



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

Case Number 3803/2021

In the matter of:

MINISTER OF HUMAN SETTLEMENTS

FIRST APPLICANT

**MEC FOR DEPARTMENT OF HUMAN
SETTLEMENTS, FREE STATE**

SECOND APPLICANT

and

MMINATHOKO TRADING 117 CC

RESPONDENT

CORAM: NAIDOO, J

HEARD ON: 23 FEBRUARY 2023

DELIVERED ON: 18 JULY 2023

JUDGMENT - APPLICATION FOR RESCISSION OF JUDGMENT

- [1] This is an application for rescission of a judgment granted against the applicants, who are the first and second defendants in the main action, in which the respondent sued the applicants for payment of

monies due to it for services rendered in terms of a contract entered into between the second applicant and the respondent. The application is opposed by the respondent. For convenience, I shall refer the first applicant as 'the Minister' or 'first applicant', the second applicant as 'the MEC' or 'second applicant' or collectively as 'the applicants', and the respondent as 'MMinathoko' or the 'respondent'. Ms JMA Engelbrecht represented the applicants, and Adv HJ Van Der Merwe represented the respondent.

[2] The applicants sought an order in the following terms:

- "1 That the judgment granted against the defendants on 9 June 2022 be rescinded in terms of the rule (sic) of the Honourable Court;
- 2 That the leave be granted to the defendants to continue their defence of the claim.
- 3 That the plaintiff's legal representative the cost this application (sic) on attorney and own client scale".

[3] As I indicated, the MEC and MMinathoko entered into a contract in February 2018 for the construction of houses in Bethulie in the Free State. The work was done and invoices submitted to the MEC, who failed to pay. MMinathoko sent a letter of demand to the MEC and when it did not receive payment, it issued summons against the MEC and the Minister. The MEC does not dispute that it owed the amount of One Million Two Hundred and Fifty Thousand One Hundred and Fifteen Rand and Seventy Two Cents (R1 250 115.72) to MMinathoko, and communicated as much to the latter. The MEC however, alleges that on 24 August 2021 he

indicated that he owed the money to MMinathoko (without saying to whom this indication was made) but that he had received a notice from the South African Revenue Service (SARS) indicating that MMinathoko owed SARS an amount of R1 367 088.39, and that the MEC, on account of owing or holding monies due to MMinathoko, was appointed in terms of the Tax Administration Act (28 of 2011 as amended), to pay such money to SARS. The MEC did not mention when the notice from SARS was received.

- [4] The MEC indicates that the amount of R1 057 313.14 was paid to SARS on 25 March 2022. SARS confirmed that it received payment on 29 March 2022. MMinathoko pointed out that the notice from SARS is dated 7 June 2016 and therefore denies that the notice was received by the MEC in August 2021. In addition, MMinathoko points out discrepancies in the reference numbers reflected in the section 179 notice and the proof of payment tendered by the MEC. In response to the allegation that the section 179 notice has lapsed, the MEC points out that once a notice is issued, it remains valid until it is withdrawn by SARS. The notice in this matter was not withdrawn and hence remains valid.

- [5] The relevant section of the Tax Administration Act is section 179. It is perhaps useful to set out the provisions of the entire section in order to contextualise the case pleaded by the MEC:

179 Liability of third party appointed to satisfy tax debts

- (1) A senior SARS official may authorise the issue of a notice to a person who holds or owes or will hold or owe any money, including a pension, salary, wage or other remuneration, for or to a taxpayer, requiring the person to pay the money to SARS in satisfaction of the taxpayer's outstanding tax debt.

- (2) A person that is unable to comply with a requirement of the notice, must advise the senior SARS official of the reasons for the inability to comply within the period specified in the notice and the official may withdraw or amend the notice as is appropriate under the circumstances.
- (3) A person receiving the notice must pay the money in accordance with the notice and, if the person parts with the money contrary to the notice, the person is personally liable for the money.
- (4) SARS may, on request by a person affected by the notice, amend the notice to extend the period over which the amount must be paid to SARS, to allow the taxpayer to pay the basic living expenses of the taxpayer and his or her dependants.
- (5) SARS may only issue the notice referred to in subsection (1) after delivery to the tax debtor of a final demand for payment which must be delivered at the latest 10 business days before the issue of the notice, which demand must set out the recovery steps that SARS may take if the tax debt is not paid and the available debt relief mechanisms under this Act, including, in respect of recovery steps that may be taken under this section-
 - (a) if the tax debtor is a natural person, that the tax debtor may within five business days of receiving the demand apply to SARS for a reduction of the amount to be paid to SARS under subsection (1), based on the basic living expenses of the tax debtor and his or her dependants; and
 - (b) if the tax debtor is not a natural person, that the tax debtor may within five business days of receiving the demand apply to SARS for a reduction of the amount to be paid to SARS under subsection (1), based on serious financial hardship.
- (6) SARS need not issue a final demand under subsection (5) if a senior SARS official is satisfied that to do so would prejudice the collection of the tax debt.

- [6] The MEC's case is that he does not dispute that he owed money to MMinathoko, but that he was obliged to pay that money over to SARS as a result of the notice issued in terms of section 179, failing which his Department would be held personally liable to SARS for payment of that money. In addition, the notice directed him not to disclose the content of thereof to any other party, except to give effect to the notice. MMinathoko denies that the MEC was instructed not to disclose the content of the notice to it, alleging in any event, that the final demand for payment in terms of the Tax Administration Act was never served on it. Had the MEC disclosed the notice, it would have challenged the issue thereof. It is furthermore not in dispute that a Notice of Bar was served on the MEC after a Notice to Defend the action was served on MMinathoko
- [7] MMinathoko's attorney contends that the MEC has not made out a case for rescission, in that he has failed to show that his default is not wilful and has not shown that he has a bona fide defence to the claim. A letter of demand was sent to the applicants on 30 June 2021, to which the State Attorney responded and advised that the letter of demand was forwarded to the MEC and that they were awaiting instructions. According to the Sheriff's returns of service, the summons in this matter was served on the applicants on 19 August 2021. The MEC's attorney, Ms Engelbrecht alleges in the Founding Affidavit that the summons was received on 30 August 2021, with which MMinathoko agrees in its Answering Affidavit. The applicants' Notice of Intention to Defend was served on MMinathoko's attorney on 17 September 2021. The latter served a Notice of Bar on the State Attorney, representing the MEC, on 7 December 2021.

- [8] As mentioned earlier, the MEC indicated to someone on 24 August 2021 that he acknowledges liability to MMinathoko for the amount claimed, but that he had received a notice from SARS appointing “them” as their agent and directing them not to disclose the content of the notice to anyone. It is wholly unclear when this notice from SARS was received, as the notice is dated 7 June 2016. If 24 August 2021 is meant to be taken as the date that the SARS notice was received, then the MEC filed a Notice of Intention to defend knowing that the money he owed MMinathoko will not be paid to it but to SARS. He said nothing at that stage to the latter, but then informed the State Attorney on 28 September 2021 that payment could not be made as MMinathoko’s invoices were outdated. Ms Engelbrecht called MMinathoko and requested updated invoices, which were duly furnished under cover of a letter dated 6 October 2023. No payment was made, but on 20 October 2021, Ms Engelbrecht sent a letter to MMinathoko requesting that the exchange of pleadings be held over until 30 November 2021.
- [9] No response was received from MMinathoko, but on 7 December 2021, the Notice of Bar referred to earlier was served on the State Attorney’s office. It seems there was no action from the MEC’s side between 30 November 2021 and 7 December 2021. Two weeks later Ms Engelbrecht communicated with MMinathoko’s attorneys requesting an extension until 21 January 2022, as most of the (MEC’s) Departmental officials were on leave. There is no evidence of a response by MMinathoko’s attorneys to this request. Payment in the amount of R1 057 313.14 was made by the MEC to SARS on 25 March 2022, and a letter was sent on 3 May 2022 to

MMinathoko's attorneys informing them of this payment and requesting them to withdraw the action. A copy of the Notice from SARS was attached to the letter.

- [10] In response to the MEC's letter of 3 May 2022, MMinathoko's attorneys served a notice in terms of Rule 31(5) on the Office of the State Attorney, on 31 May 2022. There was no response in respect thereof and Mminathoko took judgment by default for the full amount claimed in the summons (R1 250 115.72) against both applicants on 9 June 2022. Ms Engelbrecht discovered on 1 July 2022 that judgment was taken by default. The application for rescission of judgment was issued on 21 July 2022.

- [11] Uniform Rule 31(2)(b) is relevant to this matter and provides:

(2)(a)

- (b) A defendant may within 20 days after acquiring knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as it deems fit.

The court has a wide discretion in evaluating and determining what constitutes "good cause". Over the years our courts have expressed the view that an attempt to lay down an exhaustive definition of what constitutes good cause, would hamper the ability of a court to exercise the discretion it has in making that determination.

In the much quoted matter of *Grant v Plumbers (Pty) Ltd 1949(2) SA 470 (O)*, the court set out the requirements for an application for rescission as follows:

- (a) He (ie the applicant) 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."

The Grant matter has been followed in a long line of cases from 1979 to present times. The guidelines set out in Grant have become well established in our law.

- [12] With regard to the explanation for failure to comply timeously with the Rules of Court in seeking rescission, it is equally well settled in our law that the applicant is required to give a full explanation for his default. MMinathoko alleges that the applicants' default is wilful. In *Silber v Ozen Wholesalers (Pty) Ltd* 1954(2)SA 345, another *locus classicus*, followed and cited with approval in numerous cases over the last 70 years, the court held that:

"Before a person can be said to be in wilful default, the following elements must be shown:

- (a) knowledge that the action is being brought against him;
- (b) a deliberate refraining from entering appearance, though free to do so;
and
- (c) a certain mental attitude towards the consequences of the default.

- [13] It has been held that a person is in wilful default if he had full knowledge of the circumstances and the consequences of his default, and freely and consciously takes the decision not to act. The respondent (in this case MMinathoko) bears the onus to show that the default was wilful. It has also been held that all three elements, set out in the *Silber* case, must be present before a

person can be said to be in wilful default. In this matter, with regard to the first two elements, the MEC had knowledge of the action, and entered an appearance to defend same, so the second element is not applicable.

- [14] With regard to the third element, it is clear that there was communication and correspondence between the parties regarding the future conduct of the matter. The Notice of Bar was served on 7 December 2021. Ms Engelbrecht, on behalf of the MEC asked MMInathoko's attorney, on 22 December 2021, for the matter to stand over until 21 January 2022, but received no response. It seems neither party did anything in the ensuing two and a half months to three months. The MEC paid SARS on 25 March 2022, and informed the respondent's attorney of such payment on 3 May 2022. It was only after that date that the respondent's attorney reacted and served the Notice in terms of Rule 31(5). Ms Engelbrecht advised that when the notice was served, she was on sick leave and the matter was not attended to by anyone in her office. This was not disputed by the respondent.
- [15] It hardly lies in the mouth of the respondent to now claim that the MEC was aware that he was under Bar and he should have applied to court for upliftment of the Bar and that he should have filed his plea indicating that he did not owe the money. The respondent itself was tardy in prosecuting the matter swiftly and expeditiously. It did not respond to the request to stand the matter over, creating in Ms Engelbrecht's mind the impression that they had in fact consented. This goes to the third element that the applicant must have failed to act, knowing full well the consequences of such

inaction. I am constrained to find that such a wilful state of mind existed in Ms Engelbrecht, which can also be imputed to the MEC. The respondent has failed to discharge the onus on it to show wilful default on the part of the MEC

- [16] It is so that the explanations given by Ms Engelbrecht are not as complete as they should be, but the court has the discretion to traverse the merits, to some extent, in order to assess the prospects of success. If an application for rescission depended only on the explanation for the non-compliance with the timeframes set out in the Rules, the applicant would have fallen short of the required standard, as his attorney's explanation for the delay is not one that is detailed or one that covers the entire period of the delay. Ms Engelbrecht's explanations are very general in nature, lacking the detail that is required in applications such as this. Such explanation is, however, one of the factors to be considered by the court in deciding whether to grant rescission of the judgment. This court is obliged to consider the reasonableness and adequacy of the explanation for the delay, in conjunction with other factors in making an order that would achieve fairness to both parties.
- [17] Prospects of success in the action is a very important factor in determining whether rescission should be granted in the present matter. It is trite that the applicant will have to make out a case for rescission. The applicant was directed by SARS to pay to it monies that the applicant was holding and which it owed the respondent. The MEC was legally obliged to pay that money to SARS, so the respondent's argument that the applicant was not obliged to refrain from disclosing the notice to the respondent is without merit. The

law is very clear that if the applicant failed or refused to pay the amount to SARS, it would become personally liable to pay the amount owed by the respondent to SARS. With regard to the balance, which the respondent claims is owed to it, the applicant alleges that it does not in fact owe any monies to the respondent, and that the payment to SARS extinguished its liability to the respondent. This, in my view, is an arguable case and if argued in a trial court, may well succeed. The applicant, would also then have the opportunity to substantiate its case that it does not owe the respondent any money. For its part, the respondent would then have the opportunity of properly substantiating its case that the applicant owes it the money it claims.

- [18] The applicant also alleges that there has been a misjoinder of the first applicant, the Minister. This is also an important aspect from the point of view of costs. The court is furthermore, alive to the fact that the public purse is implicated in this matter, and must do what is fair and just in order to protect such public funds. A trial court will be in the best position to interrogate the evidence, evaluate it and make an appropriate ruling. I am. Therefore, of the view that the interests of justice, as well as the interests of both parties require the issues in this matter to be fully ventilated. The applicant has set out averments, which if proved at the trial, entitle him to the relief he seeks

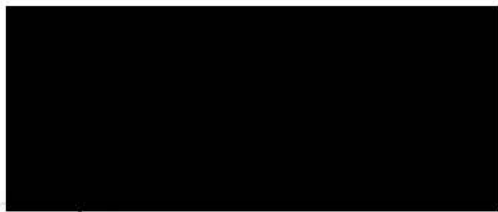
- [19] With regard to costs, the trial court, after hearing argument on the matter, will be in a better position to make a just and appropriate award.

[20] In the circumstances I make the following order:

20.1 The application for rescission is granted;

20.2 The applicants are directed to file their plea within thirty (30) days of the date of this order;

20.3 Costs stand over for later adjudication.


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S NAIDOO J

On Behalf of the Applicants:

Instructed by:

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