**IN THE LABOUR COURT OF SOUTH AFRICA**

**HELD AT PORT ELIZABETH**

**CASE NO: P 143/07**

In the matter between:

| | |
|---|---|
| **CHRISTINA JACOBA JORDAAN** | **APPLICANT** |
| and | |
| **CCMA** | **1ST RESPONDENT** |
| **COMMISIONER J VAN DER WALT** | **2ND RESPONDENT** |
| **HOMENET CORNERSTONE** | **3RD RESPONDENT** |
| **CORNERSTONE HOMENET** | **4TH RESPONDENT** |
| **LANCE DEREK GOUWS** | **5TH RESPONDENT** |
| **CORNERSTONE GRAPHICS CC t/a HOMENET CORNERSTONE BEACON BAY** | **6TH RESPONDENT** |
| **LANCE DEREK GOUWS IN HIS CAPACITY AS MEMBER OF CORNERSTONE GRAPHICS CC t/a HOMENET CORNERSTONE BEACON BAY** | **7TH RESPONDENT** |
| **D. T. GOUWS PROPERTIES CC t/a HOMENET CORNERSTONE** | **8TH RESPONDENT** |
| **D. T. GOUWS PROPERTIES CC t/a CORNERSTONE HOMENET** | **9TH RESPONDENT** |

**JUDGMENT**

**CELE AJ**

**INTRODUCTION**

[1] The applicant's resignation from her employment with the sixth respondent has the sequel to this application launched in terms of section 145 of the Labour Relations Act 66 of 1995 ("the Act"). She seeks to have an arbitration award dated 16 February 2007 issued by the second respondent as a commissioner of the first respondent reviewed, set aside and substituted. The sixth respondent, as the acknowledged erstwhile employer of the applicant and in whose favour the award was issued, opposed the application.

**BACKGROUND FACTS**

[2] The applicant commenced her employment with the sixth respondent ("the Company") on 1 July 2002 in the position of an Estate Agent. She was initially placed at the Southernwood office of the company and worked under the direct supervision of Mr Lance Gouws, her principal and majority shareholder of the company. In early July 2004 she moved to work at the Beacon Bay office of the company, where she worked under her husband Mr

Jacques Jordaan who was the Office Manager. Mr Jordaan held 34% shares in the Beacon Bay business of the company.

[3] Relations between Mr Gouws and Mr Jordaan began to take a turn for the worst. In a partnership meeting held on 22 July 2004 Mr Gouws exercised his powers, as a two thirds majority of the management committee, by removing Mr Jordaan from his position as a Manager. He however retained him as an employee of the company with his shareholding. Mr Gouws and Mr Jordaan began to negotiate the resignation of Mr Jordaan, the purchase of his shares and the value and a dividend of all partners.

[4] In the partnership meeting Mr Gouws had also introduced for discussion the protection of the fiduciary rights and the intellectual property rights of his company. That pertained more specifically to a restraint of trade. Some parties expressed reservations on the restraint of trade.

[5] On 27 July 2004 the agents of the company held their usual weekly meeting where they discussed sales related problems and other matters. Mr Gouws then gave each of his agents a document couched as a restraint of trade agreement. He gave them a period of 30 days, which according to him was for the consideration of the proposed agreement. After that 30 days' period, he expected those agreeing with the restraint, to sign it. The applicant understood the 30 days to be a period within which they had to sign the agreement. Mr Gouws explained to his staff the consequences attendant to a failure to sign the agreement. That explanation is part of the bone of contention. It was his intention that the staff had to make up their minds without delay whether they would choose to stay in his company or, as he then suspected, leave with Mr Jordaan. It was his concern that those who would chose to leave the company, might take along much of the data base within their disposal and to unfairly compete with him in the business.

[6] As it had then become clear, Mr Jordaan tendered his resignation from the company on 30 July 2004 and went to open his own estate agency in competition with Mr Gouws. A number of estate agents resigned from the employ of the company and went to join Mr Jordaan in his new agency. At that stage, the applicant, who was one of the best agents in the company, stayed behind, still pondering on the implications of the restraint of trade document.

[7] Just about 3 weeks after the applicant had received the restraint of trade document, she called Mr Gouws to a one on one meeting which they held in the boardroom. Among issues discussed was the effect of her not signing the agreement. She also asked to be paid from a bond account, indicating that she had also to leave the company. In running the affairs of his company, Mr Gouws had created a fund, he called a bond account, from which in some circumstances, his agents would be paid. Mr Gouws agreed to pay the applicant from the bond account up until June 2004 on leaving the company provided she stayed away from Ms Errol Theron, a property developer in town, with whom she did a lot of business for the company. She had a mandate from the developer to sell the properties. She did not agree to that condition of staying away from Ms Theron. She then asked Mr Gouws to furnish her with a letter of termination of employment. The parties are not agreed as to the description of that letter. Mr Gouws undertook to speak to his attorney on the issue. Some days later when the applicant asked for the letter, Mr Gouws told her that he had not had time to see his

lawyer.

[8] On 31 August 2004 the applicant served a letter of resignation from her employ, to the company. She looked for an employment position from Mr Phil Rawston, a Homenet Franchise holder in East London. When she was not successful, she went to join her husbands agency. She felt aggrieved by having had to leave the employ of the company and referred a dispute, premised on constructive dismissal, to the CCMA for conciliation and arbitration.

**THE ARBITRATION HEARING:**

**APPLICANT'S CASE**

[9] The applicant testified and three witnesses were thereafter called in her case. Their evidence in respect of constructive dismissal is as follows:

1. Applicant

As they were having a weekly meeting of 27 July 2004 discussing sales related problems, Mr Gouws gave each of them the restraint of trade document. She had never seen it in her life before. As he gave it to them he said that he knew that they were not going to be happy about the document, but they had to sign it within a month. They had to take their time to read through it. They had a month to sign and to return it to him.

Ms Cheryldene Marais who was a shareholder of the company and had been told about the document a week before, was upset and said "but Lance I thought we spoke about this". Mr Gouws responded by saying his lawyer advised him to do it.

The restraint of trade document had never been discussed with her. Nor

did Mr Gouws explain its nature in that meeting. Paragraph 2 of the document prohibited the agents from working in the East London area of the municipality boundaries for a period of six months upon leaving the employ of the company, save with the prior written consent of Homenet Cornerstone.

She read the document and realised that she was back against the wall. She couldn't sign it, for fear that she might be asked to leave, in which event she would be sitting without a job for six months. If in future she decided to resign, she would sit without a job for six months, if she had signed it.

About three weeks after they were given the document, she called Mr Gouws through to the boardroom for a meeting to discuss the document. By then there was quite an atmosphere in the office, it was not nice. She asked him what would happen if she didn't sign the restraint of trade document. He told her that she would have to leave the company. She said that she would go but asked if he would fire her, to which he said he would retrench her. She said that she would leave but asked him to pay her and to get her a retrenchment letter from his lawyer. He undertook to talk to his lawyer about the retrenchment letter.

On 31 August 2004 she approached Mr Gouws and requested a retrenchment letter from his lawyer. He told her that he had had no chance to go and see his lawyer. She found herself left with no option but to resign so she handed him a letter of resignation.

Her husband had not approached her to join his agency as he had done with other staff. She did not want to share property estates with him as it was not in her nature to do so. For two years she had not done it with other companies and had no reason to do it with him.

She was always loyal to Mr Gouws. She wanted to work for Homenet because of its successful name with which she had been associated. She was successful in her work and would not otherwise join her husband's agency. She could not agree to sign the restraint of trade document as she would be vulnerable to a dismissal and be out of a job for six months thereafter.

2. Ms Cherydene Anne Marais

She had received a notice and an agenda for the shareholders meeting of 22 July 2004. She attended the meeting. One item which was belately added to the agenda was the issue of a restraint of trade. Before the meeting she had no knowledge of the restraint of trade document and was shocked when the matter of it came up for a discussion in that meeting. Mr Gouws told the meeting that each of them would be given the restraint of trade document and they would be given 30 days to sign it. A possibility of introducing the document to new agents was also discussed. In a subsequent meeting of all staff on 27 July 2004, the matter came up again and Mr Gouws told the meeting that his lawyer had insisted on him having to implement the restraint of trade to all agents and not just to the new ones.

The working atmosphere became unfavourable as a result of the introduction of the restraint of trade document. The agents did not want to go the route of implementing it and they talked to one another to try to resolve the issue. Theirs was either to sign the restraint of trade document or leave the company. There was no other option.

She was not aware of a document which said agents had to be aware, if they chose not to sign the restraint of trade document, they could run a possible or conceivable risk of having their employment terminated for operational reasons and it would be a last resort to protect the business.

3. Ms Vuyokazi Brenda Ncita

To the extent that she could recollect, she had a meeting once with Mr Gouws where the restraint of trade was discussed. She might have attended a second meeting with the rest of the agents but could not remember the issue of the restraint being discussed with other agents.

In the one meeting she recalled, she met Mr Gouws in the boardroom alone. He told her that he had fired Mr Jordaan as he was unhappy with Mr Jordaan's style of office management and because there were complaints in the office which Mr Jordaan couldn't resolve. Mr Gouws gave her the restraint of trade document to go through and to sign it but did not explain it to her. She was not happy wit a clause, in that document, that said she would not work in that area for 6 months as an agent if, for instance she was fired by the company. She chose not to sign the restraint of trade document but chose to resign. When she tendered her letter of resignation, Mr Gouws asked if there was something he could do to stop her leaving. She told him there was nothing and she did not think of telling him to let her not sign the document. She had not been threatened into signing the document.

4. Mr Brian Baisley

Mr Gouws gave the agents a restraint of trade document to peruse and sign. He did not say what would happen if one did not sign it. Nothing happened for quite a while and there was a second meeting. Mr Gouws would not tell even when pushed what would happen if one didn't sign the document. The agents concluded on their own what would happen as Mr Gouws said that at the end of the month all agents working for the company must have signed the document.

He decided against pursuing the matter and resigned. He considered that he was still young, at 21 years and had to look at other work options. He had considered it as a veil threat that if he didn't sign he would have to leave. If he signed it, anything could happen and he might have to leave and yet could not work in that area for the next 6

months as an agent. He could not remember the issue of retrenchment coming up, in the event one did not sign the document. When he left, the work environment had become unpleasant. Nobody was comfortable to go and talk to Mr Gouws any more.

[10] The case of the applicant was then closed. The company had three witnesses who testified for it. Their evidence relevant to the restraint of trade document will then be dealt with.

1. Mr Lance Derek Gouws

He received information that Mr Jordaan was going to open an estate agency in opposition to his. He became concerned and then consulted a labour attorney, long and hard. He received advice to act with due care and diligence in complying with labour laws. He had to exercise close scrutiny of all his actions and words. He and the attorney drafted the restraint of trade document.

He wanted to protect the interests of the company because an estate agency values its agents. It was an anomaly in their industry that they did not have restraints of trade. In the big franchises, in any of the big centres, they train an agent and make him or her sign a restraint of trade. In East London it was not common practice to do it. When discussing the issue with his attorney, he was advised to attempt to protect fiduciary rights and intellectual property of the company.

The wording of the restraint was carefully chosen and was carefully used, both in the partners meeting and in the subsequent meeting with the staff. He said to them that given the current market conditions, there was a need to protect fiduciary rights of the company. Therefore it had become an operational requirement even in the case of the restraint of trade. Agents were to be aware that any choosing not to sign it, ran a possible or conceivable risk of having their employment terminated for operational reasons. It would be a last resort to protect

the company.

He introduced the restraint of trade document in a meeting of shareholders and their reaction was not good. He introduced the restraint of trade out of fear that Mr Jordaan would take the entire company staff, leaving him with no business in Pletttenberg Bay. He believed the attorney had given him good advice, he wanted the staff to decide what they were going to do. If they were to go, they had to leave and those that didn't, had to stay. He didn't want people to have a long period of time to take as much of their data base and take everything with them.

As the restraint of trade was not in place at the beginning of business, he was advised that it could be implemented at a later stage. However, everyone had to be given a period of 30 days to assess the document and to take whatever steps they saw fit and only thereafter could he attempt to implement the document, so he told them that they had 30 days to peruse the document, not 30 days to sign it. They could seek advice from whoever on the document.

Apart from the shareholders meeting, he held a staff meeting on 27 July 2004 and various meetings with individual agents on the document. He avoided answering the question on what would happen to an agent who did not want to sign the document. He conceded that he was not sure of what he was doing, right from the inception. He conceded that the situation in the office was very tense as described by the applicant. Mr Jordaan was, at the time, cajoling and having private meetings with all and sundry, in an effort to have them go with him. So the situation was obviously tense.

While he wanted to retain the staff, it would obviously be awkward to have applicant in his staff when her husband had acrimoniously left the

business and opened up another in competition to his. He could not however dispute applicant's evidence of being an honest person and the good working relationship they had had. Even though the situation was extremely difficult, and fraught with fears of a loss of confidentiality, he would still have liked to keep her in his employ. It seemed to him from her tone in the first meeting that she was determined to leave. He was concerned about a lucrative business they had with Mrs Errol Theron and that the applicant wanted to take it with her on leaving.

On 27 August 2004, he had a meeting with the applicant. It was clear to him that she wanted to have a letter which she might later use against him. At that stage, he had no intention of enforcing the restraint of trade because, by that stage, a number of staff numbers had already left the company. He would not enforce the implementation but chose not to tell her at that stage. The fact that he told her he would consult his attorney was to fob her off, because he was not going to give her that letter. When he spoke to the applicant he avoided using words "fire" or "retrenchment" and that the employment terminated for operational reasons. He could not use retrenchment to people who earned a commission and not a salary.

On 27 August 2004, he was left with three agents, including the applicant. He never went to them to tell them to sign the document. During the 30 days' period for the consideration of the document, almost every agent approached him about it. He consulted his lawyer who reminded him that what he was doing was to try to flush out and was therefore never to backdown. So he reiterated what he had said to the staff. He had given a similar document to the company staff based at Southernwood. It also caused consternation there. He met those staff members as well. None of them signed it but none left the company.

2. Ms Aneari

All staff members were given the restraint of trade document. They were told that they had to sign it. She did not sign the document given to her because she did not particularly like what was written. She had a discussion with Mr Gouws where she said she was willing to sign it. He asked if she would stay and that was the end of the matter. She could not tell if other staff signed it but recalled that everybody said they would not sign it.

She earned a living through the work she was doing. It was her livelihood. If ever she had to leave the company she would like to be able to find work elsewhere. They had a very good understanding with their principal from the beginning. His feeling was if you wanted to go, you had to make a decision you were going. If you wanted to stay, you stay. Mr Gouws came up with the document, in his way of knowing where the loyalties lay.

She found the restraint of trade document on her desk and could not tell who put it there, nor could she tell who had said they were to sign it. She thought it was obvious that it was there for them to sign it.

Ten years before, she went looking for a job and one company presented her with a restraint of trade which had a one year prohibition. She did not take the job and therefore did not have to sign it.

3. Sean Collin Clelard

He knew Mr Gouws from 1981. They were school friends. From time to time thereafter they had occasionally met. When he looked for his first home, he approached Mr Gouws who sold him one.

Mr Jordaan did offer him a position as he had done with other staff. At that time he was still working in the company. He declined the offer.

He was with the staff that were given the restraint of trade document. They were asked to peruse it at their leisure and if they had any objections they had to bring it back for a discussion. He did not sign the document but did say to Mr Gouws that he would sign it if he had to. He had a normal discussion over the document with Mr Gouws. He considered that he had no intention of moving on to anywhere else, so if he had to sign it, he would. He was not asked to, nor was he given any 30 days' ultimatum to sign the document or to leave the company. He would not be able to explain why he was treated differently from other staff on how the document was dealt with.

**REVIEW GROUNDS**

[11] The submission is that the second respondent misdirected himself on the facts and the law in that:

- He ignored the fact that the evidence of the applicant and her three witness was in conflict with that of the respondent and his witnesses,
- In his judgment he did not deal with the two versions and he did not analyse the said conflict at all.
- Neither did he make any finding on credibility or on the probabilities as it presented itself at the hearing.
- From the award, it must be deducted that the accepted the version of the respondent to the extent that it was in conflict with that of the applicant.

Facts were then set out in support of the submission made.

[12] In opposing the review application, the sixth respondent submitted that:

- The company was at a loss in understanding precisely what factual disputes the deponent suggested were not resolved,
- What credibility issues ought to have been addressed,
- On the reading of the award, the commissioner effectively found against the applicant on the basis that she had acted too hastily in resigning – at a stage when her employer had not as yet unilaterally amended her contract of employment.
- The company disputed that the commissioner in fact accepted the version presented on its behalf or that, even if he did so, that alleged error gives rise to a ground of review within the contemplation of section 145 of the Act.

**SUBMISSION BY THE PARTIES**

[13] Save to add that the defect complained of is in the nature of a gross irregularity, the submission dated 5 December 2007 by Advocate Klem S.C. for the applicant are similar to those made in the founding affidavit. On the date of hearing the review application, Mr Klem submitted supplementary heads of argument to which Mr Wade, for the sixth respondent objected, everring that the belated supplementary submissions were brought in contrary to the rules of this court.

[14] In the answering affidavit of the company a point was taken, namely that the review application was filed out of the six weeks

prescribed by section 145 (1) (a) of the Act and that no condonation application had been filed. In her replying affidavit, the applicant merely said that the application was filed within the prescribed time without taking the matter further. Mr Wade submitted in his heads of argument that the review application was not brought in time and that the applicant has not filed an application for condonation. There are further submissions made by Mr Wade on the demerit in granting the review application. It is important to firstly resolve the issue of whether or not the review application was brought within the prescribed time period, as this issue has the potential of disposing off the matter without visiting the merits and demerits of the review application.

**ANALYSIS**

**CONDONATION**

[15] Section 145 (1) (a) of the Act provides that any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the commission may apply to this court within six weeks of the date that the award was served on the applicant for an order setting aside the arbitration award. Section 145 (1) (A) of the Act states that this court may on good cause shown (my underline) condone the late filing of an application to set the arbitration award aside.

[16] No application for condonation for the late filing of the review application has been made by the applicant. In her paragraph 7 of the replying affidavit dated 14 August 2007, the applicant said:

> "I deny that my review application has been launched outside of the time limits prescribed by sec 145 (1) of the LRA. I submit that my review application has been brought within the time limits prescribed by sec 145 (1) of the LRA, read in conjunction with the Labour Court Rules."

[17] Paragraph 3 of the founding affidavit is important in terms of when one award might have been received by the applicant. It reads:

> "I submit that the award *given* by the Honourable Commissioner, Prof. J. A. Van der Walt on 16.2.07, should be set aside, on the ground that…"

[18] Had the applicant received the arbitration award on any date other than 16 February 2007, she had the opportunity in the third paragraph of the founding affidavit or in the replying affidavit, to state such date. It must therefore be assumed with reasonableness and in the absence of any thing to the contrary, that the applicant or her legal representative received the arbitration award on the same date as it was *given* out. The award purports to have been issued on 16 February 2007. I am however more than willing to add another 7 days from 16 February 2007, as a period within which the applicant might have received the award. This is borne out by the right bottom entry I found on each page of the award. The entry reads: "Last saved on Wed 21 – Feb – 2007 14:19:35". I will accordingly determine the date of receipt of the arbitration award by the applicant or her representative to have probably been on 23 February 2007.

[19] From 23 February 2007 to 25 April 2007, the date of the lodging of this application, there is a period of 8 weeks. The application should have been filed within 6 weeks from the date of receipt of the arbitration award and is therefore 2 weeks late. Accordingly, the applicant should have filed an application for condonation for the late filing of the review application.

[20] Mr Wade has reminded me of the strict parameters there are in the exercise of a discretion to grant condonation, by a referral to the often cited decisions of the Labour Appeal Court in *Queenstown Fuel Distributors CC v Labuschagne NO & Others [2000] 1 BLLR 45 (LAC)*. In paragraph [24] the court had the following to say:

> "…In principle, therefore it is possible to condone none-compliance with the time-limit. It follows, however, from what I have said above, that condonation in the case of disputes over individual dismissals will not readily be granted. The excuse for non-compliance would have to be compelling, the case for attacking a defect in the proceedings would have to be cogent and the defect would have to be of a kind which would result in a miscarriage of justice if it were allowed to stand."

This decision was delivered before the insertion of subsection 1 (A), to section 145 of the Act.

[21] The arbitration award under siege, is about a dispute over an alleged individual dismissal for which condonation should not be easily granted. While the excuse for non-compliance with a set time limit should be compelling, none has been proferred by the applicant. It might very well be said in this case that the case for attacking a defect in the proceedings is cogent. The second respondent had to determine whether the company without reasonable and proper cause conducted itself, by introducing a restraint of trade, in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between itself and its agents see – *Pretoria Society for the Care of the Retarded v Loots (1997) 6 BLLR 721 (LAC)*. To that end, the

second respondent had a duty to resolve a dispute of facts between the parties, on whether or not Mr Gouws, directly or indirectly told the staff to sign the restraint of trade within the 30 days' period and if so, the effect thereof to the employment relationship, judged reasonably and sinsibly, to see if the applicant was expected to put up with it – see *Jooste v Transnet Ltd t/a SA Airways [1995] 5 BLLR 1 (LAC)*. The second respondent, even in a simple manner, ought to have utilised that technique generally employed in the resolution of factual disputes – see in this respect a decision in *Stellenbosch Farmers' Winery Group Limited & Another v Mortel & Co 2003 (1) SA 11 SCA* at para 5. He did not make any vein attempt at following this technique.

[22] In my view, a defect thus identified would not be of a kind which would result in a miscarriage of justice, if allowed to stand. A few days after the applicant tendered her letter of resignation, she found another employment, in the same industry and area, thus mitigating her damages. As I weigh up the considerations to which I have hitherto referred, I am satisfied that this is not a case where condonation should be granted. What exacerbates the matter is that the applicant preferred not to apply for condonation and has not therefore shown any reasons underlying the late launching of the review application so as to be weighed against other relevant considerations, see in this respect the decision in *Moila Shai NO & Others (2007) 28 ILJ 1028 (LAC)*.

[23] This is not one dispute which is of such utmost gravity, the correct

resolution of which has profound socio-economic implications such that the legislature did not wish any non-compliance with the time limit in section 145 (1) (a) of the Act, no matter how gross the defect in the arbitration proceedings, to be fatal to the review application – see paragraph [23] in *Queenstown Fuel Distributors CC – case*.

[24] Accordingly the following order will issue:

1. The application to review the arbitration award dated 16 February 2007 issued by the second respondent, in this matter is dismissed.
2. The applicant to pay the costs of this application.

_____

**CELE AJ**

Date of Hearing:

Date of Judgment: 25 April 2008

**APPEARANCE**

For the Applicant: Advocate Klem S.C.

For the Respondent: Advocate Wade