

SOUTH AFRICA / JUDGMENT

Bloem water v Lesedi Civil Construction CC (5850/2021) [2024] ZAFSHC 65 (5 March 2024)

[2024] ZAFSHC 65

COURT

Free State High Court, Bloemfontein

BEFORE

Van Rhyn

CASE / FILE NUMBER

5850/2021

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IN THE HIGH COURT

OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Case No. 5850/2021

Reportable: YES/NO

Of Interest to other

Judges: YES/NO

Circulate to Magistrates: YES/NO
In

the matter between: BLOEM
WATER
Applicant
and
LESEDI
CIVIL CONSTRUCTION CC
Respondent
In
re:_
LESEDI
CIVIL CONSTRUCTION CC
Plaintiff
and
BLOEM
WATER
Defendant

JUDGMENT**BY:**

VAN RHYN, J

HEARD ON:

1 FEBRUARY 2024

DELIVERED:

5 MARCH 2024

- [1] This is an application for rescission of a judgment granted by Daniso J on 12 May 2022 in favour of the respondent against the applicant in default of an appearance by the former to defend the action instituted by the respondent.
- [2] The applicant is Bloem Water, a water services institution established in terms of section 28 of the Water Service Act[1]. The applicant took over Sedibeng Water, a local government and legal entity as contemplated in terms of the provisions of section 151 of the Constitution of the Republic of South Africa and section 2 of the Local Government: Municipal Systems Act[2]. Sedibeng Water has been disestablished by notice in the Government Gazette, effective from 26 July 2022.
- [3] The respondent is Lesedi Civil Construction CC (Registration Number 2005/103344/23) a close corporation with its main place of business situated at Klerksdorp. On 2 March 2020, Sedibeng Water appointed the respondent to provide water for a drought relief program to the towns of Cornelia and Frankfort situated within the Mafube Local Municipality, Free State Province. The respondent was required to deliver the water per water tankers from 5 March 2020. The appointment was accepted in writing by a member of the respondent on 16 March 2020.
- [4] The scope of work entailed that the respondent supplied water at a specified daily rate of R4 680.00 for a period of two months at a contract sum of R1 313 208.00, including VAT. On 20 April 2020 the applicant, by way of a written notice of extension of the agreement to provide water, extended the agreement for a further period of two (2) months. The termination date was set on 30 June 2020 in the letter dated 20 April 2020. The extension of the agreement to provide water per tanker services was accepted in writing by a member of the respondent on 11 May 2020.
- [5] The respondent issued an invoice dated 26 June 2020 to the applicant in the amount of R688 890.00, which amount was settled by the applicant on 18 November 2020. The respondent issued two (2) further invoices, dated 27 July 2020 in the amount of R 608 166.00 and 28 August 2020 in the amount of R 80 730,00 which, according to the respondent, both remained due and payable. The respondent (as the plaintiff in the main action) issued

summons against to applicant (the defendant in the main action) on 15 December 2021 for payment of the sum of R688 896.00 being the amount due and payable by the applicant in respect of Invoice 2020/34 dated 27 July 2020 and Invoice 2020/43 dated 28 August 2020 with interest a tempora morae from date of summons.

- [6] The invoices appended to the summons reflect, on an itemised basis, how the amount claimed had been made up with a description of the destination, being either Frankfort of Cornelia, the number of days, unit price and the total amount due and payable. The summons was served on Mrs J E Kriel, the personal assistant to the chief executive officer of the respondent by the Sheriff, Bothaville on 14 January 2022. The applicant did not enter an appearance to defend. The respondent obtained judgment by default on 12 May 2022 against the applicant for payment of an amount of R688 896.00, interest on the aforesaid amount and a cost order on the scale as between attorney and client.
- [7] The applicant's application for rescission is expressly brought in terms of the provisions of Rule 31(2)(b) of the Uniform Rules of Court. The rule require that such applications must be brought within 20 (court) days of the defendant having knowledge of the judgment. In the matter at hand the applicant obtained knowledge of the judgment when the court order dated 12 May 2022 was served upon the applicant on 15 June 2022.
- [8] Upon receipt of the order an internal investigation was conducted in an attempt to ascertain whether the invoices claimed were submitted and paid or not. It is contended that the applicant was under the impression that all the invoices had been settled. The applicant endeavoured to set up a meeting with the respondent with no success. The respondent obtained a warrant of execution against the applicant of which the applicant became aware of during June 2023. On 4 July 2023 the Sheriff proceeded to attach the assets of the applicant for the intended sale in execution scheduled for 11 August 2023. In the meantime, the applicant requested that the matter be kept in abeyance to finalize their investigation with the view of a possible settlement.
- [9] The applicant contends that on 26 July 2022 Sedibeng Water was disestablished under Government Gazette No 47094 with the applicant formally taking over which change resulted in some matters not being resolved "... as quickly as they may have been should the water board not have gone through the magnitude of the administrative changes it went through". Upon its internal investigation the applicant concluded that the matter should have been defended by the former Sedibeng Water, however no further facts or information pertaining to the findings through its internal investigation, nor the date of the completion thereof were divulged by the applicant.
- [10] On 17 July 2023 the applicant's attorneys of record addressed a letter to the respondent requesting to consent to rescission of judgment and an undertaking not to proceed with the process of execution pending the finalisation of the rescission application to be brought by the applicant. The applicant thereafter requested a further extension to ascertain whether matter may be settled amicable. The sale was scheduled to proceed on 11 August 2023.

Eventually the application for rescission was delivered upon the respondents on 3 August 2023.

- [11] On behalf of the applicant it was argued that it has paid the amount due and owing to the respondent and has even paid an amount in excess of the amount in terms of the contract. In its founding affidavit it is averred that an amount of R2 143 650.00 were paid to the respondent with reference to a schedule of receipts and payments appended as annexure “BW19”. According to the applicant it is “common cause” that the agreement to deliver water to the drought stricken towns of Frankfort and Cornelia was extended until 30 June 2020. The respondent denies that the delivery of services terminated on 30 June 2020. The invoices delivered to the applicant indicates that services were rendered by the respondent up until 27 July 2020.
- [12] During argument and in its heads of argument the applicant relied upon the provisions of Rule 42(1) and contended that judgment was erroneously sought or erroneously granted in the absence of the applicant on the basis that the respondent did not have a valid and binding contract to enforce and claim payment from the applicant. It is well established that Rule 42(1) caters for a mistake in the proceedings. Because it is a rule of court its ambit is entirely procedural. The court is furthermore not inclined to give a more extended application to the rule.
- [13] The application is opposed by the respondent on the grounds that the application is brought in terms of Rule 31(2)(b) and not Rule 42. Rule 42 is not applicable. In order to succeed it was incumbent on the applicant in its application for condonation and the rescission application to show good or sufficient cause for the relief sought. What sprung the applicant into action to apply for the rescission of the default judgment was the warrant of execution and the threat of the nearing sale in execution. The respondent denies that any overpayment of monies occurred. The agreement was extended verbally and the services were rendered to the applicant.
- [14] The claim by the respondent was for payment of services rendered for a period from March 2020 which period was extended verbally by the applicant when the initial period of two (2) months expired. The summons was served upon the applicant and no notice to defend was filed by the applicant. Subsequent to the judgment by default being obtained the order was also delivered to the applicant on 15 June
2022. Therefore, the application must have been brought within 20 (court) days from 15 June
2022. The applicant only launched the application for rescission more than 13 months later on 3 Augustus 2023, well outside the prescribed time limit.
- [15] It is evident that the respondent delivered three (3) Tax Invoices for the services rendered to the applicant during the period when water was delivered to Cornelia and Frankfort. Tax invoice No 2020/25 dated 26 June 2020 in the amount of R699 660.00 was paid on 18 November 2020. There is no indication that the applicant instructed the respondent to cease

the delivery of water at any stage. The applicant does not contend that delivery of water did not take place. The applicant contends that the period of service delivery extended beyond the end of June 2020, which is in conflict with the termination date of the agreement, being 30 June 2020. However, it is clear from the correspondence between the parties that the delivery of water only commenced at a later stage and not on 2 March 2020. In this regard it is noteworthy to have regard to the acceptance of the offer which was on 16 March 2020 and not on 5 March 2020.

- [16] The applicant, being the party which seeks the rescission order, bears the onus of establishing 'good cause'. Rule 31(2)(b) requires 'good cause' to be established before rescission of default judgment may be granted. The evaluation of the 'good cause' criteria has been applied consistently in relation to rescission applications, whether in terms of the common law or Rule 31(2)(b). The phrases 'good cause' and 'sufficient cause' are synonymous and interchangeable.[3] Swain J, in *Pansolutions Holdings Ltd v P&G General Dealers & Repairs CC*[4] held that a court, in evaluating 'good cause', has a wide discretion in order to ensure that justice is done.
- [17] The absence of 'wilful default' does not appear to be an express requirement under Rule 31(2)(b) or under the common law. It is, however clear law that an enquiry whether sufficient cause has been shown is inextricable linked to or dependent upon whether the applicant acted in wilful disregard of court rules, processes and time limits. In the case of *Grant v Plumbers (Pty) Ltd*[5] Brink J held that an applicant who applies for the setting aside of default judgment should comply with the following requirements:
- "(a) He must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the Court should not come to his assistance.*
- (b) His application must be bona fide and not made with the intention of merely delaying plaintiff's claim.
- (c) He must show that he has a bona fide defence to plaintiff's claim. It is sufficient if he makes out a prima facie defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour"
- [18] Courts have held that where non-compliance with the Rules of Court has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success might be[6]. The applicant has not explained Sedibeng Water's failure to take steps to defend the matter subsequent to the service of the summons on 14 January 2022. The only explanation tendered is that the former Sedibeng Water received the summons and the order and no reason could be provided for Sedibeng Water's failure to deliver a notice to defend the action instituted by the respondent. Even after the applicant took over from Sedibeng Water on 1 August 2022, apart from requesting meetings with the respondent to discuss the matter, nothing was done to apply for the rescission of the judgment by default.

[19] In *Silber v Ozen Wholesalers (Pty) Ltd*^[7] Schreiner, JA held as follows:

"It is enough for present purposes to say that the defendant must at least furnish an explanation of his default sufficiently to enable the court to understand how it came about and to assess his conduct and motives."

[20] The applicant was neglectful in not paying proper attention to the summons which was served upon Sedibeng Water and to investigate the claim by the respondent immediately. It is furthermore evident that the applicant, who took over from Sedibeng Water shortly thereafter, must have been aware of the claim for payment by the respondent. A demand for payment prior to the issue of the summons was issued by the respondent. From the correspondence appended to applicant's founding affidavit it appears as if the applicant investigated the claim for payment by the respondent since June 2022 and by August 2023 had not yet consulted with whomever was responsible at Sedibeng Water for the verbal agreement to deliver water, the commencement thereof, the extension of the water delivery project or the payments made or tax invoices received from the respondent.

[21] The applicant did not refer to any information obtained to indicate that the verbal agreement was not extended past 30 June 2020. Apart from a schedule of receipts and payments made to the respondent since 29 April 2020 up to 26 October 2020 indicating 4 different payments and a further document with the heading "FS Drought Relief Fund" indicating 5 payments made to the respondent, no explanation of the contents of these documents were provided by the applicant. No supporting affidavits from any of the employees involved in the project or the investigation that followed were obtained and appended to the founding affidavit. I am not satisfied that the applicant has furnished sufficient information that it has a good defence to the respondents claim for payment of the tax invoices dated 27 July 2020 and 28 August 2020 which included the delivery of water up until 27 July 2020.

[22] I am of the view that the requests for further time to investigate the matter is indicative of the applicant's intention to delay the finalisation of the respondent's claim. The internal investigation commenced subsequent to 15 June 2022 and by 17 July 2023 the applicant was still seeking consent to rescission of judgment as it had not yet applied for such rescission. Thereafter the application for rescission was only delivered on 3 August 2023. I agree with the respondent's contention that the applicant was jolted into action by the threatened sale in execution of the assets of the applicant.

[23] The applicant was provided with three (3) tax invoices for the delivery of water to drought stricken areas. These tax invoices provided an abundance of information from which the applicant should have been able to ascertain whether payments were made in respect of these tax invoices and when such payments were made. I find the applicant's explanations for its failure to have timeously entered appearance to defend the action and its omission to apply for rescission of judgment within the prescribed time period very weak and unpersuasive.

ORDER:

[24] In the result the following order is made:

1. The application for condonation of the applicant's non-compliance with the requirements of Rule 31(2)(b) of the Uniform Rules of Court and for rescission of the judgment granted against the applicant in default of an appearance to defend the action are dismissed with costs.

I VAN RHYN

JUDGE OF THE HIGH COURT,

FREE STATE DIVISION, BLOEMFONTEIN

On behalf of the Applicant: ADV. P T MASIHLEHO Instructed by: MATLHO ATTORNEYS
BLOEMFONTEIN On behalf of the Respondent: ADV. S GROBLER SC Instructed by: CALLIS
ATTORNEYS BLOEMFONTEIN

[1] Act 108 of 1997.

[2] Act 32 of 2000.

[3] Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA (A) at 352 H-353 A.

[4] 2011

(5) SA 608 (KZD)

[5] 1949

(2) SA 470 (O) at 476-477

[6] Darries v Sheriff, Magistrate's Court, Wynberg and Another 1998(3) SA 34 at 41A-D.

[7] 1954 2 SA 345 (A) at 353A.

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