

SOUTH AFRICA / JUDGMENT

Van Der Westhuizen v University of the Witwatersrand and Others (46152/2013) [2014] ZAGPJHC 52 (19 February 2014) [2014] ZAGPJHC 52

COURT

South Gauteng High Court, Johannesburg

BEFORE

Mashile

CASE / FILE NUMBER

46152/2013

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 46152/2013

DATE: 19 FEBRUARY 2014

In the matter between:

ANDRIES GERTHARDUS VAN DER WESTHUIZEN.....Applicant

And

THE UNIVERSITY OF THE WITWATERSRAND.....First Respondent

MEMBER OF THE EXECUTIVE COUNCIL OF THE

GAUTENG DEPARTMENT OF HEALTH.....Second Respondent

HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA.....Third Respondent

J U D G M E N T

MASHILE, J:

[1] This is an application launched by way of urgency in terms of Uniform Rule 6(12). The Applicant is asking the court to:

1.1 Declare that he has completed his 44 months of training time with the First Respondent;

1.2 Compel the First Respondent to complete and sign his application for registration with the Third Respondent within 5 days of the court granting the order that he seeks;

1.3 Granting him costs as at the scale between attorney and client.

- [2] The Applicant is a general medical practitioner having obtained his MBCHB degree from the University of the Free State in 2006. In 2010 he enrolled with the First Respondent in the Department of Obstetrics and Gynaecology to further his studies.
- [3] The Third Respondent is the governing body with which the Applicant is required to be registered prior to practicing as a qualified gynaecologist. To apply for registration with the Third Respondent, it is mandatory that the Applicant undergoes training at a certified academic department in a teaching hospital under the control of a university with faculty of health and sciences or medical school for a period of 48 months.
- [4] Charlotte Maxeke Academic Hospital is an accredited teaching hospital having been registered and recognized as such by the Second Respondent. The Applicant commenced his training with the First Respondent on 1 January 2010 and was therefore to complete on 31 December 2013.
- [5] As a post graduate medical student, the Applicant is in the employ of the Second Respondent and is accordingly bound by its terms and conditions of service, which are largely those contained in the Basic Conditions of Employment Act No. 25 of 1997.
- [6] The Applicant is also bound by the terms and conditions of the First Respondent that concern his area of speciality, obstetrics and gynaecology. These in turn are integrated with the regulations of the Third Respondent.
- [7] The Applicant is entitled to leave in terms of his conditions of service with the Second Respondent and this is regulated in accordance with the provisions of the Basic Conditions of Employment Act No. 25 of 1997. Similarly, in terms of the Third Respondent's regulations the Applicant is permitted to take four months of his 48 months of training as leave.
- [8] I have used the word, trainee/s to mean registrar/s in this judgment. In the event that the days taken by a trainee during his training go beyond the four months period, the training time will have to be extended by the number of leave days taken in excess. In terms of the First Respondent's regulations relating to leave, a trainee must apply for annual and study leaves in advance by the completion of relevant forms and have them authorized by the relevant official.
- [9] The Second Respondent applies sick leave policy as outlined in the Basic Conditions of Employment Act No. 25 of 1997. Thus, it was necessary to fill in a sick leave form and where relevant or required, attach the necessary documentation. It was therefore critical for the Second Respondent to notify the First Respondent of any leave taken by a trainee so that it could be captured and be of assistance when the trainee applies for registration with the Third Respondent.

- [10] The Applicant received a letter dated 29 October 2013 from the First Respondent on 30 October 2013 advising him that his training period with the First Respondent was to be extended to 31 March 2014 as a result of the number of sick leave days that he had taken in excess of the four months official leave. The First Respondent calculated the number of days taken in excess to be 57.
- [11] Initially the Applicant vehemently denied this and did not accept any documentary proof not signed by him and besides, he stated that he did not know their origins or who their authors were. It is apparent that when the matter was postponed sine dies on 20 December 2013, the date on which it first came before this court, the parties engaged each other in an attempt to settle their dispute.
- [12] The parties are again before this court having partially settled the matter in the sense that the Applicant has conceded that of the 57 days he acknowledges that he took 29 days in excess. However he is still resolute that other than as aforesaid he did not take any leave and wants the First Respondent to prove this. The effect is of course that the parties' dispute is now about the 28 days referred to above.
- [13] Prior to setting this matter down for the 4th of February 2014 as an urgent application, the parties agreed to extend the Applicant's

training period from 2 January to 31 March 2014. I assume that the extension is without prejudice since the Applicant has come before this court once again with the same issue albeit that with a significantly reduced number of days.

- [14] The issues to be determined by this court are whether or not:

14.1 This application should have been brought on urgent basis;

14.2 To admit the supplementary affidavit filed by the First Respondent;

14.3 The Applicant is required to still undergo training with the First Respondent for a further period of 28 days prior to the First Respondent completing the forms allowing him to register with the Third Respondent.

- [15] I will now turn to each of the three issues listed above.

URGENCY

- [16] It will be academic and fruitless to address the grounds of urgency that were for the launching of this application last year on 20 December 2013. It should suffice to state, however, that it did not seem urgent then and that it does not now. When this matter was first brought, the basis of urgency was that the Applicant was to take up new employment as a specialist medical practitioner on 1 January 2014. However, no proof of such new employment was provided. Moreover, the Applicant was prepared to postpone the application sine dies which suggested that the matter was not as urgent as it was made to sound.

- [17] The Applicant is again before this court with the same papers except that he has now filed a replying affidavit wherein he alleges that the matter persists to be urgent in that if he is right, he will be able to register with the Third Respondent, qualify as a specialist medical practitioner, apply for a new job at a higher salary scale and avoid the long hours of service with the Second Respondent, which will alleviate his heart condition from which he suffers.
- [18] The Applicant has worked for the Second Respondent for over four years with this heart condition. It is tremendously difficult to understand why all of a sudden his heart is unable to take the stress for a further period of 28 days when it has done so for four years already. Furthermore, he has failed to demonstrate that he will find employment in a private hospital and that he will not be subjected to the same long hours. His assertion therefore in this regard stands to be rejected.
- [19] The Applicant does not state that he has been offered an employment but thinks that he will upon qualification apply and be offered employment in the private sector. This cannot follow as a matter of course. The court has no proof whatsoever that his qualification as an obstetrician will be an automatic ticket to immediate employment. Again, the court must find that there is no merit for urgency in his argument.

WHETHER OR NOT TO ADMIT THE FIRST RESPONDENT'S SUPPLEMENTARY AFFIDAVIT

- [20] The Applicant has vigorously contended that the Respondent has failed to ask leave of this court to file the further affidavit. This is not entirely true because Dr Jackson deals with this very question in Paragraph 7 of the supplementary affidavit. She states that the supplementary affidavit being a further one, she seeks this court's indulgence to have it admitted into evidence
- [21] She states further that the admittance of the affidavit into evidence will not result in the Applicant suffering any prejudice because copies of the duty rosters and the human resources print outs in question were in any event furnished to him on 13 January 2014
- [22] In addition she argues that the Applicant has a choice whether or not to reply to the Respondent's further affidavit in case he holds the view that he is prejudiced. The court did extend that invitation to the Applicant but he felt that it would not be necessary to respond to the supplementary affidavit.
- [23] The principle in this respect is that a court has discretion whether to do so or not. Such discretion is to be exercised based on what is just and equitable in the circumstances. It will therefore be in the pursuit of justice and fairness that all the information concerning this matter be placed before this Court. See in this regard, *TWEE JONGE GEZELLEN (PTY) LTD AND ANOTHER v LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA t/a THE LAND BANK, AND ANOTHER* 2011 (3) SA 1 (CC).

- [24] The authorities would have obtained or engaged the profession when prescribing the 44 months training period. The objective of involving the profession being to exercise caution because the public will entrust their lives to these newly qualified medical officers. For that reason, I do not think that it is desirable to allow any transgressions, especially ones that the Applicant seeks to justify on technical grounds, to thwart the unveiling of what could be the truth.
- [25] Against that background, I hold the view that the First Respondent has a legal duty to ascertain that trainees who leave the institution are properly qualified and fit to handle health matters that often concern the lives of the public. It is public knowledge that litigation around medical negligence has skyrocketed at the cost of the tax payer. The court, would in view of the national significance of this matter, seize the opportunity to exercise its discretion and allow the admission of the further affidavit into evidence to ensure that all the issues can be properly ventilated such that the parties can have a fair and just outcome.

WHETHER OR NOT THE APPLICANT IS REQUIRED TO STILL UNDERGO TRAINING WITH THE FIRST RESPONDENT FOR A FURTHER PERIOD OF 28 DAYS PRIOR TO THE FIRST RESPONDENT COMPLETING THE FORMS ALLOWING HIM TO REGISTER WITH THE THIRD RESPONDENT

- [26] The admission of the supplementary affidavit into evidence necessarily means that the court is prepared to entertain the merits despite its finding that the matter was not at all urgent. The accredited academic hospitals at which the Applicant was employed and carried out his training have a particular system by which they capture the leaves of registrars. A detailed exposition of how it works is set out in the supplementary affidavit of Dr Jackson a summary of which follows below:

26.1 The duty rosters and the HR persal system are official records utilised by the Gauteng Department of Health at all its hospitals;

26.2 The Applicant has been with the First Respondent as a trainee and employee of the Second Respondent since January 2010 and is therefore acquainted with the procedures and processes. The trainees at each hospital would during the carrying out of their ordinary duties complete the necessary records with information;

26.3 The drawing up of a duty roster at each academic hospital is the responsibility of a co-ordinator who is a registrar. The co-ordinator records the duties of the trainees for the particular month. The duty roster reflects both the normal duties and on-call duties. At the bottom-end of the duty roster also appears the names of trainees who are on leave and the number of days that they have taken;

26.4 Dr Jackson confirms that she was responsible for drawing up of the duty rosters at Charlotte Maxeke. She then continues to aver that Dr Mankupane was the responsible co-ordinator at Chris Hani Baragwanath Hospital;

26.5 In confirmation of the above averment by Dr Jackson, Dr Mankupane deposed to an affidavit confirming that he was responsible for the drawing up of the duty rosters at Chris Hani Baragwanath Hospital;

26.6 Dr Fuziwe Dlakavu was the responsible co-ordinator for drawing up the duty rosters at Rahima Moosa Hospital. Like Dr Mankupane, Dr Dlakavu, also signed a confirmatory affidavit verifying the claim by Dr Jackson;

26.7 Dr Jackson states that she then contacted Dr Mankupane and Dr Dlakavu. Both of them confirmed to her that the information contained in the duty rosters came from their respective hospitals and that it is correct;

26.8 Every month, trainees are allowed to submit requests for leave to the co-ordinator. If these requests are reasonable and the relevant time off feasible, they are granted;

26.9 Once so granted, the co-ordinator will draw up the duty roster. The duty roster and the relevant trainee's name would not appear for any duties for the duration of their leave. A signed leave form would then have to be submitted for approval before the leave is taken;

26.10 When a leave form has been filled out, it is first signed by the trainee applying for the leave. It will then need to be signed by the registrar's supervisor who is usually the co-ordinator, and then by the Head of the Department of the hospital at which the trainee is working at the time;

26.11 This is not necessarily the hospital to which the registrar is appointed, unless he is working there at the time;

26.12 Thereafter, the leave form is sent to the HR department of the hospital where the registrar is working at the time. The leave form is checked and captured on the HR persal system by an HR employee who usually signs and dates the leave form;

26.13 That period of leave will then appear on the HR system. The First Respondent places reliance on the information recorded in the HR persal system to show leave days taken by the trainees;

26.14 The Applicant would have had to submit leave forms at the hospital where he was working at the time of requesting the leave. The leave form would then be despatched to the hospital at which the Applicant is employed;

26.15 The HR system is a central system to which all the training hospitals are linked. If a leave form has been captured on the HR system at the hospital where the registrar is working at the time, then the leave would also reflect on the HR system at hospital where he is employed.

[27] The First Respondent states that the Applicant's leave forms should have been sent to the HR Department at Charlotte Maxeke by the HR employees at the hospital at which he was employed. It appears that this was not done. The reason for this could have either been that leave forms were not completed or that the leave forms were lost or misplaced.

- [28] Dr Jackson states that she personally raised the matter with the Human Resources Department at Charlotte Maxeke Johannesburg Hospital. Ms Bongiwe Kajana, the Human Resources supervisor, informed her that the leave forms for the relevant period either do not exist or cannot be found. This is also true even of Chris Hani Baragwanath and Rahima Moosa Hospitals.
- [29] The Applicant vehemently contends that the duty rosters and the HR print-outs do not serve as conclusive proof of the amount of leave days taken by him. The Applicant maintains that he does not accept the duty rosters or the computer print-outs of the Human Resources System as conclusive proof of the amount of leave days taken by him.
- [30] The First Respondent argues that the Applicant does not necessarily contest that he took leave on the days concerned. The First Respondent, further asserts, that the Applicant claims that the First Respondent is unable to conclusively prove that the Applicant did take leave for the number of days in dispute. This is not true as Counsel for the Applicant was able to satisfactorily demonstrate that the Applicant in fact denies ever taking leave on the days alleged.
- [31] The leave system utilised by the First respondent has its limitations in that trainees would be granted leave and yet fail to complete leave forms. The leave regulations were then introduced as a curative measure. That notwithstanding, the practice persists.
- [32] In January 2013 while working at Rahima Moosa Hospital, the Applicant himself is said to have taken leave and failed to submit a leave form. Dr Jackson became aware of this when she was perusing the duty roster trying to determine how many leave days the Applicant had taken. She discovered that the Applicant had taken leave from 7 to 21 January 2013, which translated into 11 working days. The Applicant had, however, not submitted a leave form.
- [33] Dr Jackson took up the issue with the Applicant on a number of occasions and requested him to submit a leave form for the leave taken. He was not co-operative. It was only after Dr Jackson herself had completed the leave form on his behalf that he signed but this was after a period of approximately 10 months.
- [34] It appears that the Applicant would not have completed the leave form had Dr Jackson not done so on his behalf. This would therefore have not been captured in the system. It is for that reason, that one cannot rely only on a complete set of leave documents as though the system is free of flaws, which are often, deliberately or not, exploited by trainees.
- [35] The Applicant has also contended that the duty rosters are pieces of hearsay evidence because they do not state their origins or who drew them up and for what purpose. Once the court has admitted the supplementary affidavit together with the accompanying confirmatory affidavits, the hearsay evidence argument fades. Dr Jackson states that she was the responsible person for the drawing up of the duty rosters at Charlotte maxeke Hospital. She then continues to aver who the other responsible parties were at the other hospitals. The affected individuals have signed confirmatory affidavits to that effect.

- [36] The Applicant's Counsel initially argued that the deponents to the confirmatory affidavits did not categorically state that they were responsible for the drawing up of the rosters. The position is that Dr Jackson's states in her affidavit that she was responsible for the drawing up of the duty rosters at charlotte maxeke Hospital and then continues to mention who the other responsible persons were at the other hospitals.
- [37] In my view this elevates the evidence from being inadmissible to one that is properly backed-up and therefore acceptable
- [38] The argument of the Applicant that the duty rosters are hear-say evidence having been cured by the supplementary affidavit together with annexures and accepted into evidence, it follows that the 28 day period remains and that the Applicant must continue with his training for a further 28 days until its expiry.
- [39] The result is that an order is made as follows:

The application is dismissed with costs.

B MASHILE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION JOHANNESBURG

Date of hearing: 4 February 2014

Date of judgment: 19 February 2014

Counsel for the Applicant: C Van der Merwe

Instructed by Senekal Simmonds Inc.

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Instructed by Cheadle Thompson & Hayson Inc.

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