



**REPUBLIC OF SOUTH AFRICA**

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

Not Reportable

Case no: J175/2010 B

In the matter between:

**NUM obo GULE ELISH**

**Applicant**

**[First Respondent in the main Application]**

and

**EXXARO RESOURCES – NBC COLLIERIES**

**First Respondent**

**[Applicant in the main application]**

**COMMISSION FOR CONCILIATION,**

**MEDIATION AND ARBITRATION**

**Second Respondent**

**[Second Respondent in the main application]**

**COMMISSIONER M A MASHEGOANE N.O**

**Third Respondent**

**[Third Respondent in the main application]**

**Heard: 17 July 2013**

**Delivered: 28 August 2013**

**Summary: Summary: Application to dismiss review application – extensive and unreasonable with no proper explanation – no real effort to bring matter to finality – prejudice to applicant outweighs prejudice to respondent.**

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## **JUDGMENT**

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EDMONDS AJ

### Introduction

- [1] This is an application brought in terms of Rule 11 of the Labour Court rules for an order dismissing the review application launched by the first respondent and for an order that the arbitration award issued under case number MP8434-09 on 6 April 2010 be made an order of Court
- [2] The individual applicant, Mr Elish Gule (Gule) was dismissed by the first respondent on the 10 November 2009.
- [3] Subsequent to the referral of a dispute in regard to his dismissal to the CCMA, the third respondent (the Commissioner) handed down an award on 6 April 2010 in which Gule's dismissal was found to be substantively unfair, ordering his retrospective reinstatement and requiring that payment in the sum of R22 296.00 be made to Gule within 14 days of the Award.
- [4] The review application in this matter was served and filed on or about 17 June 2010.
- [5] On the 31 August 2010, the applicants gave notice of their intention to oppose the review application.

- [6] The first respondent states that the record was delivered to the Labour Court by the CCMA on or about 15 July 2010, approximately a month after the launching of the review application.
- [7] For reasons supposedly related to the Labour Court's administration of the files, the first respondent uplifted the record only on the 25 August 2010 and requested a quotation for its transcription.
- [8] For reasons purportedly relating to its own internal administration, the first respondent paid for the transcription only some four months later on 30 December 2010.
- [9] The first respondent collected the transcribed record at the end of January 2011, discovered it was incomplete and purportedly advised the applicants' attorneys of this. No proof of such advice is attached to the first respondent's opposing papers and the applicant denies that this took place.
- [10] Indeed, the applicant states that no steps were taken by the first respondent subsequent to the launching of the review application on 17 June 2010 until after the launching of this dismissal application on 30 August 2012.
- [11] The first respondent alleges that during the intervening period, it engaged with the CCMA in an attempt to obtain the missing recordings whereafter, as a consequence of the failure to uncover the missing recordings, it undertook a reconstruction of the missing portion of the evidence using the Commissioner's hand written notes and its own notes.
- [12] This reconstruction process was further hampered by the transfer of the first respondent Mr Sam Nkosi, who was responsible for the matter, to Tshikondeni during March 2011.
- [13] The draft reconstruction was finalised in October 2012, after the launch of the dismissal application.

- [14] More than two months after the launch of the dismissal application, the first respondent furnished its own employee, Mr Kubayi (Kubayi) with the finalised draft reconstruction of the arbitration record and e-mailed this to the applicant's legal representative, Mr Victor Finger, requesting that he comment on the draft reconstruction.
- [15] The applicant does not deal specifically with these allegations but simply denies them.
- [16] It does appear that the attempt at reconstruction of the record was brought to the attention of the applicant's attorneys on 12 November 2012 but no explanation is given why, 2 ½ months' after the launch of the dismissal application, no more rigorous efforts were made by the first respondent to finalise the record with the applicant and, being unsuccessful in this endeavour, no effort was made to file the record as completed by the first respondent.
- [17] The opposing affidavit, in this matter, was itself served some six months after the application was launched together with a condonation application.
- [18] The reason provided for this delay was that the application appears to have been sent to a staff member of the first respondent whom the first respondent is unable to identify. The first respondent does not explain why it is unable to identify its staff member. In opposing the condonation application, the applicant points out that the review applications under case numbers JR175 -10 A and JR175-10 B were both faxed to 012 307 3831 and the first respondent filed a notice of opposition under case number JR175-10 A and did not do so in the matter under case number JR175-10 B despite the fact that both applications were served on the same day to the same fax number.

#### Legal Principles

- [19] An applicant, in any proceedings, is obliged to ensure that the claim is prosecuted within a reasonable time.

- [20] The rules of this Court provide the time periods within which an applicant is expected to prosecute its claim.
- [21] In the circumstances detailed above, it is clear that the first respondent has made no serious effort to bring this matter to finality.
- [22] The individual respondent, Gule, has had in his favour an arbitration award since 6 April 2010 entitling him to retrospective reinstatement and the payment of R22 296.00.
- [23] It is now more than three years later.
- [24] I am satisfied that the delay is both unreasonable and that there is no proper explanation therefore.
- [25] Contrary to the first respondent's assertion that it would be prejudiced in having to reinstate a dishonest employee, there is an award in Gule's favour finding that he is not such an employee. Clearly, the prejudice to Gule in not gaining compliance with the award in his favour is far greater than any that can be suffered by the first respondent, particularly, in light of the first respondent's apparent inactivity since the launching of the review application.
- [26] I am further satisfied that the findings of the Commissioner are not ones which no reasonable Commissioner would have made.
- [27] In the circumstances, there is no reason not to make the award an order of Court and, given the respondent's dilatory conduct, no reason not to grant costs of both applications in the applicant's favour.
- [28] In the result, I make the following order:
- 1 The review application brought by the first respondent under case number JR175/2010 is dismissed;
  - 2 The Arbitration Award issued under case number MP8434-09 on 6 April 2010 is made in order of Court;

- 3 The first respondent is to make payment of the costs both of the Review Application and of this application.

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Edmonds, AJ

Acting Judge of the Labour Court

APPEARANCES:

For the Applicant: M Zondo

Instructed by: Finger Phukubje Inc.

For the Respondent: T Kubayi

APPEARANCES:

For the Applicant:

For the Respondent:

LABOUR COURT