



REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no.: JR 2848/2010

In the matter between

IDWU obo MPUTI BIBBY

Applicant

And

CCMA

First Respondent

MXOLISI MANTSHULE

Second Respondent

SHUMBA VALLEY LODGE

Third Respondent

Heard: 1 December 2015

Delivered: 4 December 2015

JUDGMENT

VAN NIEKERK J

- [1] This matter has a long and sorry history. On 10 October 2010, the second respondent (the commissioner) had issued a jurisdictional ruling in which he held that the first respondent, the CCMA, had no jurisdiction to entertain an unfair dismissal dispute referred by the applicant on 7 September 2010. The basis for the ruling was that the applicant had concluded an agreement with the third respondent in terms of which she had settled the dispute between them and in effect, waived any right to refer a dispute to the CCMA. On or about 15 October 2010, the applicant filed an application to review and set aside a settlement agreement concluded on 30 August 2010. The case then made was that despite the wording of the agreement, which indicated a full and final settlement, the agreement was signed on the basis of 'justus error' (sic). It is on some significance that the applicant sought to review was the settlement agreement, and not the commissioner's ruling.
- [2] On 8 July 2013, the applicant filed a notice of representation in terms of which she advised that she had joined the United Chemical Industries, Mining, Electrical, State, Health and Aligned Workers Union and that service of all documents would be accepted at the union's address. There is no proof of service of that notice on the third respondent, but the fax number indicated on the document is 011 572 1565. That telephone number is incorrect – documents in relation to the CCMA hearing had been sent to 086 572 1565. I have no doubt that the third respondent did not receive the notice indicating the change of representative, or the change in address for service.
- [3] Not much appears to have transpired until 4 December 2013 when this court issued an order to the effect that since the CCMA and the commissioner had not been cited as respondents the matter ought to be removed from the roll to enable the applicant to file an amended application to review and set aside the

commissioner's ruling. The notice of set down in respect of those proceedings was addressed to fax number 011 572 1565, the incorrect number.

- [4] On 14 January 2014 the applicant filed an amended application in which he sought to have the commissioner's ruling reviewed and set aside, the dismissal of the applicant to be declared unfair, payment of compensation in a maximum amount, and costs. During the course of the present hearing, Mr Ngubane, who appeared for the applicant, conceded that only the first and the last of these prayers were competent.
- [5] I raised with Mr. Ngubane the issue of the service of the application. He drew to my attention a service affidavit and copies of telefax transmission reports. The telefax transmission reports indicate that six pages were telefaxed to the destination noted only as 'Andy young' at 15:41 on 3 August 2014. Mr Ngubane submitted that Mr Young was the general manager of the third respondent and that the telefax had been addressed to him in that capacity. The second fax transmission indicates what appears to be service on the CCMA at 14:09 on 17 June 2014. The transmissions are obviously generated by different telefax machines. In the affidavit filed in terms of rule 4(2) (b) in support of proof of service, the deponent, Mr Ngubane, avers that he served the notice of motion (the reference to affidavits and annexures has been struck out of the pro forma affidavit) at 15:45 on 3 August 2014. He avers further that the fax was sent to fax number 0865721565 and that Mr Young personally confirmed receipt of the entire transmission on the same date.
- [6] The affidavit filed in support of service was commissioned on 24 July 2014, 10 days before the day on which the documents were said to have been served. When this anomaly was put to Mr Ngubane, he had no explanation as to how he had come to sign an affidavit in these circumstances. Mr Ngubane could also not explain why the application had been served on the respondent parties six months and more after the application was filed in this court. The Rules of this

court require that an application be served on all parties prior to filing (see rule 4).

- [7] There is a further issue in relation to service that is of some concern. On 11 June 2011, the third respondent's representative, an employers' organisation, had addressed a letter to the applicant's then union requesting that all papers in the matter should be addressed to the employers' organisation at PO Box 102 Modderfontein 1645. None of the papers served by the applicant have been served on that address.
- [8] I put to Mr Ngubane that in all probability, these proceedings had been conducted in the absence of any proper service on the third respondent and that it was unlikely that the third respondent was aware of them. I did not understand Mr Ngubane seriously to contest this proposition.
- [9] Rule 7 requires an application to be brought in substantial compliance with the provided form on notice to all persons interested in the application. The rule also requires the application to be delivered. The definition of deliver in rule 1 contemplates that the applicant serve the application on other parties and file it with the registrar. In the present instance, the application was clearly not brought on notice to all parties who have an interest in the in the application, nor was it served on those parties before it was filed with the registrar.
- [10] In *Mbatha v Lyster NO & others* [2000] 7 BLLR 795 (LC), Basson J said the following:
- [19] If the application is not duly filed with the Registrar and is merely served, such an application is inherently defective. The same principle has to apply where an application is merely filed but not served on the other parties. An application is for the same reason inherently defective as it is not "delivered" as is required by the Rules. Furthermore, it is clear that such application is not brought "on notice" as is required in terms of the provisions of section 33 (1) of the Arbitration Act and, more importantly, rule 7 (1) of the Rules of this court.

[20] The logic behind these rules and statutory provisions, it must be reiterated, is to bring finality to and to expedite arbitration proceedings...

[11] The application is accordingly inherently defective on account first of the applicant's failure to effect proper service and filing of the amended notice of motion and supporting affidavit and secondly, on account of the applicant's failure to provide proper proof of service of the application. In this regard, I make no specific finding of impropriety in relation to dating of the affidavit proffered in support of proof of service, it is sufficient for present purposes to find that the affidavit does not constitute proof of service of the application by telefax, nor does it constitute proof of any confirmation of receipt of the telefax by any representative of the respondent.

[12] There is a further reason why the application stands to be dismissed, one related to the statutory purpose of expeditious dispute resolution alluded to by Basson J. This matter has its roots in a dismissal that occurred in August 2010, more than five years ago. The Practice Manual notes that review applications are by their very nature urgent, and ought to be pursued with due diligence. The manner in which the present application has been handled displays nothing less than a profound ineptness and a manifest failure to prosecute the proceedings with due diligence.

For the above reasons, I make the following order:

1. The application is dismissed.

ANDRÉ VAN NIEKERK
JUDGE OF THE LABOUR

COURT

APPEARANCES

For the Applicant: Union Official

Labour Court