

SOUTH AFRICA / JUDGMENT

Waste Group (Pty) Ltd v SATAWU and Others (JS 641/13) [2023] ZALCJHB 74 (23 March 2023) [2023] ZALCJHB 74

COURT

Labour Court Johannesburg

BEFORE

T Govender

CASE / FILE NUMBER

JS 641/13

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

No. JS 641/13

In

the matter between:

WASTE
GROUP (PTY) LTD Applicant
and
SOUTH
AFRICAN TRANSPORT & ALLIED
WORKERS
UNION (SATAWU) First
Respondent
EMPLOYEES
(Named
in annexure “A”) Second
to further Respondents

Heard:

29
July 2022

Delivered:

23 March 2023

Summary: Principles concerning rescission applications restated. An inordinate delay, while frowned upon, still requires a fair and equitable application of the law.

JUDGMENT

GOVENDER, AJ

Introduction

- [1] An inordinate delay in litigation dilutes the cogency of evidence, impugns the efficiency of one's right to access the Courts in terms of section 34 of the Constitution of the Republic of South Africa, 1996, and stymies the administration of justice.
- [2] This is even more so in labour matters where one's freedom of trade and economic freedom may be adversely affected. This is aside from the right to fair labour practices, as entrenched in section 23 of the Constitution.
- [3] This matter is one of those that has forced the Court to carefully balance the inordinate delay of time that has since passed as against the parties having finality and justice done in the matter, and further a fair and just application of the law.
- [4] The matter before the Court is a rescission application concerning default Court Orders granted on 18 and 23 October 2019 respectively, in terms of which the dismissal of 21 employees was found to be procedurally and substantively unfair. The employees were each accordingly awarded twelve months' remuneration.
- [5] The dispute underlying the Court Orders came before the Court by way of a statement of case dated 29 August 2013, in terms of which SATAWU challenged their members' retrenchments for want of procedural and substantive fairness.
- [6] It appears that SATAWU's members were dismissed on 11 June 2013, some ten years ago.
- [7] This matter having been drawn out for as long as it has is the anthesis of the expediency expected in labour matters.
- [8] On 9 December 2019 the applicant brought a rescission application claiming that the notice of set down did not come to its attention. When having regard to the notice of set down, it is addressed to the applicant's erstwhile attorneys, MacGreggor Erasmus Attorneys, while the fax number that it was transmitted to, namely 012 562 0335, is the applicant's general fax number.
- [9] The notice of set down was transmitted to the above fax number on 20 August 2019, and while the applicant appears to complain about when it was transmitted, the reality is that this notice of set down preceded the trial which was due to commence on 14 October 2019.

- [10] The applicant avers that because the notice of set down did not come to its attention it did not appear at trial to defend the matter.
- [11] The applicant further contends that it became aware of the Court Orders on 19 November 2019, when it received a letter from SATAWU enclosing the Court Orders. The applicant claims that it was in disbelief that the Orders were granted in its absence.
- [12] Instead of contacting their erstwhile attorneys of record, the applicant contacted its current attorneys of record, who at that stage were dealing with its commercial matters.
- [13] The applicant's current attorneys of record brought the rescission application as aforesaid and there is accordingly no confirmation of these facts from the applicant's erstwhile attorneys, nor any explanation concerning why they were not in attendance when the trial was first called on 14 October 2019, on the papers.
- [14] Since the trial Court has a continuous roll, the matter was ultimately heard on 18 October 2019. Nothing really turns on the applicant's complaint that the notice of set down reflects the date of 14 October 2019, yet the matter was heard on 18 October 2019.
- [15] The applicant's principal contention is that by virtue of the notice of set down being sent to its general fax number and not coming to its attention, the order was erroneously granted in its absence.
- [16] However, the applicant provides no details of steps leading up to the trial, which it ought reasonably to have been aware of, nor its engagement with its erstwhile attorneys.
- [17] During argument, the applicant handed up a notice of withdrawal from MacGreggor Erasmus Attorneys filed with the Court on 20 October 2016.
- [18] There is no engagement with what happened between 20 October 2016 and October 2019 concerning steps taken by the applicant in the matter to demonstrate its diligence in the litigation, while I am cognisant that the applicant is not dominus litis.
- [19] Again, the lack of information before the Court in this regard self-evidently stems from this being raised for the first time in argument and this issue not having been canvassed in the papers.
- [20] Concerning a bona fide defence, the applicant claims that it was unable to fully deal with this because it had not been able to obtain its case file from its erstwhile attorneys by the time the rescission application was brought, and its right to supplement was accordingly reserved, aside from incorporating all notices and pleadings by mere reference.
- [21] In terms of rule 16A(2)(b) of the Rules for the Conduct of Proceedings in the Labour Court, a rescission application must be brought within fifteen days after an applicant acquires knowledge of the Court Order and the applicant submits that it has complied with the requisite time periods in this regard. I agree.

- [22] On about 7 May 2021 SATAWU and its members filed a notice of intention to oppose the rescission application and an answering affidavit.
- [23] In the opposing affidavit the respondents contend that the applicant's erstwhile attorneys, MacGreggor Erasmus Attorneys, were still on record at the time that the notice of set down was served, and accordingly the applicant was aware of the court date of 14 October 2019. Again, the notice of withdrawal was unbeknown to the parties until the matter was argued on 29 July 2022.
- [24] The respondents further aver that the matter was set down from 14 October 2019 until 18 October 2019 and that the Court was satisfied that the applicant was aware of the set down date, which is why an order was granted on a default basis on 18 October 2019.
- [25] On 23 October 2019 the Court Order was varied by adding a remuneration schedule.
- [26] The respondents also contend that the correct fax number was used to transmit the notice of set down to MacGreggor Erasmus Attorneys, which fax number was the same fax number that all Court documents had previously been sent to, and nothing turned on the notice of set down being faxed to the applicant's general fax number on 20 August 2019, because the notice of set down had also been sent to the applicant's attorneys of record at the time. This is not entirely correct as set out above.
- [27] The respondents state that the applicant has failed to set out a bona fide defence and has no prospects of success in the matter. They further take issue with the matter dating back to 2013 and still being unresolved.
- [28] As stated above, MacGreggor Erasmus Attorneys withdrew as the applicant's attorneys as per a notice of withdrawal in the Court file dated 20 October 2016, but this was unknown at the time that the respondents drafted their papers because it was raised for the first time in argument.
- [29] The rescission application was first placed on the Court roll on 28 April 2021. Van Niekerk J ordered that the rescission application be removed from the roll and that SATAWU and its members file an answering affidavit within ten days from the date of the order, with the applicant being able to file a replying affidavit after five days thereof.
- [30] The matter then came before me on 30 June 2022. On the morning of 30 June 2022, the applicant brought a postponement application claiming that there are two conflicting answering affidavits before the Court, one of which was incomplete and a postponement was requested to enable the applicant to seek clarity on these affidavits.
- [31] In the ordinary course, the applicant ought reasonably to have simply filed a replying affidavit to both answering affidavits highlighting the alleged contradictions. I found the filing of the postponement application on the morning of the hearing to be untenable to say the least.

- [32] When considering the two answering affidavits, which are dated 7 May 2021 and 20 January 2021, deposed to by Mr Edwin Mthenjane and Mr Phineus Makgopa respectively, there does not appear to be any contradiction, while objectively there is a duplication.
- [33] Once the matter was called on 30 June 2022, the parties asked that the matter stand down because there appeared to be some confusion as to which set of attorneys was appearing for SATAWU and its members.
- [34] Once the matter was recalled, I was presented with a draft order that the matter be postponed by agreement between the parties and calling for case management within ten Court days.
- [35] I must comment that the confusion as to who was representing SATAWU and its members was most fortuitous for the applicant because I was not inclined to grant a postponement application.
- [36] I was also not amenable to granting a Court Order in the terms suggested by the parties because there being two answering affidavits did not justify case management and could have been dealt with as stated above.
- [37] As such the matter was postponed to 29 July 2022, with no order as to costs and the parties were cautioned to be ready to argue the matter on this date before me, since I had already considered all the pleadings in the matter. I further advised the parties that the Court frowned upon the delays in having the matter finally determined, given that the matter was initiated in 2013.
- [38] Needless to say, a replying affidavit was never filed by the applicant.

Analysis

- [39] The Court is called upon to determine whether the rescission application brought by the applicant should be granted or not.
- [40] The application is brought in terms of Rule 16A(1)(a) of this Court's Rules, read with section 165(a) of the Labour Relations Act[1] (LRA), which provide that the Court may rescind any judgment erroneously sought or erroneously granted in the absence of any party affected by it.
- [41] In the alternative, the application is brought in terms of the common law and the applicant avers that good cause has been demonstrated for a rescission to be granted, premised on it not being in wilful default and it having a bona fide defence.
- [42] In *F & J Electrical CC v Metal and Electrical Workers Union* on behalf of Mashatola and Others,[2] Zondo J (as he then was) stated as follows:

“[27] A party may have an order of the Labour Court rescinded under s 165(a) if it is shown that the order was erroneously sought or granted in the absence of that party. Whether the court grants a rescission application under this provision does not depend upon the applicant showing good or sufficient cause. It is simply enough if the order was erroneously sought or granted in the absence of that party. That is also the position under rule 42(1)(a) ... this was held to be the position by a full bench in Tshabalala and another v Peer. Both the Supreme Court of Appeal and this court have also made this point. The court may even rescind or vary its order on its own accord under this provision.”

- [43] If the applicant has met the requirements of Rule 16A(1)(a) read with section 165(a) of the LRA, then the Court needn't consider whether the common law requirements have been met.
- [44] The question before the Court is whether the applicant has demonstrated that the Court Orders concerned were erroneously granted in its absence.
- [45] I am compelled to take judicial notice of the notice of withdrawal as attorneys of record by the applicant's erstwhile attorneys and the interests of justice would not permit me to look away from this objective fact simply because this did not form part of the papers.
- [46] From the facts set out above, there is nothing to gainsay the applicant's version that the Court Orders came to its attention when SATAWU wrote to it on 19 November 2019 enclosing them.
- [47] There is also nothing to gainsay the applicant's version that after receiving SATAWU's letter, it engaged in a comprehensive search of its database whereafter it was established that the notice of set down was sent by fax to its general fax number. A bare denial by the respondents in this regard does not create a material dispute.
- [48] While the applicant has failed to explain a three-year gap in the litigation, all pointing to a lack of diligence, the reality is that it has met the requirements for a rescission to be granted.
- [49] The Court does not come to this decision lightly having considered that it affects so many employees who have been eagerly awaiting compliance with the Court Orders since October 2019.
- [50] That being said, the law must be applied on the prevailing facts and in the interests of justice. This means that the applicant cannot be deprived of its access to the Court in terms of section 34 of the Constitution.
- [51] The parties must defend their respective rights in a trial in due course.
- [52] There is accordingly no need to consider the alternative relief for rescission to be considered in terms of the common law.
- [53] The Court can only direct that the Registrar assist the parties in allocating an expedited trial date, to the extent that this is possible.

Costs

[54] It is trite that in labour matters, costs do not follow the result[3].

[55] In order for costs to be granted the Court's judicial exercise of its discretion to award costs must be engaged and there must be a justification for the departure of the ordinary rule that costs should not be ordered. The dictates of fairness in terms of section 162 of the LRA and the constitutional and statutory imperatives that underpin it, must be considered[4].

[56] There is no reason to depart from the accepted practice in labour matters that costs do not follow the result.

[57] In the premises the following order is made:

Order

1. The applicant's rescission application is granted.
2. There is no order as to costs.
3. The Registrar is directed to allocate an expedited trial date to the parties, to the extent that this is possible.

T. Govender

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant: Lizane Steenkamp

Instructed by: CJ

Willemse, Muller & Bakinsky

For the respondent: Mr George Z Maphanga

Instructed by: Mafenya

Attorneys

[1] 66 of 1995, as amended

[2] (2015) 36 ILJ 1189 (CC)

[3] See: MEC for Finance: Kwazulu-Natal and Another v Dorkin NO and Another

[2008] 6 BLLR 540 (LAC) and Zungu v Premier of the Province of KwaZulu-Natal and Others
(2018) 39 ILJ 523 (CC).

[4] Union For Police Security and Corrections Organisation v South African Custodial Management (Pty) Ltd and Others (2021) 42 ILJ 2371 (CC), specifically at paragraph 35, read with Goba v Rand West City Local Municipality and Others

[2021] JOL 51406 (LC) specifically at paragraph 30 and 31.

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