks used for patients with symptoms of COVID-19 or other respiratory problems such as tuberculosis.

[20] He states that there are sufficient aprons but that no full-body gowns are needed at present as these are required for staff treating infected patients, whereas Mamatlale and Middelburg hospitals neither test nor treat COVID-19 patients.

[21] He concedes a pressure on supply of surgical masks but the stock is to be replenished this week.

[22] In relation to Mkhondo Hospital, the Minister attests to a sufficiency of PPE. Full-body gowns are not needed at this facility as they are reserved for those treating patients for Covid-19 which does not happen at Mkhondo Hospital.

[23] The Minister states that, in Mpumalanga, Covid-19 testing is done at Rob Ferreira, Ermelo and Temba hospitals. No other hospitals, including the ones cited by NEHAWU, do any Covid-19 testing. The hospitals that perform testing

require gloves, goggles, masks and aprons, which the Minister claims are fully supplied at these facilities and staff at these facilities are accordingly fully equipped to conduct the testing safely. He makes the point that surgical masks (and not N95 masks) “are required for testing (according to clinical judgment)”.

- [24] An averment that bears noting in assessing the allegation of PPE shortages in Mpumalanga is that there are only 18 confirmed cases of Covid-19 at the present time (8 April 2020). In all of these cases the patients only display mild symptoms and accordingly “none of them even qualify to be admitted to any of the designated health care facilities.” The Minister states that 16 of these persons are self-isolating. Two have been isolated at a care facility with all the necessary equipment for treatment.

Northern Cape

- [25] The applicant alleges that at Tswaragani Hospital, Kagiso Public Health and Olifanthoek Community Health Clinic staff are not provided with gloves and masks and are provided with insufficient sanitizers. The reasons allegedly given by the Chief Executive Officers at these facilities is that there is a shortage of supply of PPE because of procurement processes. Additionally, at EMS and John Taolo Gaetsewe facilities no protective eye protection, no N95 respirators and no A40 suits are provided to employees. The applicant further asserts that cleaners in health facilities across the province are not provided with cleaning gloves and boots.
- [26] The Minister disputes that hand-sanitisers, gloves and masks have not been provided to staff at Tswaragano Hospital, Kagiso Public Health and Olifantshoek Community Health Clinics. He states that there is a sufficient supply of these materials.
- [27] He further disputes the allegation that employees at EMS and John Taolou Gaetsewe are deprived of eye protection, N95 respirators and A40 suits. He states that all the staff there have been provided with the necessary PPE, in accordance with the World Health Organisation (WHO) guidelines.
- [28] He states all cleaners across the province have been provided with protective gloves to conduct their tasks. On the supply of boots, the Minister states that

this is not clinically required and therefore boots are not issued to general cleaners across the wards. However, those cleaners that may be cleaning in higher risk areas, are issued with boots.

Gauteng

- [29] The applicant states that at Ekurhuleni Sizwe Tropical Diseases Hospital, there are no gloves and masks for nurses, assistant nurses, doctors, porter, cleaners and administrators; at Thelle Mogoerane Regional Hospital, there are no gloves, masks and sanitizers; at Ekurhuleni District Health (clinics), there is a short supply of masks, gloves and sanitizers. In addition, there are no aprons, hand soaps, boots and special clothing for general workers; at Far East Rand Regional Hospital, there are no gloves, masks and sanitizers for all categories of staff except nurses; at Sebokeng Hospital, there are no gloves, masks and sanitizers for all categories of staff except for nurses. Additionally, nurses at Sebokeng Hospital are not trained to handle Covid-19 patients and at Rahima Hospital, there are no gloves, masks and sanitizers.
- [30] The Minister denies these allegations. At Ekurhuleni Sizwe Tropical Diseases Hospital, there are no current shortages of masks, gloves, aprons or sanitisers. He points out that, even in the absence of COVID-19, this hospital cannot operate without gloves and masks as it deals specifically with tuberculosis and other respiratory diseases. An inherent feature of this hospital's ordinary functioning is that PPE is on hand. The Minister concedes that there would be a significant constraint on supply if the additional orders for PPE items are not delivered when expected.
- [31] At Thelie Mogoerane Regional Hospital the following quantities of the specified PPE are available: 245 N95 masks, 4359 unsterile gloves and 228 sanitizers.
- [32] At Rahima Moosa, the following quantities of the specified PPE are available: 2205 N95 masks, with 9450 ordered pending delivery, 1228 sanitisers, with 5000 ordered pending delivery, and 91300 gloves with 290 000 ordered pending delivery.

- [33] At Far East Rand Hospital, the following quantities of the specified PPE are available: 702 surgical masks, 250 surgical gloves, 16 boxes of unsterile gloves, and 96 heavy duty gloves.
- [34] The Minister avers that a problem has arisen with some staff members at the above-named facilities who are clinically not meant to receive certain items of PPE but who are demanding same. He claims that the Gauteng health department issues PPE in accordance with the WHO guidelines. In terms of these guidelines, communicated to labour, staff at “the effective reception area need not be fully suited compared to those that are involved in the actual treatment or testing. However, this is for instance being demanded by such staff. Where there is pressure on demand of PPE, it needs to be issued strictly in accordance with the WHO guidelines. This means that each category of staff is issued PPE in accordance with the level of exposure of their job category.”
- [35] The Minister further attests that strict health and safety controls related to the supply of PPE are in place: “This means that the reception area for example would only be opened if there is sufficient PPE for the staff working in that area. Further, patients will not be transferred to the wards without the wards having sufficient PPE for their purposes. This is an inherent built in safe-guard at these hospitals.”
- [36] The Minister affirms that the majority of Gauteng’s 690 cases of confirmed Covid-19 infection are self-isolating persons. Only approximately 20 people are hospitalised. Of these, less than half are in public health facilities. The public health facility housing these isolating Covid-19 patients is the Charlotte Maxeke Hospital, which is fully and properly resourced to receive patients. The Tembisa hospital is also building up its capacity so that, “if the need arises it can also treat these patients should the numbers continue to rise.”

Eastern Cape

- [37] The applicant states that at Komani Hospital, there are no masks, sanitizers and gloves, at Aliwal North Mpilisweni Hospital, there is a shortage of sanitizers, gloves and plastic aprons, at Aliwal North Ureka, Khayamnandi and Thembisa

Clinics and at Matatiele's Maluti Community Health Clinic, there are no gloves, masks and sanitizers and at all Public Hospitals and clinics at King Sabatha Dalindyebo, there are no face masks, gloves, sanitizers. Only doctors are provided with these items.

- [38] The Minister replies that owing to the vastness of the province and its rural location, there are problems in communicating and delivery of items. Despite these problems, at Komani hospital, the required PPE items have been delivered in the following quantities: Surgical gloves, non-sterile: 112 boxes, Surgical gloves: sterile: 525 pairs, Surgical masks: 200 pieces, N95 respirators: 1225 and Green gloves long sleeves: 50 pieces.
- [39] At Aliwal-North: Empilisweni Hospital, there is no basis for the claim of PPE shortages. During the week of 30 March 2020, the following quantities were delivered: 150L of sanitisers; 590 boxes of 33 gloves; 610 plastic aprons were issued.
- [40] At Ureka clinic, the following quantities of the specified PPE are available: 700 gloves, 120 masks, and a bulk supply of hand-sanitisers issued for the whole district.
- [41] At Khayamnandi clinic, the following quantities of the specified PPE are available: 300 gloves, 82 masks, and access to the bulk supply of hand-sanitisers issued to the district.
- [42] At Matatiele – Maluti CHC, the following quantities of the specified PPE are available: 1000 gloves, 210 units of masks, and access to the bulk supply of hand sanitisers issued to the district.
- [43] At Thembisa clinic, the following quantities of the specified PPE are available: 500 gloves, 15 boxes of masks, and a bulk supply of hand-sanitisers for decanting and distribution.
- [44] The Minister notes that the allegations pertaining to the “whole of the Sabata Dalindyebo district” are difficult to reply to because they lack specificity.

However, he avers that across the Eastern Cape province the following additional PPE has been ordered: 103 190 N95 gloves, 10 000 surgical gloves; 17 000 gowns; 79 100 aprons, 2 610 heavy duty gloves, 239 400 natural rubber gloves, and 26 000 Nitrile Rubber Latex gloves.

- [45] The Minister makes the further averment that the Eastern Cape's Health Superintendent-General has issued Guidelines setting out what PPE each category of employee ought to be issued with. He states that this indicates a directive that no employee be instructed or expected to work without appropriate PPE.

North West Province and the Western Cape

- [46] Despite citing the MECs for Health as respondents, the applicant makes no allegations relating to the Western Cape and North West Province.

South Africa in General

- [47] In his affidavit, the Minister of Health states that "there is in fact enough stock in the hospitals concern[ed], and if there is any shortage, it can be resolved easily". He also avers that "no individual working in the health sector is made to work without being provided with the necessary and requisite PPE. What is necessary and required is determined with reference to the WHO guidelines, and on the simple request of staff members."

Analysis of PPE shortage allegations

- [48] The applicant's allegations of PPE shortages in hospitals that unduly expose its members to COVID-19 infection weigh up poorly against the respondents' denials. It is apparent from the above, considering the inherent strength of the applicant's claims, many of which are hearsay or unsourced, as well as after applying the *Plascon Evans* rule to the totality of the evidence, that the applicant has not come close to establishing its central contention that, at the time it launched its application, there was a shortage of PPE at public health facilities warranting the relief it sought.

Meaningful engagement

[49] The applicant seeks a *mandamus* compelling the Minister of Health and the MECs to consult it on issues connected to the pandemic. A refusal or failure to consult in these circumstances may be bad social partnership or human resources but the applicant could point to no legal norm that was breached, assuming these respondents had refused to consult it. Factually too, it is far from proven that the applicant was denied the opportunity to be involved in discussions on the pandemic that it now seeks from the respondents by way of a *mandamus*. It is not necessary to traverse the opposing versions on this question in as much detail as with the dispute concerning PPE. It suffices to state that the respondents produced strong evidence that since the onset of the coronavirus crisis, they have engaged with the applicant and other trade unions on the issues raised by the applicant, and intend to continue to do so.

Directing the Third Respondent to exercise his powers in terms of OHSA

[50] The relief sought by the applicant is misconceived in fact and law. It is evident from the founding affidavit that it is not the applicant's case that the Minister of Labour has not done anything that is expected in terms of the Act. The case in the founding affidavit is really against the other respondents and about seeking a meeting with the first respondent.

[51] In any event, it is clear from a reading of the provisions of the OHSA that the powers of the Minister can only be exercised in circumstances where the Minister is advised of hazards which threaten the health and safety of the employees, through complaints which would have been registered with Inspectors designated by the Minister in terms of section 28 of the OHSA and once all interested and affected parties have been afforded an opportunity to make representations in writing. According to the Minister, he received no such complaints or applications.

[52] In addition, in the case of *PSA obo members v Minister of Health and Others*,⁶ this court held that in so far as the OHSA is concerned s35(2) provides that the

⁶ [2019] 1 BLLR (LC) 71.

Labour Court is constituted as an appellate court in respect of decisions taken by the chief inspector in terms of s35(1) of the said Act. The court held further that it does not have the jurisdiction to directly enforce any of the general duties of the employer established by s 8 of the Act, as a court of first instance.

[53] The fourth to twelfth respondents' core functions in terms of service delivery is to provide health care for patients. Their staff are essential service providers who are exposed to health risks in providing these services, particularly during the Covid-19 pandemic. The third respondent can only exercise its discretion if these respondents have failed to take reasonable steps to minimise the risk of its frontline and support workers from being infected with the coronavirus. In the case of *Jobert v Buscor Limited*,⁷ the court held that an employer cannot be held liable for an employee who was injured on duty if such employer had taken reasonable care to prevent the risk of any illness or injuries at its workplace.

[54] As the facts demonstrate, no real evidence was provided to this court that these respondents are failing to take reasonable steps in minimising the risk of infection to their health workers and support staff working on the frontline against the coronavirus.

Interdicting disciplinary action

[55] Paragraph 4 of the notice of motion asked for an order that pending meaningful engagement with the applicant, its members shall not be compelled to render services without PPE and shall not be threatened or subjected to disciplinary measures for refusing to carry out functions without the appropriate PPE.

[56] No facts are cited regarding any employees who have been threatened with dismissals related to refusal to perform their duties due to a lack of PPE. The court cannot grant a global ruling that employers cannot take disciplinary action against NEHAWU's members who refuse to treat patients because in their opinion they do not have appropriate PPE. The relief sought is thus abstract and can be dismissed for this reason alone.

⁷ (2013/131160 [2016] ZAGPPHC (9 December 2016)).

Costs

- [57] It is true that the Labour Court is ordinarily reticent to award costs in employment disputes, guided by the interests of justice and equity. It may, at first glance seem that the applicant, having raised matters of life and death importance to its members specifically, and of interest to the public generally, should be all the more exempt from an adverse costs order. However, that assessment is, in my view, short-sighted and anachronistic in the present circumstances. Legal points aside, the applicant had a very poor factual basis to drag all the twelve respondents to court.
- [58] Indeed, a consideration of its allegations that the Minister and MECs had refused to consult with the union reveal that the conduct of its own officials likely played a far greater role in damaging the 'social partnership' it professes to display in seeking consultation. The insistence of meeting the Minister himself on or about 30 March 2020 and not 'only' the Director-General, if true, smacks of undue self-importance at the expense of finding solutions.
- [59] On the issue of PPE, while the Minister in his affidavit concedes that things are not moving at an ideal pace, the making of exaggerated claims based on speculation causes unnecessary stress and panic inside and outside the country, as loose assumptions about South Africa's readiness for Covid-19 can be made.
- [60] The Minister of Health pointed out that all the respondents are before the court at the instance of the applicant on an urgent basis, during a lockdown period, when the court has no jurisdiction to hear it. He states that the time and resources used to defend the Applicant's spurious claims "could and ought to have been put towards our efforts in addressing the Covid-19 outbreak. Instead, for two consecutive days each of the MECs and Heads of Department had to spend significant amount of time dealing with this application, time that they cannot afford as their services and time are required on the pressing issue of dealing with Covid-19.
- [61] In my view, under circumstances of national disaster, everyone is called upon, for the good of society as a whole, to co-operate in bringing the pandemic under

control. In short, a new value system on what constitutes acceptable behaviour has been thrust upon us all. This court is, of course, not in any position whatsoever to dictate that a spirit of co-operation *must* imbue how parties conduct themselves or express or advance their interests. But what the court can do is adjust the standard of what constitutes frivolous and vexatious conduct in litigation. In this way, those who elect to pursue obviously untenable legal points, use the court process as part of other power-plays, unnecessarily consumes the resources of their opponents or make allegations they cannot substantiate - know that they run the risk of a cost order thereby should they lose.

Benita Whitcher

Judge

REPRESENTATION:

For the Applicant:

Baloyi S SC, with Mosikili T,
instructed by Thaanyane
Attorneys

For the Third Respondent:

Werkmans Inc

For the Eleventh Respondent:

Kahanovitz S SC, with
Williams JL, instructed by
State Attorney, Cape Town

For the remaining Respondents:

Ngcukaitobi T SC, with Peer Y,
instructed by State Attorney,
Pretoria