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

Reportable

Case no: D203/15

In the matter between:

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| SENZO HENDRICK MCHUNU | Applicant [ 3rd Respondent] |
| And | |
| RAINBOW FARMS (PTY) LTD | Respondent [Applicant] |
| In Re | |
| RAINBOW FARMS (PTY) LTD | Applicant |
| And | |
| COMMISSION FOR CONCILIATION | |
| MEDIATION AND ARBITRATION | 1st Respondent |
| COMMISSIONER EMMANUEL | |
| SKHOSIPHI NGCOBO | 2nd Respondent |

SENZO HENDRICK MCHUNU 3rd Respondent

**Heard: 01 June 2017**

**Delivered: 12 June 2017**

**Summary: Rule 11 Application to dismiss review application. Applicant in review application failed to comply with the Practice Manual. Application to dismiss review and that the arbitration award be made an order of court granted with costs.**

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**JUDGMENT**

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GUSH J.

[1] The 3rd respondent in the review application applies in terms of Rule 11 of the rules of the Labour Court for order dismissing the applicant's application to review and set aside the arbitration award handed down by the second respondent in review application. In order to avoid confusion I shall refer to the applicant in the rule 11 application as Mchunu and the respondent therein as Rainbow.

[2] Both the review and the Rule 11 applications were enrolled for hearing. As Mchunu had applied to dismiss the review application it was necessary to determine this application first as should it succeed it would dispose of the review application.

[3] It is important to record the chronology of events that led to Mchunu launching the Rule 11 application to dismiss Rainbow's review application.

a. Mchunu was dismissed by Rainbow on 9 October 2014;

b. The arbitration relating to Mchunu's dismissal was heard on 22 January 2015;

c. On 5 February 2015 the arbitrator handed down an award in which award he concluded that Rainbow had unfairly dismissed Mchunu and ordered that he be reinstated;

d. Rainbow received the award on the same day viz. 5 February 2015;

e. On 18 March 2015 rainbow served the application to review the arbitration award on the court;

f. On 21 May 2015 the CCMA filed the record with the Labour Court and on the same day the Court sent a Rule 7A(5) notice to the Rainbow;

g. On 22 May 2015 Rainbow uplifted the record from the court file in order to transcribe it;

h. On 11 November 2015 Rainbow filed the "transcribed". record with the Court The record comprised a copy of the arbitration award, "bundle "A" comprising one document, "bundle "B" also one document, a photo copy of the arbitrator's hand written notes and a typed copy of the transcribed electronic record (Rainbow made no effort to type a copy of the handwritten notes);

i. On 11 July 2016 Rainbow filed a supplementary affidavit in which the deponent inter alia record that the typed record refers in a number of places to "un-interpreted Zulu";

j. On 22 July Mchunu filed a rule 11 application asking for the review to be dismissed as a result of Rainbow's failure to diligently prosecute the review.

k. Rainbow opposed the Rule 11 application on 12 August 2016 and Mchunu filed an opposing answering affidavit in the review on 16 August 2016;

l. On 7 and December 2016 and 23 January2017 Rainbow wrote to the registrar of the Court advising him that the file had been indexed, that the matter was "ripe for hearing" and requested that it be enrolled for hearing.

[4] The rules of the Labour Court require an applicant who wishes to apply for an award of the CCMA to be reviewed is required to "furnish the registrar and the other parties with a copy of the record or portion of the record …"[1]

[5] The provisions of Rule 7A(8) that require an applicant, within 10 days of uplifting the record, files a notice either that it stands by its notice of motion or varying the terms of the notice of motion and an affidavit supplementing the supporting affidavit. Not only did Rainbow not comply with this rule when it filed the record it did so without comment. In so far as Rainbow did file a Rule 7A(8)(b) notice and affidavit it did so exactly 7 months later.

[6] The Practice Manual issued in 2013[2] deals specifically with an applicant's duties and obligations regarding the record and the consequences of not complying with the obligation to file the record within 60 days of being advised that it is available to be uplifted and what steps must be taken if the record is incomplete.

> 11.2 **Applications to review and to set aside arbitration awards and rulings**
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> 11.2.1 Once the registrar has notified an applicant in terms of Rule 7A (5) that a record has been received and may be uplifted, the applicant must collect the record within seven days.

[1] Rule 7A(6)
[2] Came into effect on 2 April 2013.

11.2.2 For the purposes of Rule 7A (6), 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.

11.2.3 If the applicant fails to file a record within the prescribed period, the applicant will be deemed to have withdrawn the application, unless the applicant has during that period requested the respondent's consent for an extension of time and consent has been given. If consent is refused, the applicant may, on notice of motion supported by affidavit, apply to the Judge President in chambers for an extension of time. The application must be accompanied by proof of service on all other parties, and answering and replying affidavits may be filed within the time limits prescribed by Rule 7. The Judge President will then allocate the file to a judge for a ruling, to be made in chambers, on any extension of time that the respondent should be afforded to file the record.

11.2.4 If the record of the proceedings under review has been lost, or if the recording of the proceedings is of such poor quality to the extent that the tapes are inaudible, the applicant may approach the Judge President for a direction on the further conduct of the review application. The Judge President will allocate the file to a judge for a direction, which may include the remission of the matter to the person or body whose award or ruling is under review, or where practicable, a direction to the effect that the relevant parts of the record be reconstructed.

[7] In this matter Rainbow did not:

a. file the record within 60 days;

b. Request an extension from Mchunu;

c. Make application for an extension of the period; or

d. If it was really concerned about the record, approach the Judge President for a direction as to the further conduct of the application.

[8] In the absence of compliance with the practice manual it is clear that the review application is deemed withdrawn. As Rainbow seemingly simply ignored this

provision I am satisfied that Mchunu was entitled to launch the Rule 11 application to have the review dismissed.

[9] By so doing Mchunu, as he is entitled to, brought the Rule 11 application to bring finality to the matter. In his prayer for relief Mchunu seeks not only the dismissal of the review application but that the award be made an order of this Court.

[10] It may be contended that where an application is deemed withdrawn that it is unnecessary to have it dismissed. Whether the review is dismissed or whether it is deemed withdrawn is not relevant to the primary issue viz facilitating the enforcement of the order by having it made an order of Court.

[11] A deeming provision is but a legal fiction. It presupposes that an applicant may endeavour to have the matter revived as in the circumstances of a deemed withdrawal the review has not actually been withdrawn.

[12] I am in this matter faced with an application to dismiss the review application and accordingly I am satisfied therefor that in the interests of certainty Mchunu is entitled to order dismissing Rainbows review application to review the award as a precursor to the award being made an order of court.

[13] The practice directive specifically deals with the process to be followed when an applicant regards the record as being inadequate. There is absolutely nothng on record to gainsay the conclusion that Rainbow deliberately ignored the practice directive and waited until the matter was enrolled thereby effectively non suiting Mchunu to the effect that the matter would be unreasonably delayed.

[14] Rainbow has offered no explanation whatsoever for its failure to comply with the practice directive. Its explanation for the delay as set out in the supplementary affidavit is unacceptable. The facts of the matter are that Rainbow made no effort whatsoever to have the “un-interpreted Zulu” interpreted or have the hand written notes transcribed. The essence of the dispute resolution process prescribed by the Labour Relations Act is to ensure disputes are expeditiously resolved. In order to facilitate this where a record may be lacking the Judge President of the

Labour issued practice directives. Rainbow ignored these directives at their own peril.

[15] This is an application to dismiss Rainbow's review application on the grounds that Rainbow has failed to properly, timeously or diligently prosecute the review. I am not asked in this application to consider the merits of the review. Accordingly and particularly as Rainbow has taken no steps whatsoever to reconstruct the record, the issue regarding the completeness of the record is not relevant.[3] What is relevant is Rainbow's conduct regarding the prosecution of its application to review the award.

[16] There is no reason in law or fairness why the Rainbow should not pay Mchunu's costs.

[17] For the reasons set above I make the following order:

a. The application by Rainbow Farms (Pty) Ltd to review the arbitration award KNPM3452-14 brought under case number D203-15 is dismissed for want of timeous and proper prosecution thereof;

b. The award KNPM3452-14 is made an order of Court;

c. Rainbow Farms (Pty) Ltd is ordered to pay Senzo Hendrick Mchunu's costs.

D H Gush

[3] See Baloyi v MEC Health Limpopo. 2106 (4) BCCR 443 CC and in particular para 58

Judge of the Labour Court of

South Africa



APPEARANCES:

FOR THE APPLICANT: Adv P Blomkamp SC

Instructed by Llewellyn Cain Attorneys

FOR THE RESPONDENT: Mr Titus MacGregor Erasmus Attorneys