

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 914/19

In the matter between:

KASIRYE IMAGING (PTY) LTD

Applicant

and

**COMMISSON FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

V.E MOYO N.O

Second Respondent

MOSODI JOHANNES PUTUKA

Third Respondent

Heard: 6 March 2024

Delivered: 23 April 2024

JUDGMENT

NAIDOO, AJ

Introduction

[1] The applicant seeks to review and set aside an award, dated 1 April 2019. In terms of the award, the second respondent found that the third respondent's dismissal was substantively and procedurally unfair and awarded him 10 months compensation, equating to R320 000.00.

[2] The applicant operates a radiology department out of an emergency hospital. Its operations run on a 24-hour basis and mainly attend to patients involved in motor

vehicle collisions.

[3] The third respondent was employed by the applicant as a radiographer and was scheduled to work from 31 December 2018 to 4 January 2019. The third respondent did not attend work during this period and was subsequently dismissed.

[4] Having received an adverse arbitration award, the applicant, on 13 May 2019, filed its review application and on 1 August 2019, served the third respondent the record, together with its supplementary affidavit. Important to this matter is the fact that the applicant served the two affidavits as well as the record, on the third respondent, by way of emails. The applicant's representative has put up a service affidavit and has attached the emails in question, together with a delivery receipt.

[5] On 19 September 2019, the applicant's representative indexed and paginated the court file and the review application was set down on the unopposed roll for 21 July 2020.

[6] On 16 July 2020, the third respondent's attorney filed a notice of intention to oppose the review application.

[7] On 20 July 2020, the third respondent brought an application seeking to remove the review application from the unopposed roll and place it on the opposed roll and to direct the applicant to file the record and its supplementary affidavit, within 10 days of the order being granted.

[8] In his founding affidavit to the removal application, the third respondent submits that while he did receive the applicant's founding affidavit, heads of argument and practice note, he had not received the record or the applicant's supplementary affidavit.

[9] The applicant filed its answering affidavit in respect of the removal application on the same day, whereafter the third respondent filed his replying affidavit on 21 July 2020.

[10] On 21 July 2020, the unopposed review application, as well as the third respondent's removal application, came before Patel AJ, who, in terms of an order dated 27 August 2020, held that:

'1. The matter is removed from the unopposed roll and placed on the opposed roll.

2. The issue the Applicant raises in respect of the Third Respondent's filings of the pleadings shall be dealt with in their response to the Third Respondent's answering affidavit.'

[11] The applicant has, subsequent to Patel AJ's order, requested that its review application be enrolled on two different occasions.

[12] There is no dispute that the third respondent did receive the notice of set down in respect of the hearing on 6 March 2024, as well as the notice informing the parties of the change of venue. These notices have all been sent to him, by this Court, using the very same email address the applicant used when serving the record and supplementary affidavit on the third respondent.

[13] On 6 March 2024, the review application came before this Court. Initially, neither the third respondent nor his representative attended the proceedings which prompted me to continue to hear the application in default. Mr Berry, a member of Guardian Employers Organisation, represented the applicant and had just completed arguing the applicant's second ground on review when Mr Baloyi presented himself in court and entered the third respondent's opposition to the review application being heard.

[14] Mr Baloyi placed the very same removal application brought by the third respondent before Patel AJ and advised me that to date, the third respondent had not yet received the record or the applicant's supplementary affidavit and thus the matter was not ripe for hearing.

[15] Mr Baloyi confirmed that he was not seeking a postponement, but rather 'direction' from this Court by way of directing the applicant to file the record and

supplementary affidavit on a certain date and the third respondent to file his answering affidavit by a certain date.

[16] I adjourned proceedings and issued the following directive:

‘1. Parties are directed to reduce their respective arguments (including the respective relief sought today), as presented at Court on 6 March 2024; to writing and where necessary to attach documents relied upon, other than those documents submitted to Court on even date.

2. Parties are further directed to address this Court in respect of all three of the following:

2.1. Does the Court have the authority to dismiss the third respondent’s opposition to the review application, for lack of diligently pursuing same?

2.2. Can the Court *mero motu* raise and rely on the aforementioned authority? and

2.3. Under the circumstances of this case, in particular from the period immediately leading up to the hearing of this matter in July 2020, to date hereof; why should this Court not dismiss the third respondent’s opposition for failing to diligently pursue same?’

[17] This Court thanks both Mr Baloyi and Mr Berry for timeously delivering their respective submissions.

Evaluation

[18] Prior to addressing the queries recorded in the directive, it appears that much of the third respondent’s submissions related to the fact that he, to date, had not received the record or the applicant’s supplementary affidavit. Accordingly, the review application ought not to proceed.

[19] Mr Baloyi referred to various authorities as to why the applicant’s service affidavit was not in accordance with the Practice Manual¹ and other authorities which

¹ Practice Manual of the Labour Court of South Africa, effective 1 April 2013.

speak to the fact that when there is no service, or proper service of a record and/or supplementary affidavit; the need for a respondent to file an answering affidavit does not arise.

[20] The issues which Mr Baloyi raised were or ought to have been addressed in the removal application before Patel AJ. Once Patel AJ made an order, this Court had no authority to revisit the very same issue. Stated otherwise, the issue of the third respondent not receiving the record or the applicant's supplementary affidavit, was the sole reason why the third respondent brought the removal application and requested, as per his notice of motion, that the application be directed to serve on the third respondent the record and supplementary affidavit, within 10 days of the order being granted.

[21] Before me, Mr Baloyi couched his argument as a request for this Court to give direction by determining a date for the applicant to serve the third respondent with the outstanding record and affidavit, which as mentioned, falls squarely within what the third respondent sought in his notice of motion to the removal application which served before Patel AJ.

[22] To the extent, the third respondent sought clarity in respect of Patel AJ's order or took the view that the order did not address or adequately address his prayers; it was always open for the third respondent to have, on application, applied to vary Patel AJ's order in terms of s165(b) of the Labour Relations Act² (LRA), alternatively Rule 16A of this Court's Rules³. What the third respondent cannot do, is to rely on the removal application before Patel AJ, to persuade this Court to grant the very same order which served before Patel AJ and which Patel AJ dealt with.

[23] Mr Baloyi placed much emphasis on the argument that the Registrar, when setting down the matter for 6 March 2024, did so on the unopposed roll, which was in conflict with Patel AJ's order. I do not understand what the legal consequence to this argument is. The applicant's two requests for the matter to be enrolled was made at

² Act 66 of 1995, as amended.

³ GN 1665 of 14 October 1996: Rules for the conduct of proceedings in the Labour Court.

a time when the third respondent had only filed a notice to oppose the review application without filing any opposing affidavit.

[24] Having made this point and in the absence of Mr Baloyi seeking a postponement, nothing prevents this Court from hearing the review application on an unopposed basis.

[25] Assuming this approach is incorrect, the consequence pursuant to this approach is nevertheless the same when addressing the queries recorded in the directive.

[26] It is trite that this Court has the inherent power to dismiss a review application on account of the applicant's undue delay in furthering same.⁴

[27] In *Ferreira v Tyre Manufacturers Bargaining Council & others*⁵ the Court stated that:

'... this court's power to dismiss referrals and applications for lack of diligence on the part of applicants in pursuing their matters is not derived from the rules of court, as such. Rule 11 is merely a convenient procedural vehicle for bringing an application before court for consideration. The power to dismiss matters is a power that the court exercises in the course of exercising its own inherent powers as a High Court.'

[28] I see no reason why this principle should not likewise apply to a respondent, on account of their inaction in opposing a review application.

[29] This is more so, when one has regard to a primary purpose of the LRA, as recorded in s1(d)(iv). I cannot see why this Court, under appropriate circumstances, cannot raise the issue of a respondent's inaction with the possibility of their defence being dismissed and request parties to address the court on this very issue. I venture to say that under certain circumstances, it would be remiss of this Court not to *mero*

⁴ See *Solidarity & others v Eskom Holdings Ltd* (2008) 29 ILJ 1450 (LAC); [2008] JOL 21489 (LAC) at paras 38 to 39.

⁵ (2013) 34 ILJ 364 (LC); [2012] ZALCPE 8 at para 13.

motu raise this very issue.

[30] It is clear that the LRA places a high premium on the speedy resolution of labour disputes, and in particular, a review application, which by its nature is urgent.⁶

[31] On the facts before the Court, it is clear that the third respondent has done absolutely nothing to oppose the review application from 21 July 2020 to 6 March 2024. For a period of nearly 4 years, the third respondent, in an attempt to obtain the record and applicant's supplementary affidavit, has not sought to vary Patel AJ's order, not contacted the applicant's representative seeking the record or supplementary affidavit post Patel AJ's order and perhaps more practically, not retrieved the record and supplementary affidavit from the court file.

[32] Instead of pursuing any one of the pragmatic approaches listed, the third respondent comes to court on 21 July 2020, complains that he did not receive the record and supplementary affidavit, successfully makes an application to remove the matter from the roll and then does nothing for nearly 4 years, just to come to court on 6 March 2024 and request, what in essence, is the very same outcome as what was recorded in his removal application in 2020.

[33] The third respondent's conduct flies in the face of s1(d)(v) and understandably is prejudicial to the applicant, as stated by Mr Berry.

[34] On the issue of service of the record and supplementary affidavit, Mr Baloyi stated that it is not the third respondent's case that the applicant did not serve the aforementioned documents on him, rather the third respondent did not receive same. It is however intriguing how the third respondent received all other documents both from the applicant and this Court when using the very same email address, but, for reasons which cannot be explained, did not receive the record and supplementary affidavit.

⁶ The Court in *Inxuba Yethemba Local Municipality v Msweli & others* (2024) 45 ILJ 548 (LC); [2023] ZALCPE 23 at para 12 stated: "This court has accepted that a review application is by its nature an urgent application and that it requires prosecution with diligence and urgency".

[35] For reasons advanced I find that due to the third respondent's tardy and dilatory conduct and inaction, which he was the sole author of, his opposition to the review application, *as per* his notice of intention to oppose the review application; stands to be dismissed and the review application ought to be considered on an unopposed basis.

[36] Returning to the applicant's review application, as earlier stated the applicant had begun its argument prior to Mr Baloyi entering. The applicant's first ground on review is capable of disposing of this matter and hence little purpose would be served if this matter was to be re-enrolled on the unopposed roll.

[37] The applicant's first ground on review was that the second respondent refused to accept the applicant's bundle of documents at arbitration due to the fact that the bundle intended to be use, was not indexed and paginated.

[38] For purposes of the review application, this Court had sight of the documents the applicant attempted to introduce at arbitration, as annexed to its founding affidavit to the review application and consider these documents to be material to the dispute that served before the second respondent.

[39] While it is accepted that an arbitrator has a discretion to conduct an arbitration in a manner they deem appropriate, such discretion cannot extend to instances, as is in this case, where a party's right to a fair hearing is unduly infringed. The consequence of the second respondent's approach was that the applicant was not afforded a proper opportunity to be heard and hence the second respondent committed a reviewable act.

[40] This Court sitting as a review court, is not in a position to examine the applicant's documents in order to determine whether the third respondent's dismissal was fair or not. It would be for an arbitrator to consider when deciding the fairness of the third respondent's dismissal. For this reason, the matter ought to be remitted to the first respondent. Having made this finding, it is not necessary for the Court to consider the applicant's remaining grounds on review.

Order

1. The applicant's review application is heard on an unopposed basis.
2. The second respondent's award is reviewed and set aside.
3. The third respondent's dispute is remitted to the first respondent to be considered *de novo* before an arbitrator, other than the second respondent.
4. There is no order as to costs.

M. Naidoo

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr Berry official from GEO

Instructed by:

For the Respondent: Mr Baloyi of MM Baloyi Attorneys

Instructed by: