IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO: C323/04

In the matter between:

COLLIERS PROPERTIES **Applicant**

and

AMARALL CHRISTIAN Respondent

JUDGMENT

MURPHY, AJ

1. On 23 February 2005 the respondent was granted a default judgment against the applicant by Oosthuizen AJ in terms whereof the applicant was ordered to pay the respondent the sum of R 48 000.00 in terms of section 194(3) of the Labour Relations Act being compensation ordered in respect of the automatically unfair dismissal and the sum of R10 000.00 in terms of section 50 of the Employment Equity Act being compensation in respect of sexual harassment. The learned judge also made an order that the amounts should attract interest and awarded costs against the applicant.

2. On 26 May 2005 the applicant brought an application for the rescission of the judgment handed down on the 23rd February 2005. I shall refer to this application as "*the first application*".

3. A few days later, on 30 May 2005, Mr Ahmed Collier brought a second application under the same case number, citing additional parties as respondents. This application I shall refer to "*the second application*". In terms of it, the applicants sought urgent relief ordering that a writ of execution issued under the relevant case number against "Ahmed Collier trading as Collier Properties" be stayed and that also the processes of execution of the same be suspended pending the return day of a *nisi* calling upon the respondents to show cause why the various processes of execution including the writ, a garnishee order and a notice of attachment should not be set aside. The second application was set down for hearing on 01 June 2005 to be heard as a matter of urgency.

4. The respondent opposed the application and raised various points in *limine*.

5. The second application came before Pillay J on 07 June 2005 and was postponed by her in order to permit the applicant in the first application to file supplementary affidavits and to allow the respondent to reply. She ruled that both applications be heard simultaneously.

6. When the matter came before me counsel for the applicant, after some argument, abandoned the second application and confined himself ultimately to the application for rescission of the judgment. The second application was problematic because it has been made under the same case number as the application for rescission but in fact involved different parties in respect of whom no application for joinder was made.

7. The premise of the second application is that the execution process

was brought against the wrong person, namely Mr Ahmed Collier, when it should allegedly have been brought against Mr Ismail Collier, his son. The respondent's position in this regard is that the judgment was handed down against Collier's Properties, an estate agency, of which the principal sole registered agent is Mr Ahmed Collier. Accordingly, the respondent is of the view that she was indeed employed by Ahmed Collier trading as Collier Properties. Her submissions in this regard are borne out by documentation supplied by the Estate Agents Board. However, as I have indicated, the applicant eventually abandoned this application.

8. Because of this the only application before me is the first application brought in the name of Colliers Properties for the rescission of the judgment handed down by Oosthuizen AJ.

9. The respondent has raised a point *in limine*. With reference to rule 7(3)(a) of the Rules of the Labour Court, she submits that the application is not in accordance with the rules and should be dismissed on that ground alone. Rule 7(3)(a) stipulates that any application to this court must be supported by affidavit and that the affidavit must clearly and concisely set out the names, descriptions and addresses of the parties. Neither of the supporting affidavits deposed to by Mr Ahmed Collier or Ismail Collier in respect of the first application cite and/or describe an applicant, despite Pillay J having afforded the applicant an opportunity to supplement its papers. I am in agreement with Mr van der Schyff, who appeared on behalf of the respondent, that the rules are peremptory and any non-compliance requires condonation to be sought by way of application. Given the centrality of the dispute around who the applicant in fact is in relation to the second application and the entire issue of execution, the defect in this regard cannot be seen to be entirely of a technical nature. The papers do indeed reflect confusion

as to whether Mr Ahmed Collier or Mr Ismail Collier was the respondent's employer and thus the applicant. The applicant's failure to properly identify itself or himself has resulted in a number of ambiguities making it impossible for the respondent to deal properly with the application. Accordingly, I agree that the application should be dismissed on this ground alone.

10. Nevertheless, lest I be mistaken on this, there is some merit in dealing with the application for rescission itself.

11. Applications for rescission can be brought either in terms of rule 16A of the Labour Court Rules or in terms of section 165 of the Labour Relations Act. The applicant has omitted to state whether the application was brought in terms of the rules or in terms of section 165. In the heads of argument filed on behalf of the applicant it is stated that the application for rescission was brought under rule 16A(1)(b). Rule 16A(1)(b) provides that the court may in addition to any powers it may have, on application of any party affected, rescind any order or judgment granted in the absence of that party. However, in terms of rule 16A(2)(b) any party desiring any relief under sub-rule (1)(b) must make application showing good cause within 15 days after acquiring knowledge of the order or judgment granted in the absence of that party.

12. It is common cause that the applicant learnt of the judgment for the first time on 16 March 2005 and that the application for rescission was served on the respondent's attorneys some two months late on 26 May 2005. Accordingly the applicant is out of time in respect of any application made under Section 16A(1)(b). The applicant conceded this and sought condonation in terms of rule 12 of the Rules of the Labour Court.

13. Rule 12 permits the court to extend or abridge any period prescribed by the rules on application and also to condone non-compliance with any period prescribed by the rules on good cause shown. In prayer 1 of the notice of motion the applicant seeks an order that the applicant's failure to comply with rules of the court as regards the formal service, the giving of notice and the applicable time periods be condoned and that the time period with which to bring the application be extended. No reference was made to rule 16A. Nevertheless I am prepared to accept that the intention was to seek an extension or condonation of the 15-day time period referred to in that rule.

14. The only averment in the applicant's supporting affidavits offering any explanation for the delay of 2½ months in bringing the rescission application is contained in the affidavit of Ismail Collier where he states that after having received a faxed copy of the judgment on 16 March 2005, he approached a Mr Kumamdan, a colleague who previously practised as an attorney and who claimed to have experience in matters of this nature, to assist and advise him to resolve the matter as he believed that the judgment had been obtained on incorrect information. He averred that Mr. Kumandan had advised him that the matter was under control, that he had nothing to worry about and that he had no reason to believe otherwise until he recently discovered that Kumandan had in fact spent a lot of time out of town. It was only when his father informed him of the existence of the writ of execution dated May 2005 that he became concerned that there may be a problem and moved to instruct his present attorneys of record.

15. Mr Kumandan in his affidavit explained that he had not responded to the judgment because he relied on an alleged undertaking by the respondent's attorney to engage in a round table conference to try and

settle the matter. The respondent's attorney denies having given such an undertaking although admits that there was some discussion of a round table conference. When he heard nothing further from Kumandan he proceeded with the execution process.

16. The difficulty with the applicant's version is that whatever arrangements there may have been between Kumandan and the respondent's attorney, the sheriff of the court visited Colliers Properties on 7 April 2005 to effect the warrant of execution, which yielded a *nulla bona* return. It is clear from the warrant and the return that the sheriff had direct dealings with either Ahmed Collier or Ismail Collier who informed him that there was no moveable property or disposable assets. Accordingly it is highly improbable that either Mr Ahmed Collier or Mr Ismail Collier could have assumed that Mr Kumandan had matters under control. Rather, I agree with the respondent, Colliers Properties preferred to neglect the matter in the hope that it would simply go away.

17. Accordingly, I am not persuaded that the applicant has furnished a reasonable explanation for its delay in bringing the application for rescission in terms of rule 16A(1)(b). It has not provided sufficient information to account for its inertia during the 2½ months after it learned of the judgment. It follows that it has not shown good cause and the application for condonation in terms of rule 12 must be dismissed.

18. Although there is no express application in terms of section 165 of the LRA before me, in the interests of justice I am prepared to consider whether such an application has any merit. Section 165 provides that the Labour Court, acting on its own accord or on the application of any affected may vary or rescind a decision, judgment or order that is

erroneously sought or erroneously granted in the absence of any party affected by that judgment or order. (The other grounds for granting rescission or variation identified in section 165 have no relevance in this matter). In order to succeed under this head the applicant would have to show that the order was granted as a result of an erroneous assumption on the part of Oosthuizen AJ. The section provides a procedural step designed to correct expeditiously an obviously wrong judgment or order.

19. A case could be made out that the judgment of Oosthuizen AJ was erroneously granted were it to be found that the applicant never received the respondent's statement of case. The respondent has averred that on 27 July 2004 she faxed a copy of the statement of case to Collier's Properties in Lansdowne, which was then diverted automatically to Ahmed Collier's residence. She provides proof of the onward transmission in one of her affidavits. Mr Ahmed Collier in his supporting affidavit admits that the fax number to which the statement of case was sent was his home fax number. In this regard he states:

> This is my home telephone number, and although the fax facility still exists on the line, I have not had a fax machine in my house since 2001 and it is possible that the fax was received on my computer, which I seldom check, however I have never had sight of the documents allegedly faxed to me.

This, to my mind, amounts to an admission that the fax was probably received but that Mr Collier simply failed to check his mail. It means that service was indeed effected in accordance with rule 4(1)(a)(iv) of the Rules of the Labour Court. In any event the respondent in her opposing affidavit further averred that after receiving the statement of case, Mr Ismail Collier telephoned her on her cellular telephone from his private number. According to her, he stated that he noted that she had taken the matter to the Labour Court, but laughingly told her that she would never succeed as he had not employed her in the first place. This averment has

not been denied in reply and hence, in accordance with the principles in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), I am obliged to conclude that the statement of case was indeed properly served. Accordingly, it follows that I am unable to conclude that the order of Oosthuizen AJ was erroneously granted on the grounds that the applicants never received the statement of case.

20. To sum up, I am unable to grant the application for rescission brought in terms of rule 16(1)(b) because it was brought outside of the time limits stipulated in rule 16(2)(b) and no proper case for condonation has been made out in respect of the delay; and secondly I am unable to grant rescission in terms of section 165 of the Labour Relations Act (in respect of which no time limit is stipulated) on the grounds that the applicant has not shown that the order was erroneously sought or granted in its absence.

21. Some suggestion was made from the bar that the order of Oosthuizen AJ was erroneously granted in respect of the R 10 000.00 awarded under the Employment Equity Act because the jurisdictional preconditions of section 60 of the Employment Equity Act have not been fulfilled. Section 60 provides for vicarious liability on the part of employers only where the employer fails to take necessary steps to eliminate the alleged sexual harassment. There is no express reference to section 60 in the judgment of Oosthuizen AJ, which means there may indeed be some merit in the point. The point however has not been pleaded or raised in the supporting affidavits and was made as a last ditch effort from the bar, without the respondent having had an opportunity to present evidence on the point or to deal with it in argument. Hence, a proper case has not been made out in that regard either.

22. The applicant's approach in this entire matter appears to have been somewhat cavalier and as such should attach an order of costs.

23. In the premises I make the following orders:

23.1 The applicant's applications under case number C323/2004 are dismissed.

22.2 The applicant is to pay the respondent's costs on a party-party basis.

MURPHY, AJ

Date of hearing: 14 June 2005
Date of judgement: 28 July 2005
Applicant's legal representative: Adv G Elliot instructed by RP Totos Attorneys
Respondent's legal representative: Adv J van der Schyff instructed by N Allen Attorneys