REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION

CASE NO: A3080/2015

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.

………………… ………………

DATE SIGNATURE

In the matter between

MUNICIPAL EMPLOYEES PENSION FUND **APPELLANT**

And

PRO-CARE CONTRACTING (PTY) LTD t/a PRO-CARE CIVILS **RESPONDENT**

JUDGMENT

MAYET AJ:

[1] This is an appeal against the refusal of the magistrate to grant rescission of a default judgment granted against the appellant in favour of the respondent in the Kempton Park Magistrates' Court.

[2] The relevant factual circumstances that led to the appeal can be summarized as follows:

[2.1] The parties concluded a contact in terms of which the respondent carried out certain building work, in particular, the upgrading and renovation of the paved areas and entrance to the Panorama Plaza in Kroonstad.

[2.2] LMV (Pty) Ltd, a consulting firm of engineers was appointed by the appellant to manage the project and to sign off on all work done by the respondent and to issue a payment certificate for settlement by the appellant when satisfied with the standard of workmanship.

[2.3] Furthermore the contract made provision for a 10% retention of the total value of the contract which would be held for a period of twelve months after the contract had been completed and after the consulting engineers had signed off on the project so as to protect the appellant against any latent defects in the workmanship.

[2.4] In June 2011 the consulting engineers, LMV (Pty) Ltd confirmed that the project had been completed professionally to its satisfaction and signed off on the contract in June 2011.

[2.5] On 8 August2012, after one year had elapsed, LMV (Pty) Ltd issued the final certificate of payment and confirmed that it was satisfied with work done by the respondent which meant that the retention money became due and payable.

[2.6] As a result of non-payment of the retention money despite demand, the respondent sued the appellant in the Kempton Magistrate's Court and was granted default judgment in the sum of R67, 679.64 plus interest and costs.

[3] The requirements for a successful application for rescission are set out in Grant v Plumbers (Pty) Ltd 1949(2) SA 470 (O) at 470-477:

"(a) He must give a reasonable explanation of the 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 the Plaintiff's claim.

(c) He must show that he has a bona fide defence to the plaintiff's claim. It is sufficient if one 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 provide evidence that the probabilities are actually in his favour."

Wilful default

[4] I deal firstly with the explanation provided by the appellant for the default. The absence or default must be set out fully because it is relevant to the question whether or not the default was wilful. In Silber v Ozen Wholesalers (Pty) Ltd 1954(2) SA 345(A) at 353, the court held that the applicant should at least furnish an explanation for his default sufficiently to allow the court to understand how it really came about and to assess his conduct and motive. The appellant contends that it only became aware of the default judgment granted against it when the sheriff called on its premises on 3 December 2013 to attach the appellant's movable assets. In his founding affidavit the

CEO, Mr Letjane states that he immediately investigated the matter and on 3 December 2013 he established that the respondent addressed a letter dated 7 November 2013 to notify the appellant of the default judgment. However that letter was also not brought to his attention and he was of the view that a member of his administrative staff simply filed the document. This explanation is not plausible because the letter was addressed to and received by a senior member of his staff, one Anna Capelhina who is the property manager of the appellant.

[5] Mr Letjane also denies ever having received the summons despite the return of service showing that it was served on the appellant's premises on 28 June 2013 and that it was received by Mrs Visagie who is a manager. Mr Letjane's averment that Mrs Visagie has no recollection of receiving the summons cannot be true because there is *prima facie* evidence that it was served on her as reflected on the return of service. The further averment that if it had been served on her she would have given it to an unnamed responsible person borders on the absurd. There is no reasonable explanation offered by Mrs Visagie to explain her selective amnesia in regard to the summons.

[6] It is abundantly clear that Mr Letjane used his authority to undermine the professional standard of his managers by creating the impression that they were all incompetent and he was the only one capable of dealing with the summons. This is quite disingenuous and does not in any way explain fully the reason for the default. The court a quo was correct in rejecting the flimsy explanation given by Mr Letjane and for finding that the appellant was in willful default.

Bona fide defence

[7] The appellant contends that it has a bona fide defence to the respondent's claim, a counterclaim thereto and it has reasonable prospects of success. In support hereof the appellant refers to an oral exchange between its Head of Procurement and Chief Quantity Surveyor, Mr Maluka and its consulting engineers that the retention money

would not be paid until the outstanding defects in the paving had been attended to and rectified.

[8] The defects listed in appelant's founding affidavit included the following:

[8.1] Incorrect pavement curbing;

[8.2] Parking markings had been painted and not sandblasted as required and had faded;

[8.3] Designated and disabled parking was incorrectly sized and/or located. The correctly sized bay was located too far from the entrance and the bays, correctly located, were of an insufficient size to accommodate disabled persons. A grainy photograph was attached to show the defects referred to above.

[9] However all of the above was refuted by its designated principal agent LMV (Pty) Ltd who confirmed in writing that the minor defects in respect of broken paving had been carried out by the contractor.

[10] On 4 October 2014 a meeting was held at the offices of the appellant to discuss among others, the delay in payment of the retention money. The meeting was attended by Mr Maluka, Ms Ana Capelinha and other staff from the appellant's office as well as by Mr Boshoff from the consulting engineers. This meeting was fruitful in that all outstanding issues were resolved to the satisfaction of the relevant parties and it was agreed that the retention money would be paid immediately to the respondent. This was confirmed in an email addressed to Ms Capelinha who, in her reply on the very same day, gave an undertaking to pay within a week.

[11] However payment did not take place and on 7 November 2013 Ms Capelinha apologized for the delay in payment in an email and confirmed that her Managing

Director had approved payment of the invoice. Furthermore she asked if the respondent would accept payment with no interest charges as well as no legal fees.

[12] In the circumstances it does not help the appellant to make the bald statement that Ms Capelinha was not in a position to undertake to make payment on its behalf as she was not aware of the “extent of issues” since she was present at the meeting in October 2013 when the first undertaking was given to make immediate payment. She gave the second undertaking to make payment after her Managing Director approved the invoice for payment. It cannot be said therefore that she acted impulsively and outside her mandate.

[13] All of the above leaves no doubt that the appellant knew at all material times that it was indebted to the respondent for payment of the retention money which became due and payable on 31July2012

[14] In an attempt to avoid the consequences of its acknowledgement of the debt and its undertaking to make immediate payment of the retention money to the respondent, the appellant tried to pass off the offer of payment as a settlement offer. This conduct of the appellant must be condemned as a ploy to delay payment as there was never any mention of settlement negotiations at the meeting nor in any of the correspondence between the parties when the undertaking was given to make immediate payment.

[15] Despite referring to a counterclaim as part of its bona fide defence, the appellant has made no attempt whatsoever to obtain quotations presumably because the work was signed off by its consulting engineers as having met its approval.

[16] With due regard to the conduct of the appellant in delaying payment of the retention money by firstly challenging the right of its authorized principal agent to sign off on the work and issue the final certificate of payment; challenging the undertaking given by its Property Manager to make immediate payment and instituting a supposed counterclaim without supporting quotations, demonstrates that the rescission application and this appeal has been brought to merely delay payment and frustrate the respondent.

[17] I am in agreement with the Magistrate's finding that the appellant has no bona fide defence. Consequently the appeal must fail.

In the result I propose the following order:

The appeal is dismissed with costs.

A MAYET

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

I agree, and it is so ordered.

WHG VAN DER LINDE

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

APPEARANCES

FOR THE APPELLANT: ADVOCATE ROBERT WILSON

INSTRUCTED BY: DOCKRAT INCORPORATED

FOR THE RESPONDENT: ADVOCATE H P VAN NIEUWENHUIZEN

INSTRUCTED BY: E.P. DU PREEZ ATTORNEYS

Date argued: 18 April, 2016

Date judgment: 29 April, 2016