

**REPUBLIC OF SOUTH AFRICA**

Not reportable

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

**JUDGMENT**

Case no: J516/11

In the matter between:

**GOLDFIELDS MINING SOUTH AFRICA**

**(PTY) LIMITED**

**Applicant**

and

**COMMISSION FOR CONCILIATION**

**MEDIATION AND ARBITRATION**

**First Respondent**

**XABA, T.C**

**Second Respondent**

**Date of hearing: 9 November 2011**

**Date of judgment: 10 November 2011**

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**JUDGMENT**

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**SAVAGE AJ**

## Introduction

- [1] This is an unopposed application to dismiss the second respondent's unfair dismissal dispute currently pending before the first respondent ("CCMA") under case number GAJB 18406/05.

## The facts

- [2] The second respondent, Mr Xaba, was dismissed on 22 October 2004 after having been found guilty of falsifying medical records. He referred an unfair dismissal dispute to the CCMA. His dismissal was found to be procedurally and substantively unfair. The arbitration award was reviewed and set aside on 5 June 2007 and the dispute referred back to the CCMA for a hearing de novo. On 14 June 2007 the order of the review court was served on the CCMA by the applicant. On 14 March 2011 Mr Xaba served the order on the CCMA and on 22 March 2011 the applicant received a notice of set down of the arbitration to be held in the matter on 12 April 2011. The applicant brought the current application to dismiss the dispute as a consequence of which the arbitration hearing did not proceed on the date scheduled.

- [3] On 24 March 2011 the applicant's attorney wrote to Mr Xaba requesting him to withdraw the dispute failing which an application would be made to this Court for an order dismissing the dispute on account of his unreasonable delay in prosecuting the matter. No response to this request was received from Mr Xaba.

[4] From the papers it is clear that there have been no steps taken by Mr Xaba from 14 June 2007 until 14 March 2011 to have his unfair dismissal dispute set down by the CCMA and there has been no explanation for his failure in this regard. Prior to the set down of the arbitration in March 2011, the applicant claims that it laboured under the belief that Mr Xaba had abandoned his claim in that almost four years had elapsed since the date of the court order and seven years since his dismissal.

[5] In its founding papers the applicant contends that Mr Xaba's prospects of success in the arbitration are poor in that he had conceded that it was his handwriting on certain forged documents, with no explanation as to why this was and that he was directly implicated by other employees in the forgery. Furthermore, the applicant's only witness in the matter, Mr P J Snyman, is now deceased and a copy of his death certificate was attached to the founding affidavit.

#### Applicable legal principles

[6] The purpose of the LRA "*..to promote – ... the effective resolution of labour disputes*"<sup>1</sup> necessitates that disputes reach finality within a reasonable time, or "fairly and quickly",<sup>2</sup> without having "gone stale"<sup>3</sup> due to the unavailability of witnesses or evidence or as a result of undue delay. Parties are therefore

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<sup>1</sup> Section 1

<sup>2</sup> Section 138(1)

<sup>3</sup> *Mohlomi v Minister of Defence* 1997(1) SA 124 (CC) at 129H-130A

required to proceed with expedition in prosecuting claims under the LRA and may be debarred from obtaining relief to which that party may have been entitled because of an unjustifiable delay in prosecuting the claim.<sup>4</sup>

[7] This Court has the power to make an order which has the effect of putting to an end to litigation between the parties,<sup>5</sup> whether arising before this Court or before the CCMA. The Court therefore holds a discretion as to whether to permit litigation to continue where there has been a lapse of time or lack of expedition in the conduct of a matter.<sup>6</sup> In the exercise of its discretion, Van Niekerk J in *Karan t/a Karan Beef Feedlot & another v Randall*<sup>7</sup> concluded that it should consider three factors: the length of the delay, the explanation for the delay; and the effect of the delay on the other party and the prejudice that that party will suffer should the claim not be dismissed. Furthermore:

“...(A)n application to dismiss is a drastic remedy, and should not be granted unless the dilatory party has been placed on terms, and when appropriate, after any further steps as may have been available to the aggrieved party to bring the matter to finality have been taken”

### Evaluation

[8] On 14 June 2007 the order of this Court in the review application made earlier was served on the CCMA by the applicant. For almost four years from date of service of this order, the CCMA did not set the matter down for

<sup>4</sup> *Karan t/a Karan Beef Feedlot & another v Randall* (2009) 30 ILJ 2937 (LC)

<sup>5</sup> *NUMSA & other v AS Transmissions & Steerings (Pty) Ltd* [1999] 12 BLLR 1237 (LAC)

<sup>6</sup> *Bernstein v Bernstein* 1948(2) SA 205 (W)

<sup>7</sup> At para 14

arbitration, nor does it appear that Mr Xaba took any steps to have the arbitration set down by the CCMA. This is evident from the fact that the dispute was not set down for hearing by the CCMA. In failing to act in this regard, Mr Xaba did not proceed with the necessary expedition that could reasonably be expected of him in prosecuting his unfair dismissal claim.

- [9] Mr Xaba was not placed on terms by the applicant to have the matter set down for arbitration, nor did the applicant take any steps itself to have the matter set down by the CCMA subsequent to it having served the order of the review court on the CCMA. As the period of time that elapsed following the service of such order extended into years, the applicant laboured under the belief that Mr Xaba had abandoned his claim. His conduct surely supported such belief given that during this period nothing was heard by the applicant from Mr Xaba or the CCMA relating to the matter. Accordingly, the applicant's belief that Mr Xaba had elected not to pursue his claim was not an unreasonable one given that it was one supported by his own conduct. I am satisfied that in the circumstances of this matter, the applicant was not under any obligation to hurry Mr Xaba's case along<sup>8</sup> after it having served the order of the review court upon the CCMA, or to place him on terms to prosecute the matter. This is because the applicant was not the party that had brought the claim of unfair dismissal. Once the dispute was referred back to the CCMA for a hearing de novo and the applicant had served the order of the review court on the CCMA, I find that the applicant's obligations ended in relation to the set down of the matter. Thereafter, if the applicant

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<sup>8</sup> NUMSA & other v AS Transmissions & Steerings (Pty) Ltd [1999] 12 BLLR 1237 (LAC) at para 6

sought to pursue his unfair dismissal claim with the CCMA he should have taken the necessary steps to do so, including seeking of the CCMA that the matter was timeously set down for arbitration. For the applicant to attend at the CCMA nearly four years after the review application had been granted to seek the set down of the matter, with no proper explanation provided for this delay, was unreasonable.

[10] Given that this matter was unopposed, there has been no explanation placed before this Court by Mr Xaba to explain the extensive delay which ensued until he sought the set down of the matter some four years later. In spite of the fact that the CCMA clearly failed to act with the alacrity that was required of it to set the matter down, Mr Xaba cannot hide behind the CCMA's failing in this regard. I find that it is reasonable to have expected of Mr Xaba that he take action to secure the set down of the matter. He cannot rely on the CCMA's inaction to justify his own failure to act.

[11] The period of delay is not one that can be easily overlooked by this Court. Clearly, the effect of such an extensive delay which is both unexplained and is not of its own making, is prejudicial to the applicant insofar as it is faced with the prospect of having to defend a dismissal now seven years old, with its primary witness now deceased. The applicant was entitled to enjoy the expeditious resolution of this dispute. Mr Xaba's failure to prosecute his claim over an extended period of time, the absence of any explanation for such delay and the effect of such delay must result in him being debarred from pursuing his unfair dismissal claim and obtaining any relief to which he

may have been entitled in terms of it. I am satisfied that the circumstances of this case justify such drastic a remedy.

### Costs

[12]The Court has a broad discretion in terms of section 162 of the LRA to make an order for costs according to the requirements of the law and fairness. In exercising this discretion, I find that costs should not be ordered against the second respondent given that the matter was unopposed.

### Order

[13]The dispute pending before the first respondent under case number GAJB18406-05 is dismissed.

[14]There is no order as to costs.

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K M Savage  
Acting Judge

**APPEARANCES**

**APPLICANT:** L Giai-Coletti  
Instructed by Webber Wentzel

**SECOND RESPONDENT:** No appearance

LABOUR COURT