

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

CASE NO. JR 467/09

In the matter between:

**MURRAY GLEN CC t/a
MURRAY PARK & CARAVAN
PLEASURE RESORT**

APPLICANT

and

**CORNELIA JOHANNA
Grobbelaar**

1ST RESPONDENT

**COMMISSION FOR CONCILIATION,
MEDIATION & ARBITRATION**

2ND RESPONDENT

THE SHERIFF, SPRINGS

3RD RESPONDENT

JUDGMENT

LAGRANGE J:

- [1] This application is somewhat unusual. The applicant, which runs a caravan and chalet pleasure resort is seeking to permanently stay the enforcement and execution of an award issued by a Commissioner of the second respondent, the CCMA. Interim relief was initially granted on 4 March 2010 to allow the first respondent, the applicant's former employee, to file answering papers. The rule

was further extended on 15 April 2010 by this court until 21 May 2010, being the final return day.

- [2] The applicant claims that the first respondent, Ms Grobbelaar, had either settled with the applicant, or had abandoned or waived the award made in her favour.
- [3] On 12 December 2008, an arbitration award was handed down in the form of a default decision in favour of Ms Grobbelaar. She claimed to have been unfairly dismissed by the applicant after working for it for more than three years, following an argument with her employer. The arbitrator found that their dismissal was both substantively and procedurally unfair and awarded her four months salary as compensation amounting to R 44,000-00. A year later Grobbelaar applied to the CCMA to have the award certified under section 143 of the Labour Relations Act 66 of 1995 ('the LRA'). Subsequently, a writ of execution was issued by the registrar of the labour court and a number of goods belonging to the applicant were subsequently attached by the Sheriff on 17 February 2010. One of the items attached was a vehicle which the applicant claims does not belong to it (a vehicle registration certificates attached to the founding affidavits indicates that the registered vehicle belongs to one Law, whom the applicant claims is the daughter of the sole member of the applicant), and in respect of which interpleader proceedings would be instituted.
- [4] The applicant claims that Ms Grobbelaar had acted disingenuously and fraudulently by not complying with an agreement concluded in May 2009 between herself and Mr J Law, the sole member of the applicant, in terms of which she resumed her employment with the applicant in June 2009 and the applicant agreed to waive its claims against her in relation to the rear rental owing by her in respect of a house in which she stayed. The applicant also claims it agreed it would not pursue her alleged unlawful appropriation of the stove and kitchen cupboards from the house in question. In return, Grobbelaar allegedly agreed to waive her claim and rights to the award made in her favour.

- [5] The applicant initially sought to rescind the award and filed a rescission application together with a condonation application for the late filing thereof. The condonation application was dismissed sometime in April 2009. At that time, Law claims he happened to meet Grobbelaar at a shop where she was working. Grobbelaar told him she was not happy in her current occupation and asked to be allowed to move into one of the chalets on the applicant's premises. Law claims in essence that he agreed to a request, allegedly owing to a previous intimate relationship between him and Grobbelaar which had gone on a number of years. After Grobbelaar had moved in, they had a discussion in terms of which it was agreed she would come back and work for the applicant in June that year. The applicant raised with her the unpaid rental on the house she had occupied before her termination and the property she had allegedly appropriated. In the discussion which followed between them the parties supposedly agreed not to pursue their respective claims against each other.
- [6] Law claims that Grobbelaar presented him with an employment contract which he amended, but "for some or other reason", she never signed the contract. He does not provide any explanation what steps he took, if any, to try and secure her signature.
- [7] For her part, Grobbelaar denies that any agreement was concluded with the applicant which waived any of their respective claims against each other. She does admit that the meeting took place but that all that was discussed at the meeting was her conditions of employment "... in the light of the applicant's intention to offer me a new position at the applicant." She also agrees that she obtained a draft employment contract for further discussion between the parties, but says she was never presented with the amendments made to the draft contract, which is attached to the applicant's founding affidavit. She agrees the contract was never signed and also claims it was never discussed again after she presented the draft.
- [8] As far as the previous employment relationship went, Grobbelaar claims she was provided with free accommodation as part of her employment contract, and in fact Law had offered her a property as a gift arising from their romantic

attachment, but he never fulfilled that promise. Regarding her accommodation when she was re-employed by the applicant in 2009, Grobbelaar denies ever requesting to move into any of the applicant's chalets. Somewhat confusingly she states: *"My request to the vacate one of the chalets at the applicant's premises was directed at the dependent prior to April 2009 and prior to the deponent meeting me in a shop in Springs."* Nevertheless, later in the affidavits she denies ever moving into one of the chalets and denies ever signing a lease agreement or receiving any invoice for rental. She further claims no legal steps had been taken by the applicant against her in respect of any outstanding rental.

[9] Grobbelaar denies walking out on 14 December 2009 claiming that she was dismissed by the applicant.

[10] In his replying affidavit, the applicant puts more flesh on the allegations about Grobbelaar's previously rental of his house during her first term of employment and adds further details, which should have been included in the founding affidavits. He asks rhetorically how it could have happened that he and Grobbelaar could only have dealt with the conditions of her new employment without addressing the previous arbitration award she had obtained against the applicant.

In limine issues

[11] The applicant asks the court to disregard the answering affidavit of Grobbelaar because it was filed one day late without a condonation application being filed, and accordingly is not properly before the court. When the court had previously extended the rule, Grobbelaar was directed to file her answering affidavit within three days of the order of 4 March 2010, but she filed it a day late on 10 March 2010. The applicant argues that the affidavit is not properly before the court in the absence of a condonation application and should be disregarded. The applicant was also directed to file any replying affidavit within three days of receiving the answering affidavit, which was 15 March 2010, but only filed its reply on 18 March 2010. Consequently, both parties failed to comply with the court's directions.

[12] The Labour court like the High court has the power to regulate its own procedure.¹ In this case the directives issued by Molahlehi J could have had no other purpose than to ensure that the matter would be fully ventilated in affidavits in good time before the final hearing on the return date.² This object was achieved despite both parties filing their affidavits late in terms of the court's directives. These directives were of an interlocutory nature and did not dispose of any of the substantive issues in the application. As such, the court is entitled to reconsider them.³ In passing, it can be mentioned that the remedy for a party objecting to non-compliance with a direction is to file an application to have the step set aside as irregular, which neither party has done in this instance in respect of each other's late filing of affidavits.⁴

[13] Given that neither party suffered any prejudice resulting from these procedural delays, and that the purpose of the direction was to ensure the proper ventilation of issues by the time the matter was ready for final determination, the court condones the late filing of both affidavits, which were filed in ample time before the first return day on 15 April 2010.

¹ See **Queenstown Fuel Distributors CC v Labuschagne NO and others (2000) 21 ILJ 166 (LAC)** at 171, par [13]. This decision also distinguished between cases in which it is the non-compliance with the directory provisions of the rules of court which is being forgiven and those in which the provision in question is peremptory in terms of a statutory provision, which a court cannot waive compliance with unless expressly given the power to do so by the statute (at 169, paras [5] – [6]).

² See **Chelsea Estates & Contractors CC v Speed-O-Rama 1993 (1) SA 198 (SE)** at 201G-202A, where Mullins, J said: “As has often been stated, the Rules are made for the Courts, not the Courts for the Rules. It is not inappropriate to quote the words of Slomowitz AJ in the case of *Khunou and Others v M Fihrer & Son (Pty) Ltd and Others* **1982 (3) SA 353 (W)** at 355F-356A as follows:

‘The proper function of a Court is to try disputes between litigants who have real grievances and so see to it that justice is done. The rules of civil procedure exist in order to enable Courts to perform this duty with which, in turn, the orderly functioning, and indeed the very existence, of society is inextricably interwoven. The Rules of Court are in a sense merely a refinement of the general rules of civil procedure. They are designed not only to allow litigants to come to grips as expeditiously and as inexpensively as possible with the real issues between them, but also to ensure that the Courts dispense justice uniformly and fairly, and that the true issues which have mentioned are clarified and tried in a just manner.’”

Of course the Rules of Court, like any set of rules, cannot in their very nature provide for every procedural situation that arises. They are not exhaustive and moreover are sometimes not appropriate to specific cases. Accordingly the Superior Courts retain an inherent power exercisable within certain limits to regulate their own procedure and adapt it, and, if needs be, the Rules of the Court, according to the circumstances. This power is enshrined in s 43 of the Supreme Court Act 59 of 1959.’

³ See **Zondi v MEC, Traditional and Local Government Affairs, and others 2006 (3) SA 1 (CC)** at 13, par [30] on the power of the high courts to reconsider interlocutory orders.

⁴ Rule 12(2) of the Labour court rules.

- [14] Grobbelaar also raises some *in limine* issues relating to the lack of urgency of the matter. This is the return day for the application and given that the rule was originally granted and extended once, with both parties having had an opportunity to ventilate the issues fully so that a final determination can be made. I believe that when the interim relief was granted the court had addressed the issue of urgency. The application is no longer urgent but a final determination of the parties' respective rights in the matter now must be made.

Evaluation of the merits

- [15] The essential question to be determined in this application is whether the applicant has established a clear right to have the enforcement of the arbitration award and the subsequent writ permanently stayed. The effect of such an order is tantamount to setting aside the writ.
- [16] The legal basis of the applicant's claim is the alleged existence of an agreement by Grobbelaar to abandon the arbitration award in favour of her in exchange for the applicant waving its claims against her. Alternatively, it claims Grobbelaar had waived her right to enforce the award.
- [17] Even if the answering and replying affidavits were to be disregarded on the basis that they were both filed out of time, the Biggest difficulty the applicant faces in this regard is the absence of any clear unambiguous extrinsic evidence to corroborate These alleged mutual undertaking³. The only document the applicant was able to produce was the unsigned draft employment contract. When the answering affidavit is considered, matters are complicated further because Grobbelaar denies ever having seen the contract with the handwritten amendments.
- [18] Even if the document could be considered as evidence of a waiver by Grobbelaar of the award in her favour, such evidence has very tenuous probative value at best. The only reference in the document which might conceivably pertain to any abandonment of rights is the following hand written sentence which appears, for

no apparent reason, under the clause dealing with probation. It reads: "*no previous claims since a new employment contract from 29/5/09*" (sic). It is common cause this inscription was made by LAw. Grobbelaar denies she ever agreed to these amendments or that they were they presented to her.

- [19] The applicant points to surrounding circumstances from which it wishes unambiguous inferences to be drawn. Thus, the applicant argues that it is improbable that it would have agreed to re-employ Grobbelaar when she still had a claim of R 44,000-00 against the applicant arising from the arbitration award. It also submits it is improbable it would agree to rent out two chalets to the applicant at no cost, as Grobbelaar alleges, if such an award was outstanding against it. The applicant further points out that it was only when the second term of employment ended that Grobbelaar took steps to enforce the original arbitration award.
- [20] It must be said that Grobbelaar's resumption of employment with the applicant does raise questions. Equally, one may wonder why the applicant would have re-employed Grobbelaar, without obtaining her unequivocal abandonment of the award and acknowledgment of the alleged claims against her beforehand. If Law had made the amendments to the draft contract and intended those to be material conditions governing Grobbelaar's re-engagement, then it cries out for an explanation why he was content to re-employ Grobbelaar without ever finalising the document. To say that Grobbelaar never signed the document 'for some or other reason' is simply not sufficient to explain his failure to insist on her acceding to those provisions in writing.
- [21] A waiver of rights is not to be lightly construed. As Corbett, AJA (as he then was) emphasised in ***Borstlap v Spangenberg en andere* 1974 (3) SA 695 (A)**:

"Dit is herhaaldelik deur ons Howe beklemtoon dat duidelike bewys van 'n beweerde afstanddoening van regte geverg word, veral waar op 'n stilswyende afstanddoening staat gemaak word. Dit moet duidelik blyk dat die betrokke persoon opgetree het met behoorlike kennis van sy regte en dat sy optrede teenstrydig is met die voortbestaan van sodanige regte of met die bedoeling

om hulle af te dwing. Soos Hoofregter INNES die vereistes in Laws v Rutherford, 1924 AD 261 op b1. 263, gestel het -

"The onus is strictly on the appellant. He must show that the respondent, with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it. Waiver is a question of fact, depending on the circumstances. It is always difficult, and in this case specially difficult to establish." "

- [22] While Grobbelaar's conduct in accepting re-employment with the applicant and not proceeding to take further steps at that stage to enforce the award at that stage may well be indicative of a possible intention not to pursue the enforcement of the award, it is not unequivocal evidence that she had plainly permanently abandoned her right to do so, irrespective of what might have transpired between her and the applicant after she was re-employed. The applicant claims it did not proceed to review the decision of a CCMA commissioner to dismiss its condonation application for its late filing of its rescission application in respect of the award against it, because of the mutual abandonment of claims by it and Grobbelaar. Equally, it may have been content to let the matter lie in the hope that the award might eventually prescribe.
- [23] Grobbelaar has disputed that there are any arrear rentals allegedly owing to the applicant, and the applicant is unable to produce any evidence to support his own averments that before her first dismissal she was renting accommodation from the applicant rather than receiving it free. The difficulty this conflicting evidence presents is that it undermines the basis on which a reciprocal abandonment of rights could be founded. It is difficult to see why Grobbelaar would have agreed to waive her rights to enforce the award because of her alleged indebtedness if she did not believe she owed the applicant any rental. Although the applicant argues that it is unlikely he would have re-employed Grobbelaar without this agreement, it does not claim that her re-employment was subject to her abandonment of her rights. If it had been, then again it is inexplicable why such

an undertaking would not have been obtained in an unequivocal form before her re-employment.

- [24] What complicates matters further in assessing the facts on the papers is that it is difficult to know to what extent the parties might have been willing to re-enter an employment relationship for unarticulated reasons relating to the previous personal relationship between Law and Grobbelaar. Whatever the case, the question remains is whether on the papers the applicant has clearly established an abandonment of the award by Grobbelaar either by agreement, or unilaterally, or that she has in some other way waived any reliance on it.
- [25] In terms of the rules of the High Court and the Magistrates Court⁵, a judgment can be abandoned on the filing of a formal notice by the party that agrees to waive its rights to the judgment in its favour. No such procedure exists in respect of an arbitraton award which has not yet been made an order of court. There was no other unequivocal or demonstrative act on the part of Grobbelaar that the applicant can point to which shows that she clearly abandoned all her rights to enforce the award when she re-entered employment with the applicant. The applicant was not compelled to re-employ Grobbelaar. It ought not to have been difficult for the applicant to have secured Grobbelaar's written consent to waive her rights under the award as a pre-condition for re-employing her, but it did not. Likewise, it would have been relatively simply to have recorded the supposed reciprocal abandonment of their claims against each other in a distinct document. It did not require the conclusion of a new contract of employment containing such a provision to achieve this.
- [26] There are material disputes of fact on the affidavits which the applicant should have anticipated and it ought to have applied to refer the matter to oral evidence. Accordingly, it is only entitled to the relief sought if the facts as stated by respondents, together with the admitted facts in applicant's affidavits, justify such

⁵ High Court Rules r 41(2) and Magistrates' Courts Rules r 27(4).

an order, or when it is clear that the facts, though not formally admitted, cannot be denied and must be regarded as admitted.⁶

[27] On this basis the applicant has failed in my view to establish on the papers that the applicant plainly intended to abandon the award in her favour, and the application must fail. I see no reason why the costs should not follow the result in this instance.

Order

[28] Accordingly,

- a. The rule is discharged.
- b. The applicant is ordered to pay the first respondent's costs.

Order

The application is dismissed with costs.



ROBERT LAGRANGE
JUDGE OF THE LABOUR COURT

Date of judgment: 16 March 2011

Date of hearing: 21 May 2010

Appearances:

For the applicant: L C Leysath instructed by Gishen-Gilchrist Inc.

For the first respondent: W P Scholtz of Jansens Attorneys

⁶ See *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235E - G. In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* E 1984 (3) SA 623 (A) at 634H - I