

Not reportable

Not of any interest to other judges

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

CASE NO: JR281/10

DATE: 2010-09-08

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In the matter between

CITY POWER JOHANNESBURG (PTY) LTD

Applicant

and

NDELA, ZIMELE B

Respondent

JUDGMENT

20 VAN NIEKERK, J:

This is a matter that was heard yesterday. It is an application to review and set aside an arbitration award made by the second respondent. The application was set down on what is referred to as the unopposed roll. When the matter was called, the third respondent's legal representative appeared and raised a number of points *in limine*,

in circumstances where on 24 March of this year, a notice for intention to oppose the application was filed, and on 13 August 2010, a notice of appointment was filed by the third respondent's present attorneys of record.

I indicated after hearing argument that I would make a ruling during the course of this morning in respect of the points raised.

Before turning to those points and my ruling in that regard, it ought to be recorded that on 31 August this year, the third respondent filed an answering affidavit, it being common cause that the time period
10 for the filing of such an affidavit expired on 24 July 2010. The answering affidavit was therefore filed more than a month late, and was not accompanied by any application for condonation for the late filing.

The technical points as I understood them were as follows. First, the application is fatally defective, in that the applicant's attorney of record signed the founding affidavit. Now as I understood the argument raised by Mr Scholtz (who appeared for the third respondent) the Act requires a 'party' to a dispute to bring an application and this necessarily requires that a party to the dispute must sign the founding affidavit.

20 There is no merit in this contention. The applicant in this matter is a corporate entity and that being so, it is entitled to litigate in this court, having authorised a person to act on its behalf and to sign all necessary documentation on its behalf. The fact that the applicant's instructing attorney was so authorised is neither here nor there.

Mr. Scholtz also attacked the resolution filed by the applicant

As I understood the argument, he submitted that the resolution was defective in the sense that it was signed prior to the lodging of this application, but after a case number had been obtained.

Similarly, there is no merit in this contention. It follows that the applicant, being a corporate entity, was required to adopt the resolution in order to institute these proceedings. The resolution was dated 3 March 2010, the Notice of Motion signed on 11 March 2010 and the application filed the next day, 12 March 2010. In this court, it is common practice to request a case number prior to lodging an application. All of
10 these events were preceded by the resolution, and were validly conducted.

In these circumstances, there is no question that the resolution is proper, that it was properly signed, and that the applicant properly initiated these proceedings and properly authorised the applicant's attorney of record (who incidentally had personal knowledge of the arbitration proceedings under review) to sign the necessary affidavits on behalf of the applicant.

The third respondent appears to have confused the issue of *locus standi* with authority. Having regard to the documentation before
20 me, there is no question that the initiation of these proceedings was properly authorised and that the signature of the founding affidavit by Mr Singh was effected under the necessary authority, that being the resolution that preceded signature of the affidavit and the filing of this application.

The third point *in limine*, as I understood it, was that the

application was fatally defective in the sense that the applicant had not complied with the provisions of Rule 7(A)(6) and (8), which requires a full record of the proceedings under review to be filed in this court. The third respondent claims that there were a number of documents which were not filed, including the certificate of outcome, on which it places some importance.

What this contention overlooks is the fact that the Rule requires an applicant to file only a copy of the record or a portion of a copy of the record that is relevant to the review proceedings. Now if an applicant
10 files only a portion of the record and it subsequently transpires that the review in court is faced with an incomplete record, that is the matter that the applicant will have to deal with in due course and if necessary, suffer the consequences of an adverse costs order. In the present circumstances, the applicant has filed a record that substantially complies with the Rule. In any event, I fail to see what significance the documents alluded to by the third respondent have in these proceedings.; there was certainly no case made out that their omission was fatal. As I have already indicated, the applicant files such portions of the record as it does, at its risk - this is not a matter that goes to the
20 question of whether or not the application is fatally defective.

Finally, the third respondent contended that the matter was improperly enrolled. I understood the argument to be that the matter, having been opposed, ought to have been set down on the opposed motion roll.

There is no merit in this contention and despite reference by Mr

Scholtz to authority that appears to suggest that when an application is opposed (at least in the sense of a notice of intention to oppose having been filed) it nonetheless remains necessary for the matter to be enrolled as an opposed application, even if the respondent has filed no answering affidavit.

There is no support for this view in either the Act or the Rules. Neither makes reference to motion court in the sense of an opposed Motion Court or an unopposed Motion Court, nor is there any reference to opposed and unopposed rolls. The fact of the matter is that this
10 application was enrolled for hearing, and it is incumbent on the Court to deal with the matter on that basis.

In any event, it seems to me that where a notice of intention to oppose is filed and the respondent in due course fails to file an Answering Affidavit, the Court is entitled to treat the matter as unopposed. This is particularly so where an Answering Affidavit is filed out of time without any application for condonation, because in those circumstances, the affidavit is not properly before the Court.

In summary : there is no merit in any of the points *in limine* raised by the third respondent, all of which represent an attempt to
20 avoid the consequences of a failure to file an answering affidavit timeously, or with a proper application for condonation.

I was inclined, for these reasons, to treat the matter as unopposed and make a ruling on that basis. However, Mr Khumalo, who appeared for the applicant, indicated that the applicant's attitude was that if the third respondent wished to file an application for

condonation in due course, it ought to be permitted to do so.

That is the nature of the order I intend to make. What remains is the question of costs. It seems to me that in circumstances where a respondent such as a third respondent in these proceedings has failed to comply with the Rule by filing an answering affidavit within the specified time limit without an application for condonation, thereby occasioning the postponement of the matter, that it ought to be liable for the costs of that postponement.

For these reasons I make the following order:

- 10 1. The application is postponed *sine die*.
2. The third respondent is to file an application for the condonation of the late filing of his Answering Affidavit, within seven days of the date of this order.
3. The third respondent is to pay the wasted costs occasioned by the respondent.