REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO: C395/00

In the matter between:
ANGELA URSULA STRAUB_Applicant

and

NICOLAS JOHN BARROW N.O____First Respondent

FERDA ROSA BARROW N.O._____Second Respondent
(In their capacities as trustees

of the Barrow Family Trust)

J U D G M E NT

WAGLAY, J:

1. The applicant seeks to make the settlement agreement which she concluded with her erstwhile employer an order of this Court in terms of section 158(1)(c) of the Labour Relations Act ("Act").

2. The agreement records the erstwhile employer to be Rosenhof Country Lodge. It is common cause that Rosenhof Country Lodge is owned by the Barrow Family Trust with Nicolas John Barrow and Ferda Rosa Barrow the Trustees.

3. In the heading of the application, the applicant cites her erstwhile employer as Mr Nic and Mrs Ferda Barrow and in the founding affidavit records the

following:

"The respondent is MR NIC AND MRS FERDA BARROW (the Barrow Family Trust) full legal capacity with its

registered office at the Barrow Family Trust, Baron Von Rheede Street, Oudtshoorn."

4. The application is opposed on three grounds:

(i) The wrong party is cited as the respondent;

(ii) that there is a matter pending before another Court between the parties in respect of the same cause of action - a defence it refers to as *lis alibi pendens*; and

(iii) that the suspensive conditions in the settlement agreement have not been fulfilled.

5. With regard to the wrong citation of the respondent, the point raised by Mr *Barrow*, who represented the respondent, is not altogether without merit. However, having regard to the documents filed of record, particularly the opposing papers, I am satisfied that the proper respondent is before this Court. While I find unsatisfactory the fact that applicant who, although not at the time of lodging the application, is now legally represented did not see it important to seek to amend the papers to properly cite the respondent, I shall take this into account when dealing with the issue of costs.

6. Having regard to what I have said above I do not find the point raised by the respondent to affect the application. For proper form, however, I have decided that the respondent should be cited as I have in this judgment. I may also add

that having considered the papers it is obvious that the trustees were sought to be held liable in their representative capacity although they are cited in their personal capacities in the heading of the application.

7. The next defence raised by the respondent, that of *lis alibi pendens* is a defence that seeks to stay proceedings between parties where the parties are already involved in litigation in respect of the same subject matter and the litigation remains pending. This defence is based on the grounds that:

(i) the applicant in this matter instituted proceedings in the Magistrate's Court for the district of Oudtshoorn for payment of an amount that had been agreed between the respondent and the applicant in terms of the agreement which applicant now seeks to make an order of this court;

(ii) The matter was defended by the respondent who then instituted a counter-claim against the applicant;

(iii) Applicant later withdrew her action and tendered respondents' costs;

(iv) Respondent duly had its bill of costs taxed and, according to it, also obtained judgment in its favour against the applicant in respect of the counter-claim.

Respondents' argument is that since the applicant has failed to pay the costs as taxed, in respect of the action applicant instituted and has not satisfied the judgment debt in respect of the counter-claim, applicant cannot proceed with her application in terms of section 158(1)(c) which is now before me, because her failure to pay the costs and capital as aforesaid makes the matter between the parties relating to the action and counter-claim instituted in the Magistrate's Court in Oudtshoorn, still pending and since the matter relates to the same cause of action, the present application should be refused.

8. The defence of *lis alibi pendens* can only be raised where the matter between the parties remains unresolved, not in respect of performance of any

court order , but in respect of the issue in dispute and relief i.e. once final judgment is pronounced the defence of *lis alibi pendens* can no longer be raised. In the matter relating to the action and counter-claim between the applicant and respondent, applicant withdrew its claim, respondent accepted the withdrawal - this is evident from the fact that it had its bill in respect of the matter taxed. Furthermore, respondent has already obtained judgment in respect of the counter-claim. There is, therefore, nothing more for that Court to do other than issue a warrant of execution if respondent so seeks. Furthermore, respondents' claim is by virtue of the judgment liquidated and besides execution is capable of being set off against claims made by the applicant against it. In the circumstances, respondents' submission that the matter remains pending between the parties cannot be sustained and this objection is accordingly dismissed.

9. Turning then to the final issue. The settlement agreement concluded between the parties records the following:

"*This constitutes a full and final settlement of employee's*

claim of unfair dismissal (CCMA case reference WE14013)

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(1) In the event of the employee being found guilty in the pending criminal case against her she will make no claim against the employer with regard to her dismissal.
(2) ...
(3) Should the employee be found not guilty in the criminal case, the employer will -
3.1 provide her with a positive written reference

3.2 make an ex gratia payment equal to three months' salary. This will not be subject to deductions and will be paid within 14 days of
the outcome of the case."

10. The above agreement was concluded on 9 November 1998 and the "*criminal case*" referred to in paragraphs 1 and 3 of the agreement is a reference to fraud charges which were preferred against the applicant by the State, the complainant in the matter being the respondent. On 12 October 1999 the State however decided not to proceed with the criminal charges against the applicant withdrew it, and advised the parties accordingly.

11. As a consequence of the withdrawal applicant seeks to enforce the agreement. Respondent, however, argues that the fact that the charges are withdrawn does not mean that the applicant has been found “not guilty”. The respondent has, since it has been given notice of the withdrawal, attempted and is attempting to obtain a *nolle proseque* certificate in order to pursue a private prosecution. According to the respondent, therefore, until such time as the applicant has been found “not guilty” - particularly where there is no indication from the complainant that it no longer seeks to pursue prosecution, the matter remains pending and thus in the present matter the suspensive conditions of the settlement agreement have not been fulfilled. Since the respondent in this matter intends to proceed with the prosecution, albeit private prosecution, I should so respondent submits, refuse this application.

12. In order to test the validity of respondents' submission, it is necessary to have regard to the terms of the settlement and the interpretation thereof. The manner in which an agreement should be interpreted was set out by the

Appellate Division in *Coopers & Leybrandt v Bryant* 1995(3) SA 761 (A) at 767E-768E where it held:

According to the 'golden rule' of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity or some repugnancy or inconsistency with the rest of the instrument...The mode of construction should never be to interpret the particular word or phrase in isolation (in vacuo) by itself...The correct approach to the application of the golden rule of interpretation, after having ascertained the literal meaning of the word or phrase in question is, broadly speaking to have regard :

(1) to the context in which the word or phrase is used and its inter-relation to the contract as a whole, including the nature and purpose of the contract... ;

(2) to the background circumstances which explain the genesis and purpose of the contract, i.e. to matters probably present in the minds of the parties when they contracted... ;

(3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is, on the face of it, ambiguous, by considering previous negotiations and conduct of the parties showing the sense in which they acted on the document, direct evidence of their own intentions.

13. Having regard to the agreement as a whole the very first sentence sets out the following :

"*In the event of the employee being found guilty in the* ***pending criminal case****...*"(emphasis added).

The words "pending criminal trial" can only have one meaning in the context of the settlement and that is, as applicant properly argues, the criminal case then being prosecuted by the State - if the parties had intended anything else or as

respondent seeks to argue to include private prosecution then the word "pending" would not have been used. Accordingly the phrase "*should the employee be found not guilty in the criminal case*" (paragraph 3 of the agreement) must be read subject to what is stated in paragraph 1 of the settlement agreement, namely the pending criminal case.

14. The only suspensive condition in terms of this agreement was that the applicant had to be found not guilty in the "criminal case" which at the time the agreement was concluded, was pending against her. Once the State decided not to prosecute the criminal case the suspensive condition was fulfilled. This is so because a letter from the Commanding Officer addressed to the applicant records that the Director of Public Prosecutions had decided not to prosecute. The only inference that can be drawn therefrom is that the State was not satisfied that it had sufficient evidence to successfully prosecute the applicant. The withdrawal by the State should therefore for purposes of this agreement mean that the suspensive conditions have been fulfilled. While the respondent still has the right to put further evidence before the Director of Public Prosecutions to reconsider its decision or to proceed with private prosecution I am satisfied that the way the agreement stands the parties only contemplated that the criminal charge that was then pending against the applicant and the one that was withdrawn was the one referred to in the agreement. I am therefore satisfied that the suspensive conditions of the agreement were fulfilled and accordingly respondents' further objection is also dismissed.

15. Having dismissed all of respondents' objections I see no reason not to grant the order sought by the applicant. The applicant at the time of her dismissal earned a salary of R2 500,00 per month and in terms of the settlement agreement, respondent agreed to pay to the applicant the sum of R7 500,00. which is what I should order the respondent to pay.

16. With regard to costs, for reasons I have stated in paragraph 5 above I was reluctant to grant applicant any costs in this matter. However, since the second and third objections raised by the respondent lacked merit I believe that the respondent should be liable for 50% of the applicant's costs.
In the result I make the following order:

(a) The settlement agreement entered into between the parties dated 9 November 1998 is hereby made an order of Court, respondent must thus pay to the applicant the sum of R 7 500,00.

(b) Respondent is to pay 50% of applicant's costs in respect of this application.

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B. WAGLAY

Judge of the Labour Court

APPEARANCE
ON BEHALF OF APPLICANT: Adv A. M. Smalberger

INSTRUCTED BY: Berman & Fialkolov
ON BEHALF OF RESPONDENT: Mr N J Barrow
DATE OF HEARING: 27 October 2000
DATE OF JUDGMENT: