

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: J1043/09

In the matter between:

ENVIROSERV WASTE MANAGEMENT (PTY) LTD

Applicant

and

THOBILE SOGIBA AND OTHERS

1st Respondent

THE SOUTH AFRICAN TRANSPORT & ALLIED
WORKERS UNION (SATAWU)

2nd Respondent

JUDGMENT

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FRANCIS J

Introduction

1. The applicant brought an application to dismiss an application filed by Thobile Sogiba and others (the respondents) in April 2002 under case number J1222/02, on the grounds that the respondents did not prosecute their application expeditiously. The application was opposed by the respondents who filed a counter application that the material facts in dispute in case number J1222/02 be referred to oral evidence.

The background facts

2. The respondents were employed by the applicant. They are for convenience sake called the respondents. At the time of their employment they were members of the second respondent, the South African Transport and Allied Workers Union (SATAWU). During March 2001 they were suspended by the applicant for alleged instances of misconduct. On 20 March 2001 after several meetings were held between the applicant and

representatives of SATAWU, they entered a written agreement in terms of which they agreed to a voluntary termination of the contracts of employment of the respondents, subject to the condition that they would receive severance packages as if they had been retrenched by the applicant. On or about 31 March 2001 and in terms of the agreement the applicant duly paid all outstanding monies, including the agreed packages to the respondents. They acknowledged receipt of such monies in writing.

3. In April 2002 the respondents brought an application under case number J1222/02 for an order to set aside the aforesaid agreement on the basis that it was null and void and for compensation. They contended that SATAWU's shop stewards were forced into accepting a retrenchment and that the agreement was signed without them being consulted. An answering affidavit was filed by the applicant on 7 May 2002. The matter was enrolled for a hearing on 29 May 2003. The presiding judge in his chambers indicated to the representative of the parties that there was according to him a material dispute of fact that could only be determined after the hearing of oral evidence. The parties agreed thereafter that the application filed under J1222/02 be postponed *sine die* to allow the respondents to prepare and submit a statement of claim. It was also agreed that the parties would meet to consider the issues to be determined by this Court and that the respondents would be responsible for arranging such a meeting.
4. The J1222/02 application was set down for a hearing on 9 September 2003 in the opposed motion roll. The respondents did not file a statement of claim and to arrange a meeting with the applicant as undertaken. Heads of arguments were filed by the applicant during August 2003 and raised the existence of a material dispute of fact

regarding the circumstances under which the agreement was signed, which necessitated the institution of action proceedings rather than motion proceedings alternatively a referral for oral evidence. The matter was again postponed *sine die*, due to the existence of a material dispute of fact. The respondents were ordered to pay the wasted costs. A bill of costs was taxed in an amount of R11 551.38. It was served on the respondents attorneys. The amount has to date not been paid. The first respondent thereafter appointed new attorneys, Baker Mohamed Siritzky. The J1222/02 was again enrolled for a hearing on the opposed motion roll on 22 January 2004. After the applicant's attorney had contacted the respondents' attorney the matter was removed from the roll and it was agreed that the matter should proceed by action proceedings. The matter was removed from the roll and costs were reserved.

5. During 2005 the respondents approached WESUSA a registered trade union to seek legal assistance on what further steps to take in the matter. In June 2002 WESUSA advised the respondents to file an application under case number J1216/06 against SATAWU. In the J1222/02 SATAWU was not cited as a party. In August 2006 SATAWU filed a notice to oppose but did not file an answering affidavit. The J1216/06 application was enrolled on the unopposed roll of 6 June 2006. The presiding judge indicated that the respondents should consider joining the applicant as a party to the proceedings. WESUSA advised the respondents to seek the assistance of an attorney for the joinder application. The respondents approached their current attorney for assistance during February 2008. A joinder application was served on the applicant on 26 March 2008. The application was not opposed. The applicant filed an opposing affidavit and answering affidavit on 9 May 2008. The applicant had raised several points *in limine* including *lis pendens*, the

outstanding costs, undue delay in prosecuting the second application and a material dispute of fact. The respondents did not file a replying affidavit.

6. In a letter dated 15 December 2008 the respondents' current attorneys advised the applicant's attorneys that he was not going to continue with the J1216/06 and would be pursuing case J1222/02 and that the parties would attempt to agree on the further conduct of the matter by way of having relevant disputed matter referred to oral evidence. The applicant's attorneys advised the respondents' attorney in a letter dated 3 March 2009 that they were not amenable to the suggestions and that an application to dismiss would be brought. The respondents on the same day advised the applicant's attorneys that he was instructed to proceed with the J1222/02 application.
7. On 21 May 2009 the applicant brought the dismissal application. The respondents opposed the application and filed a counter application for an order that the material facts in dispute be referred to oral evidence.

Analysis of the facts and arguments raised

8. It is common cause that the respondents were members of SATAWU which has a recognition agreement with the applicant. The respondents were suspended in 2001. An agreement was concluded between SATAWU and the applicant in terms of which the respondents were paid severance pay and certain moneys due to them. The agreement was signed by a union organiser and shop stewards and the employees whose names were listed on a list. The offer and acceptance were made in full and final settlement of all

claims of the listed employees against the applicant arising from their employment with the applicant, the termination thereof and/or otherwise. The respondents acknowledged receipt of the payment and were paid.

9. The first application was filed in 2002 which is more than eight years ago. The respondents were made aware of the existence of a material dispute of fact on 29 May 2003. They had undertaken to refer the dispute to oral evidence. The respondents enrolled the main application on the motion roll on two further occasions. Several years have passed before the second application again on motion was filed. The respondents being faced with material dispute of facts, should have filed a statement of claim, as agreed between the parties on 29 May 2003. They have failed to do so. It is clear from the facts of this case that no further prosecution of the first application has been taken for more than six years since January 2004. The respondents have failed to prosecute the first application in an expeditious and diligent manner as is expected of litigants involved in labour disputes.
10. The respondents' conduct falls short of what is expected from litigants involved in labour litigation. Legislative policy favours the expeditious resolution of labour disputes and it cannot be expected that the applicant should suffer any further because of the delays caused by their stubborn approach and failure to bring the matter before Court in a proper fashion. The applicant has been drawn into lengthy and costly litigation with little or no prospects of recovery of any legal costs. The taxed bill of costs is still outstanding and the respondents have not made any tender towards the applicant's costs occasioned by the opposition to the second application. The applicant's contention that it will suffer severe

prejudice should the matter be allowed to proceed to oral evidence or trial at this late stage was not challenged. Barry Miles who was on behalf of the applicant involved in negotiations leading up to the agreement sought to be set aside, moved to Qatar during or about 2004 and it will be difficult, if not impossible to obtain his evidence relating to the circumstances under which the agreement was entered into. All the positions previously occupied by the respondents have also been filled a long time ago and it will be extremely prejudicial for the applicant should it be expected to reinstate them at this late stage.

11. There is no evidence before this Court that the first respondents' representatives were intimidated into signing the written agreement. SATAWU on 8 June 2001 confirmed that the respondents were consulted before entering into the agreement. SATAWU advised the applicant that it had been properly mandated by the respondents to enter into the agreement. The respondents were members of SATAWU and the applicant was entitled to negotiate with it during the conclusion of the agreement. The respondents accepted the benefits flowing from the agreement and are estopped from raising the alleged unenforceability of the agreement. There is no tender for restitution of the benefits received by them under the agreement. They were not retrenched in terms of section 189 but the applicant entered into an agreement with SATAWU in terms of which there was a voluntary termination of their services.
12. This Court has been subjected to harsh criticisms by the higher courts about delays in matters referred to this Court. Some of the criticisms are unwarranted since the delays lie squarely on the doors of litigants as this case clearly demonstrates. The respondents have issued an application under case number J1222/02 which was set down for a hearing on

29 May 2003. It was pointed out by this Court that the matter should be referred to oral evidence and the parties agreed to do so. The matter was not referred to oral evidence and was instead enrolled for a hearing on 9 September 2003. It did not proceed but was again enrolled on 22 January 2004 but was removed. In June 2002 the respondents were assisted by WESUSA and issued a new application under case number J1216/0s this time only against SATAWU. It was enrolled for a hearing on 6 June 2006 and the Court indicated that the applicant should have been joined. The matter was postponed *sine die* and the applicant was duly joined as a party to the proceedings. In December 2008 the respondents' current attorneys of record said that they were not going to proceed with the J1216/06 but the J1222/02 application would be referred to oral evidence. The respondents were notified by the applicant's attorneys that an application to dismiss the J1222/02 application would be brought. There is simply no plausible explanation given why the dispute under case number J1222/02 was since May 2003 not referred to oral evidence.

13. The respondents were afforded more than sufficient time and opportunity to bring the matter before Court in a proper fashion and fairness dictates that they should not be allowed to waste valuable time and resources any further. It is important that finality be reached and to allow the respondents to request a referral to oral evidence or trial at this stage will not serve the interest of justice.
14. The application sought by the applicant stands to be granted. It follows that the respondents counter claim stands to be dismissed.

15. I do not believe that this is a matter where costs should follow the result.

16. In the circumstances I make the following order:

16.1 The application brought under case number J1222/02 is dismissed.

16.3 The individuals cited as applicants in the applications brought under case number J1222/02 and J1216/06 are barred from instituting any further proceedings against the applicant relating to or in connection with the settlement agreement entered into between the parties on 20 March 2001.

16.4 There is no order as to costs.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT : BESTER & RHOODE ATTORNEYS

FOR SECOND RESPONDENTS : ATTORNEY J D VERSTER

DATE OF JUDGMENT : 26 OCTOBER 2010