



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR1099/12

In the matter between:

THABANI MOYO

Applicant

And

CCMA

First Respondent

COMMISSIONER KERRY DRISCOLL

Second Respondent

EXECUJET (PTY) LTD

Third Respondent

MARIANNA MULLER

Fourth Respondent

CINDY ROBERTSON

Fifth Respondent

Date Heard: 28 January 2015

Date Delivered: 26 March 2015

JUDGMENT

WHITCHER J

- [1] On 24 May 2014 the Applicant filed an application to review the arbitration award granted against him by the Second Respondent on 3 April 2012 under CCMA case number GAJB171/05. When this matter came before this court on 28 January 2015 the Applicant contended that the only issue for determination is Third Respondent's condonation application for the late filing of its answering affidavit. I pointed out to him that the review application was set for hearing as well.
- [2] The answering affidavit was filed one day late and served 31 days late on the Applicant because it was erroneously sent to his former service address. I am satisfied that the Third Respondent has provided a sufficient explanation for the delay in filing its answering affidavit. On this basis alone, it should be entitled to an order condoning its failure to file the affidavit timeously. The prospects of success, an important factor in considering an application for condonation, are dealt with in the context of the Third Respondent's application to dismiss the review application.
- [3] The Third Respondent opposes the review on the following basis:
- (i) The Applicant's review application revolves around the evidence allegedly led at the arbitration, the evaluation of this evidence and the conduct of the proceedings but, to date, he has failed without good reason, to file a complete record of the arbitration proceedings. There is no application before the court which demonstrates and proves with reference to the record the alleged irregularities.
 - (ii) The Applicant's founding affidavit does not set out material facts clearly and concisely.
 - (iii) The Second Respondent did not commit any reviewable irregularities.
 - (iv) The arbitration proceedings under review arose from a court order which referred the Applicant's dispute to arbitration. The Applicant has made application to rescind that court order. The Third Respondent contends that the Applicant's rescission and review applications are mutually destructive and cannot logically co-exist.

- [4] The context of the dispute and the relief sought is apparent from the chronology and time periods of the events which transpired.
- [5] In January 2005 the Applicant referred a dispute concerning an alleged unfair discrimination claim in terms of section 10 of the EEA to the CCMA. In addition, an ordinary unfair dismissal claim was also referred.
- [6] In a signed agreement, the parties consented to conferring jurisdiction on the CCMA to arbitrate the unfair discrimination claim.
- [7] However, at the arbitration proceedings, the Applicant amended his dismissal dispute to an automatically unfair dismissal claim. The arbitrator, on application by the Third Respondent, ruled that the CCMA lacked jurisdiction to determine the automatically unfair dismissal claim. The Applicant made application to review and set aside this ruling, which application was dismissed on 13 December 2006.
- [8] The Applicant then purported to refer an unfair discrimination claim to the Labour Court. However his referral was dismissed for *inter alia* a failure to file a statement of claim and a default appearance. The Applicant sought to rescind and appeal these decisions. On 30 August 2011 this Court directed that Applicant's case be referred to the CCMA for arbitration on the basis of the signed arbitration agreement. The Applicant made application to rescind this order but also proceeded with the arbitration.
- [9] The arbitration was held over four days (6 and 7 February and 12 and 13 March 2012) and resulted in an award of approximately 40 pages. The award includes a detailed recording of the evidence led by the parties at the arbitration.
- [10] On 24 May 2012, the Applicant filed this review application against the award. The Applicant also proceeded with his application to rescind the judgment which directed his dispute be arbitrated by the CCMA. The Applicant has filed various further applications in pursuit of this rescission application.

- [12] In respect of the review application, the CCMA filed the record on 28 June 2012 and advised the Applicant of same.
- [13] After the record was transcribed, the Applicant discovered that the record of one day of the proceedings, the 7th February, is missing.
- [14] In September 2013 the Second Respondent deposed to an affidavit in which she stated that she has provided her handwritten notes and a typed version to the Applicant. She swore the notes are indeed the notes she had taken during the arbitration and rejected the Applicant's claim to the contrary.
- [15] The Applicant applied to this Court for a directive on the missing record. In the application he stated that the missing audio files contained the evidence he had presented at the arbitration. On 18 October and 5 December 2013 the Court directed the parties to attempt to reconstruct the record of 7th February. The parties did not do so.
- [16] The Applicant contends that the Third Respondent did not contact him to reconstruct the record. The Third Respondent contends that the duty to prosecute and expedite the review rests on the Applicant and in this he ought to have contacted them to arrange a reconstruction meeting, but he failed to do.
- [17] In any event, what is pertinent and a decisive fact is that in affidavits deposed to by him, the Applicant adopted a consistent rigid stance, namely that he is not prepared under any circumstances to attempt to reconstruct a record of the proceedings held on the 7th February. He stated that, even if the parties had met to attempt to reconstruct the record, he would have refused to do so because, in his view, the handwritten notes provided by the Second Respondent were fabricated by her and she deliberately destroyed the recordings of his evidence to "devise a perverted and corrupt award". He is only prepared to consider a hearing *de novo* before a different commissioner. It is thus clear that the Applicant is not prepared to attempt a reconstruction *under any circumstances*. His sole aim is to secure a new arbitration.

- [18] The Practice Manual of the Labour Court provides that a review application is by its nature an urgent application and therefore the applicant is required to ensure that all the necessary papers in the application are filed within twelve months of the date of the launch of the review applications (including heads of argument). The Manual requires that records must be filed within 60 days of the date on which the applicant is advised by the registrar that the record has been received but makes provision for the respondent to grant the applicant an extension of time. It also makes provision for condonation applications in the event of non-compliance with the Practice Manual. The Applicant has failed to make such applications.
- [19] The dispute that gave rise to the arbitration in question arose in 2005, nearly 10 years ago. The Applicant launched his review application on 24 May 2012. Therefore in terms of clause 11 of the Practice Manual all necessary papers, including the record and affidavits *based on the record*, should have been filed by 2 April 2014, a year ago.
- [20] The Labour Appeal Court decision in *Lifecare Special Health Services (Pty) Ltd t/a Ekhuhlangeni Care Centre v CCMA & others*¹ dealt with a situation where a portion of the recordings of an arbitration was lost and the commissioner's handwritten notes were transcribed and provided to the Respondent in an attempt to address this problem. It was found that:

"The court should have suggested to the parties that...in so far as might prove necessary...Whether the product of their endeavours is adequate for the purposes of the appeal or review is for the court hearing same to decide...Those concerned are expected to cooperate. With the requisite cooperation, there is reason to believe that a fair reproduction will be feasible. When it appeared that there were difficulties with regard to the record, it was the obligation of Lifecare, as the reviewing party, to initiate

¹ [2003] 5 BLLR 416 (LAC).

the enquiries and steps which have been set forth in this judgment." (own emphasis)

- [21] The issue is whether the Applicant's refusal to *attempt* a reconstruction of just one of the days of a four day arbitration is justified and, as a result, the matter should be remitted back to the CCMA for a new hearing before another commissioner. A successful reconstruction would spare the Third Respondent, its witnesses and CCMA the burden of a new arbitration years in circumstances where the dispute which gave rise to the arbitration arose almost 9 years ago and the original arbitration took four (4) days to complete.
- [22] According to the Applicant the missing tapes covered his testimony at the arbitration and some of the issues put to him during cross-examination.
- [23] In my view the Applicant's refusal to even attempt the reconstruction in question is not justified. The award of the Second Respondent is approximately 40 pages long. It includes a detailed recording of the evidence led by the parties. The first six (6) pages contain is dedicated to just the evidence led by the Applicant and is extremely detailed. Nowhere in his complaint does the Applicant allege and attempt to prove that the award does not accurately and sufficiently record the evidence he led at the arbitration. He also provided no evidence that the notes provided by the Second Respondent are fabricated. He merely makes bald allegations.
- [24] Considering the stance taken by the Applicant there is no room for an order which would give the Applicant a further chance to attempt a reconstruction of the missing part of the record.
- [25] In light of all the above, especially the Applicant's unreasonable refusal to even consider a reconstruction, there is no good reason to remit the matter to the CCMA for a new hearing. The Third Respondent is entitled to finality on this matter which has dragged on for years, through no fault on its part.

[26] The result of the Applicant's action is that I have a review application before me which is dependent on the record of the proceedings, but there are no submissions before me with reference to the record. The application is therefore defective and unsubstantiated, but there is no good reason to give the Applicant a further chance to rectify same. For these reasons the application is dismissed.

[27] My decision to dismiss the review application is fortified by the fact that, in any event, the Applicant does not set out any clear sustainable grounds of review in his application. The Third Respondent also filed an extensive answering affidavit wherein it essentially reconstructed the issues and evidence allegedly led before the commissioner and established, with reference to this material, that the Second Respondent committed no reviewable irregularities. In sum, his non-appointment to the posts in question had nothing to do with race. He did not have the requisite qualifications and experience. The Employment Equity Act does not entitle him to be appointed merely on the basis that he is black. The difference in remuneration was not based on race but on position, service and qualifications. There is no evidence to the contrary from the Applicant.

[28] In light of these findings there is no need to determine whether the Applicant has prosecuted two inconsistent remedies with the rescission and review application.

[29] Order

1. The late filing of the Third Respondent's answering affidavit is condoned.
2. The application to review the arbitration award granted against the Applicant by the Second Respondent on 3 April 2012 under CCMA case number GAJB171/05 is dismissed.
3. There is no order as to costs.

Whitcher J

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Self Represented

For the Third Respondent: W Hutchinson instructed by Norton Rose Fulbright
South Africa

LABOUR COURT