



THE LABOUR OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No.: JR889/2010

In the matter between:

UNIVERSITY OF SOUTH AFRICA

Applicant

and

MPITSENG TLOU-MSIZA

Respondent

Held: 7 January 2014

Delivered: 27 October 2015

JUDGMENT

PILLAY, AJ

- [1] This matter appeared before me as an application in terms of Rule 11 of the Rules of this Court to dismiss the review application launched by the employee in May 2010.

- [2] The employee filed a supplementary affidavit six months later. There was no record that was served on the employer and/or filed with this court.
- [3] The attorneys for the employer wrote to the then attorneys for the employee indicating that the record had not been served on them.
- [4] The employee served a transcript on the employer's attorney on 13 December 2010. However, as it turned out, this record was incomplete. There was further correspondence to the employee's new attorney. The new attorney responded by way of letter dated 27 January 2011 for the first time indicating that the transcribed record was incomplete. There are three days of the proceedings that were not provided for by the CCMA. Enquiries were made with the CCMA in an attempt to obtain the outstanding recordings and the handwritten notes taken by the arbitrator.
- [5] The employee's attorney responded on 1 April 2011, indicating that they had contacted the CCMA in an effort to obtain handwritten notes and to ensure that the missing record is reconstructed.
- [6] After further correspondence between the attorneys, the employee's attorney despatched a letter on 13 October 2011, which communicated that the CCMA was not in a position to provide the commissioner's handwritten notes as they were not available. Unfortunately, the employer failed to provide the employee with any handwritten notes.
- [7] Ultimately, a request was made to the CCMA to set the matter down for reconstruction of the record. Following several enquiries from the employee's attorney in an attempt to have the matter set down for reconstruction, the matter was set down for 20 November 2013. At this reconstruction meeting, it turned out that the commissioner did, in fact, have his original handwritten notes.
- [8] There were attempts made to consolidate the notes and transcription. However, for various reasons, the employee was unable to obtain a full copy of the recording. It, therefore, became necessary for the transcription of the arbitrator's handwritten notes.

- [9] I am informed that the complete copy of the record would soon be available.

Law

- [10] A determination on whether an application in terms of Rule 11 should be dismissed is an exercise of discretion. There are various factors to be taken into account in exercising this discretion. This includes the delay in the prosecution, whether there is a reasonable explanation for the delay, the prejudice to the parties and whether there are prospects of success in the main case.
- [11] The delays were occasioned by the CCMA failing to provide a full record of the proceedings. It appears that the CCMA further delayed the process before an ultimate conclusion that some of the evidence would not be available.
- [12] The employer has failed to address prospects of success at all, which is a significant factor in the exercise of my discretion. If prospects of success are not canvassed, it weighs heavily in favour of exercising the discretion by not dismissing the main application.
- [13] I pause to point out that, in addition to failing to address the prospects of success, the employer itself has not taken any steps to aid in the process of ensuring that a full record was available to this court.
- [14] In exercising my discretion, I must ensure that there is fairness to both parties. Where the employer has failed to allege and/or demonstrate that there are no prospects of success in the main application, I do not believe it would be fair to dismiss the main application. This is more so given that the employer itself did not take any active steps in an effort to bring the proceedings to a conclusion.
- [15] I am not inclined to dismiss the main review application. While there has been a lengthy delay, the employee has taken steps to ensure that the matter is prosecuted. She transcribed whichever portions of the record were made available to her. She ensured that a supplementary affidavit was filed. Large parts of the delay were caused by the CCMA.

[16] I am not inclined to dismiss the main review application.

Order

[17] In the circumstances, I make the following order:

- (a) The application in terms of Rule 11 is dismissed;
- (b) The employee is to file the full record within five days of the handing down of this order, if it has not done so;
- (c) The parties are then to proceed with the filing of affidavits in terms of the Rules of this Court;
- (d) There is no order as to costs.

Pillay, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: G Van Der Westhuizen

Instructed by: MacRobert Inc.

For the Respondent: Mr Molebaloa

Instructed by: MS Molebaloa Attorneys Inc.

LABOUR COURT