

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case number: 1845/2022

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

MEC: FREE STATE PROVINCIAL GOVERNMENT:
DEPARTMENT OF POLICE, ROADS AND TRANSPORT

Applicant

And

SEDTRADE (PTY) LTD

Respondent

HEARD ON: 09 FEBRUARY 2023

JUDGMENT BY: DANISO, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 19 JUNE 2023 at 14H00.

- [1] On 23 June 2022 judgment was granted against the applicant by agreement between the parties (consent order) pursuant to action proceedings instituted by the respondent as plaintiff against the applicant as defendant for unpaid invoices relating to the upgrading of the road between Deneysville and Heilbron in terms of a contract concluded between the parties on 13 September 2016.

[2] In terms of the said consent order the parties agreed that:

“1. The defendant is to pay to the plaintiff the amount of R7 332 809.60;

2. The defendant is to further pay to the plaintiff the amount of R8 060 952.12;

3. Each party to pay its own costs.”

[3] In this opposed application, the applicant seeks an order for the rescission or variation of the consent order based on the common law ground of *iustus error* and this is due to the fact that the applicant's acting director of Legal Services Mr Monyane, authorised the applicant's attorney to consent to the order under the mistaken belief that the respondent had completed the works and thus entitled to the payment. It was only after Mr Monyane submitted a motivation for the payment that he became aware that the respondent had not completed the works and that the applicant's project manager Mr Ndaba had also refused to sign the certificate of completion for that reason. The photographs taken at the site¹ depicts about a kilometre of incomplete road works.

[4] It is the applicant's case that the consent order ought to be rescinded for the reason that if the respondent is paid as per the consent order, that would amount to fruitless and wasteful expenditure as all the contractual payment would be exhausted whilst the project is incomplete. The court is also entitled to rescind the order on just and equitable grounds to guard against an abuse of public funds.

[5] The respondent's opposition is premised on the grounds that the application is motivated by an ulterior purpose. The applicant simply seeks to avoid a

¹ Annexure “DPRT6” of the applicant's founding affidavit.

perfectly valid obligation to pay the respondent because, pursuant to the consent order no payment was made by the applicant with the result that approximately two months later on 1 September 2022 the respondent had to issue a warrant of execution for the enforcement of the consent order.

- [6] The respondent explains that the defences relied upon by the applicant namely, incomplete works and unsigned completion certificate existed before the consent order was issued. The matter was discussed between the applicant's officials before the settlement agreement was concluded and Mr Ndaba was present together with other applicant's officials at the meeting where the settlement agreement was ultimately concluded and later reduced into writing by the applicant's head of department. Mr Monyane's error if any, it did not have an effect in the conclusion of the settlement agreement which resulted in the consent order therefore it does not vitiate the consent order. There is also no evidence that there purported error was induced by misrepresentation on the part of the respondent.
- [7] As regards the photographs depicting the incomplete work, the respondent states that the photos are not an adequate reflection of the road. The outstanding work is actually in relation to the extra one kilometre which the applicant had first to obtain authorisation from the Provincial Treasury and since no authorisation was obtained by the applicant the respondent could not build that road. According to the respondent, the application is both morally and legally repugnant it must accordingly be dismissed with costs on a punitive scale.
- [8] In terms of the common law a consent order may be rescinded on *justus error* where it can be shown that the denier of liability laboured under a mistake alternatively on *justa causa* based on a good and sufficient cause shown warranting the rescission namely, there is bona fide defence which *prima facie* carries some prospect of the applicant succeeding on the merits.²

² D E Van Loggerenberg et al Erasmus: Superior Court Practice 2nd edition (2015) at B1–308.

- [9] The background facts leading to the conclusion of the settlement agreement which resulted in the consent order do not support the applicant's contention that Mr Monyane laboured under a mistake when he authorized the applicant's attorney to conclude a settlement agreement with the respondent. His haphazard conclusion of a settlement agreement which resulted in the consent order to pay a debt which was disputed was merely a pure neglect of his obligations to ensure that the applicant averts the legal risks including the risk of fruitless and wasteful expenditure of public funds. I am thus not persuaded that the applicant's reliance on *justus error* is legally sustainable.
- [10] On the papers, it is not in dispute that roadworks in relation to about a kilometre of the road is incomplete and that with regard to the complete part of the road there are snags which have not been attended to by the respondent. The parties are in disagreement with regard to the reasons for the incomplete works. A contractor is not entitled to the final payment until the building project is complete.³ The onus is on the respondent to allege and prove that 'everything was done that had to be done in terms of the contract' on which they rely for its claim. For this reason, it does appear that *prima facie*, the applicant's defence to the respondent's claim carries some prospects of success. The application is also *bona fide* as the applicant is desirous to be heard in the main action accordingly, the applicant has made out a case for the rescission of the consent order on the basis of just cause.
- [11] Turning to the issue of costs. Notwithstanding the conclusion that I have come to, I am not persuaded by the applicant's contention that the respondent should be saddled with the costs based on its opposition of the application. The respondent had a judgment granted in its favour by consent after a protracted period of settlement negotiations the respondent was therefore entitled to oppose the application.

³ *Dalinga Belleggings (Pty) Ltd v Antina (Pty) Ltd* **1979 (2) SA 56** (A).

[12] On the other side, the applicant's conduct and how it shaped the proceedings which resulted in the consent order being granted has been reprehensible, it is indeed a conduct which is well within the type of conduct considered to warrant a punitive cost order as asserted by the respondent.

[13] In the result, I make the following order:

(1) The court order dated 23 June 2022 is hereby rescinded.

(2) The applicant shall pay the costs on attorney and client scale.

N.S. DANISO, J

APPEARANCES:

Counsel on behalf of Applicant: Adv. B.S. Mene SC

Instructed by: State Attorney

BLOEMFONTEIN

Counsel on behalf of Respondent: Adv. S. Grobler (SC)

Instructed by: Raees Chothia Attorneys

C/O Honey Attorneys

BLOEMFONTEIN