IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

CASE NO D868/98

In the matter between:

R GOYAL AND LA VOGUE **Applicant**

and

T V MWASI **Respondent**

JUDGMENT

WALLIS AJ

[1] This is an application for the rescission of a judgment granted by this Court. The circumstances in which the application arises are as follows: the respondent, Ms Mwasi, was employed as the manager of a shop trading under the name La Vogue at premises situated in West Street, Durban. Her employment was terminated when the business ceased trading from these premises at the end of February 1998.

[2] Ms Mwasi was aggrieved by her dismissal and referred a dispute in that regard to the CCMA. Whilst the papers and the reference are not before me, the resultant certificate of non-resolution of the dispute issued by the Commissioner identifies the parties as on the one hand, Mwasi, and on the other, La Vogue.

[3] It is clear that there was no appearance by the employer before the CCMA. Instead, a letter was addressed to the Commissioner on 12 March 1998. That letter is written on the letterhead of the present applicant, Episode Importers and Wholesalers cc t/a La Vogue. It refers expressly to the "Matter between Mwasi and La Vogue". The tenor of the letter is that there is an identity between the corporate body and La Vogue. Thus it refers to a letter written by the landlord of the West Street premises to "our company, La

Vogue". The letter is signed by one Roshika Goyal who claims to be a "director". It is obvious that she was not alive to the niceties of the distinction between a company and a close corporation.

[4] Ms Mwasi then approached attorneys who instituted proceedings before this Court for her re-instatement in employment retrospectively to the date of her dismissal. That application was brought in terms of Section 191(5)(b) of the Labour Relations Act 66 of 1995 to which I will hereinafter refer as the LRA. It is in relation to these proceedings that certain difficulties regarding the identity of Ms Mwasi's erstwhile employer began to creep into the picture.

[5] In paragraph 1.2 of the statement of case filed in terms of Rule 6, the respondent in those proceedings is cited in the following terms:

> "The respondent is Roshika Goyal t/a La Vogue, a clothing importers and retailers, under registration number 4820164061 with its offices at first floor, Unit 4, 274 Edwin Swales Drive, Rossburgh, Durban. The address is P O Box 41028, Rossburgh, 4072. Fax Number (031) 4651599. Telephone number (031) 4651244."

[6] That form of citation is immediately confusing. Whilst the form is consistent with the personal citation of a natural person, namely Roshika Goyal, the description of the respondent which follows is consistent with the description of a firm of which Roshika Goyal is said to be the proprietor. If one seeks for clarification of the

position, all the indicators in the founding papers are to the effect that a firm trading as La Vogue rather than a natural person, Roshika Goyal, is being cited as the respondent.

[7] Firstly, there is the certificate of non-resolution of the dispute issued by the CCMA to which I have already referred. Secondly, the letter in terms of which Ms Mwasi's services were dispensed with is annexed as part of the application and it is on the same letterhead as the previous letter to the CCMA although in the annexed copy the name of the close corporation has somehow been cut off. The language of the letter is, however, inconsistent with Roshika Goyal being the employer in her personal capacity. I should mention that she is the author of the letter and she signs it as a director. Thirdly,in dealing with the alleged substantive unfairness of the dismissal, the application describes the respondent as being "a big organisation". That is likewise inconsistent with a citation of Roshika Goyal in her personal capacity as opposed to a citation of a firm of which she was thought to be a proprietor.

[8] In my view, therefore, the application papers when properly construed should be understood as citing a firm in its own name as contemplated by Rule 20(1). As is the position in the High Court, an erroneous reference to someone as the proprietor of the firm does not affect the validity of the citation. I am fortified in this view by the fact that on receiving a copy of the application papers that is how they were understood by Roshika Goyal who was at the time representing the

applicant. At that time she was the person who held a 51 percent member's share in the applicant close corporation which share she had shortly before the date of the letter sold to her fellow member, one Sanjeev Goyal. It is a matter of speculation as to the relationship between Roshika Goyal and Sanjeev Goyal.

[9] Be that as it may, Roshika Goyal deposes to the fact that on receiving the application papers she immediately faxed a letter to Ms Mwasi's attorneys. That letter forms part of the papers and is dated 25 November 1998. It is on the applicant's letterhead and is clearly couched as being written on behalf of the applicant.

[10] In all the circumstances, there can, I think, be no prejudice to either Roshika Goyal or to the present applicant in my construing the citation of the respondent in the Section 191(5)(b) application as being a citation of the firm of La Vogue which it is now common cause is the name under which Episode Importers and Wholesalers cc conducts business.

[11] It is unfortunate that the citation of the employer in the application under Section 191(5)(b) was not immediately remedied on receipt by the attorneys of Ms Goyal's letter dated 25 November 1998. Had it been, much time, legal manoeuvring and costs would have been saved. However, that was not to be and the application proceeded in its original form.

[12] As it was not opposed, it came before WAGLAY AJ (as he then was) on 29 July 1998 and he granted an order in the following terms:

"It is ordered that:

1. The dismissal of the applicant was procedurally and substantively unfair;
2. The applicant is hereby re-instated in her employment with the respondent with retrospective effect and as from 1 March 1998 on conditions no less favourable to her than those that governed the applicant's employment prior to her dismissal. Such re-instatement is to be effected in one of respondent's Durban businesses;
3. The respondent is to pay the costs of this application."

[13] I should mention that notice of set down was, in accordance with the practice of this Court, sent by registered post to the named respondent and there is no indication of non-receipt thereof in the Court file although such receipt is denied. A copy of the court order was sent by the same means but attracted no response.

[14] After the court order was granted, it is clear that a bill of costs was taxed on behalf of Ms Mwasi and apparently she tendered her services but was rejected. Nothing was done by the present applicant in regard to the judgment.

[15] Be that as it may, when Roshika Goyal received a letter from Ms Mwasi's attorneys in September 1999, she caused attorneys to be instructed to represent the present applicant in relation to the proceedings flowing from the judgment. In a letter dated 10 September 1999, an application for rescission of judgment was threatened. What is in my view significant is that it was the present

applicant on whose behalf such an application was foreshadowed. That implicitly recognised that the judgment was one against the present applicant.

[16] Indeed, when an application was brought on 22 September 1999 both Roshika Goyal and the applicant "trading as La Vogue" brought the application. The basis of the application was that the default was not wilful and that there was a proper defence on the merits in that it was claimed that Ms Mwasi had been retrenched due to circumstances beyond the employer's control. Roshika Goyal denied personal liability on the basis that she was no longer the owner or a member of the applicant.

[17] When this application for rescission of judgment was brought it prompted Ms Mwasi's attorneys to bring an application to remedy the problems regarding the citation of the respondent in the Section 191(5)(b) proceedings. That application was granted without opposition on 26 November 1999 and in terms of Rule 22 the present applicant, Episode Importers and Wholesalers cc t/a La Vogue, was substituted for Roshika Goyal t/a La Vogue. The only possible basis for that application was that the change was purely in the nature of a clarification. It is obviously not permissible to effect such a substitution after judgment so as to change the identity of the party against whom a judgment has been granted.

[18] The result of the order for substitution was that the present

applicant brought a fresh application for rescission of judgment based on the same facts as the previous application which facts I have already summarised. The apparent reason for doing this was a belief on the part of the applicant that as it was put in paragraph 2.3 of Mr Surtee's affidavit, "The respondent's claim was transferred or initiated" when the order for substitution was granted. For the reasons I have already given concerning the proper meaning of the citation of the respondent in the Section 191(5)(b) proceedings, I do not regard that contention as being correct.

[19] In argument before me today, Mr Ndaba, who appeared for the applicant, effectively confined himself to the argument that the judgment had been obtained against the wrong party and now that the erroneous citation had been remedied, the true defendant and admitted employer should be permitted to defend the proceedings. If that were indeed the correct factual position then the contention would have been irresistible. However, for the reasons already given I do not regard the contention as being correct insofar as its factual basis is concerned.

[20] The true position, in my judgment, is that the Section 191(5)(b) proceedings were properly brought against a firm, La Vogue, and the judgment was granted against that firm. The subsequent proceedings have been directed solely at correcting the erroneous identification of the proprietor of that firm. Now that this has been done, the judgment stands and the correction of that identification

furnishes no basis for an application for rescission of the judgment. Mr Ndaba did not pursue with any vigour the notion that in that event rescission should be granted. In that he exercised, in my view, a wise discretion.

[21] The Section 191(5)(b) application was served and received and was not opposed. The claim by Roshika Goyal that she thought it could be sorted out in correspondence with Ms Mwasi's attorney rings hollow in the light of the express terms of the notice of application and the absence of any favourable response from the attorneys to her letter. Even if that failure could be regarded in some measure as being excusable there is the further insuperable difficulty that there is a palpable absence of any defence. The dismissal of Ms Mwasi was effected without any attempt to comply with the requirements of Section 189 of the LRA. It was, in my view, manifestly unfair both procedurally and substantively. Even if there are circumstances in which a failure to comply with the provisions of Section 189 will not lead to the resultant dismissal being condemned as unfair, there is in my view insufficient in the papers in this matter to suggest that this is such a case.

[22] There is an endeavour to contend that the closure of the shop at the instance of the landlord was done with great suddenness and very little notice. Indeed, the suggestion is that only one day's notice was given. In my view, however, that contention is incompatible with the correspondence which Ms Goyal annexed to her founding affidavit. There are two annexures to that affidavit, both of which are letters dated 26 February 1998 addressed by the landlord to the applicant. The one letter records that it has been explained many times to the applicant that the landlord was unable to allow it to continue its occupation on a monthly basis. It also records that the landlord was not prepared to enter into a longer term lease agreement at a reduced rental as

suggested by the applicant. That this was indeed the suggestion was confirmed by the affidavit of Ms Goyal and by the other documents in the papers. In those circumstances, it is manifest that the suggestion that the lease terminated suddenly thereby forcing a retrenchment without compliance with the provisions of Section 189 is not factually correct. The proper inference to be drawn from this letter is that the existing lease had expired and the applicant was continuing to occupy the premises from month to month whilst endeavouring to negotiate a fresh lease. In those circumstances its continued occupation of the premises was at all times precarious and consequently there was at all times a distinct possibility that it would be compelled to close the business.

[23] On the facts put before me there is no suggestion that it would have been feasible simply to move the business to alternative premises. Accordingly, the risk of loss of jobs existed and had probably existed for several months prior to the final termination of the applicant's occupation of the premises. Those several months should have been used for the purpose of complying with the requirements of Section 189. The failure to use the time available for that purpose was manifestly unfair to Ms Mwasi.

[24] In the circumstances, there is nothing in the application papers before me which suggests that if this judgment were rescinded and the matter proceeded to trial as it would then have to do, the outcome of that trial would be any different from the order which has already been made.

[25] Leaving that aside, there are some arguments in the papers concerning the disposal of Roshika Goyal's interest in the close corporation and Mr Surtee's acquisition thereof. These arguments are misconceived. Ms Mwasi was employed by a corporate body and dismissed by a corporate body. She was entitled to relief against the corporate body irrespective of who owned the member's interest therein.

[26] In the result, the application must be dismissed with costs. In the

taxation of those costs I draw the registrar's attention to the massive and unnecessary duplication of proceedings and documents by both sides. This duplication should be taken account of in the taxation of the bill of costs presented for that purpose.

[27] There is one last matter. It is that much of the activity leading up to the application for rescission of the judgment stemmed from endeavours by the attorneys on behalf of Ms Mwasi to enforce the order for re-instatement. To that end, they sued out a writ of execution on 16 August 1999 directing the Sheriff of the district of Durban to attach and take into execution certain movable goods and thereafter to cause those goods to be realised by public auction for the purpose of paying to Ms Mwasi the sum of R17 000,00 together with interest and the taxed costs of the application in terms of Section 191(5)(b). The attachment which was effected pursuant to that writ prompted an urgent application that was in turn opposed. The order which was ultimately made by MLAMBO J on 14 December 1999 was that the sale in execution pursuant to the writ be stayed pending the rescission application to be heard on 21 February 2000. That is the application I have already dealt with. The costs of the urgent application were reserved for decision by the Court determining the rescission application.

[28] As I indicated in argument, I have considerable reservations concerning the propriety of the issue of that writ. I am unable to see on what basis one can take an order for re-instatement in

employment and use that as a foundation for the issue of a writ levying execution for payment of a sum of money. Of course, insofar as the writ was issued in respect of the recovery of the taxed costs, that is a wholly different matter.

[29] The position, as I understand it, from the order of MLAMBO J is that the stay of the sale in execution will lapse with my judgment in the rescission application. To the extent necessary, I will add an order to that effect.

[30] That leaves the question of the costs of the urgent application. There is a difficulty with those costs. On the one hand, as I have indicated I have some reservations about the propriety of the issue of the writ. On the other hand, that was not the point raised in the urgent application. Instead, the point that was made was simply that pending the outcome of the application for rescission it would be inappropriate for Ms Mwasi to be permitted to pursue execution in terms of the judgment she has obtained. That is, in principle, correct subject to the merits of the application for rescission. The approach adopted by Ms Mwasi in her opposing affidavit in that application was that the matter was being unduly delayed, the application for rescission was unmeritorious and there was no defence to her claim. By and large, I have upheld those contentions.

[31] In all the circumstances, it seems to me that recognising both the

strengths and weaknesses of each party's case in regard to that urgent application, it would be appropriate for me to order that each party pay its or her own costs of that urgent application.

[32] I accordingly make the following order:

1. The application brought under case number D868/98 for the rescission of the judgment granted by WAGLAY AJ on 29 July 1999 is dismissed with costs.
2. Insofar as it is necessary to do so, I direct that the order granted by MLAMBO J on 14 December 1999 staying the sale in execution pending the outcome of this application lapses on the grant of the order dismissing the application for rescission.
3. As regards the costs of the urgent application for a stay of the sale in execution, the applicant and the respondent are to bear its and her costs respectively in that application.

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WALLIS AJ