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

Case No. 2377/ 2021

In the matter between:

MANGAUNG METROPOLITAN MUNICIPALITY

APPLICANT

and

ALENTI 220 (PTY) LTD t/a ITEC ALENTI

RESPONDENT

Registration Number: 2009[...]

IN RE:

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In the matter between:

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APPLICANT

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and

MANGAUNG METROPOLITAN MUNICIPALITY

RESPONDENT

CORAM: GUSHA, AJ

HEARD ON: 15 JUNE 2023

DELIVERED ON: This judgment was delivered electronically by circulation to the parties' representatives by way of email and by release to SAFLII. The date and time for delivery is deemed to be at 12h00 on 28 JULY 2023.

JUDGMENT

INTRODUCTION

[1] In the present matter the applicant as per its notice of motion, primarily seeks condonation of its non-compliance with the Uniform Rules of Court pertaining to its late filing of its application for leave to appeal the default judgment granted by Boonzaaier AJ on the 28th November 2022. Secondary to the aforesaid, the applicant seeks leave to appeal the aforesaid default judgment¹.

[2] The application is opposed.

CHRONOLOGY OF EVENTS

[3] The parties are engaged in a protracted legal tussle emanating from a contract they concluded as a result of a competitive bidding process for the supply, maintenance and lease of multifunctional printing machines for a period of 36 months, commencing on the 1st April 2016 until the 31st March 2019.²

¹ As per AR6 page 28 of the application for leave to appeal bundle, the notice of application for leave to appeal is however unsigned by the deponent, Mr A.G. Raynard.

² Tender MMM/BID 324:2015/2016.

[4] After the aforesaid termination date, the contract was continually extended tri-monthly until the 10th September 2020. On the latter date the contract was then purportedly extended on a month to month basis.

[5] Subsequently, the respondent³ unsuccessfully sought an extension until the 7th December 2020. The refusal by the applicant⁴ to further extend the contract triggered the main action between the parties. Resultantly, on the 27th May 2021 the respondent issued summons against the applicant

[6] Consequent to service of the summons, the applicant filed a notice to defend, however no plea was subsequently filed. Resultantly, on the 5th August 2021 the respondent filed a notice of bar calling upon the applicant to file its plea within 5 days, failing which the applicant would *ipso facto* be barred from pleading. This notice did not elicit a plea and the applicant having failed to file its plea within the requisite time was then *ipso facto* barred.

[7] After placing the applicant under bar, the respondent applied for default judgment which was set down for hearing on the 24th November 2022. The applicant in turn filed a notice in terms of Rule 30⁵ and Rule 30 A⁶ wherein it complained that the respondent

³ Plaintiff in the main action.

⁴ Defendant in the main action.

⁵ **30. Irregular proceedings**

(1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.

(2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if—

(a) the applicant has not himself taken a further step in the cause with knowledge of the irregularity;

(b) the applicant has, within 10 days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within 10 days;

(c) the application is delivered within 15 days after the expiry of the second period mentioned in paragraph (b) of subrule (2).

(3) If at the hearing of such application the court is of opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems meet.

(4) Until a party has complied with any order of court made against him in terms of this rule, he shall not take any further step in the cause, save to apply for an extension of time within which to comply with such order.

(5) ...

⁶ **30A. Non-compliance with Rules**

failed to give it 5 days' notice of its intention to apply for default judgment and that accordingly this rendered the intended application for default judgment irregular. This however did not elicit the desired result and the applicant, notwithstanding having asserted the purported irregular step, did nothing further to pursue this aspect. Instead of acceding and removing the alleged irregularity complained of, the respondent in turn filed its own notice in terms of Rule 30A wherein it asserted the bar that the applicant was still under.

[8] The applicant then brought an urgent application to uplift the bar. Boonzaaier AJ, dismissed the application for want of urgency and immediately on application by the respondent, considered and granted the application for default judgment.

[9] Aggrieved by the aforesaid judgment by default, the applicant approaches this court for leave to appeal and contends that Boonzaaier AJ misdirected herself when she granted default judgment whilst she was aware that the applicant's application to uplift the bar was still pending. The contention is further that in doing so, Boonzaaier AJ effectively denied the applicant the benefit of a fair trial on the merits of the application to uplift the bar.

THE APPLICATION FOR CONDONATION

[10] The applicant filed its unsigned and un-commissioned notice for leave to appeal on the 24th February 2023. In terms of the Uniform Rules such application had to be filed within 15 days from the date of judgment and thus on or before the 19th December 2022⁷. It is common cause between the parties that the application for leave to appeal

(1) Where a party fails to comply with these Rules or with a request made or notice given pursuant thereto, or with an order or direction made in a judicial case management process referred to in rule 37A, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days from the date of delivery of such notification, to apply for an order—

(a) that such rule, notice, request, order or direction be complied with; or

(b) that the claim or defence be struck out.

(2) Where a party fails to comply within the period of 10 days contemplated in subrule (1), application may on notice be made to the court and the court may make such order thereon as it deems fit.

⁷ **49. Civil appeals from the High Court**

(1)

was filed manifestly out of time. The parties are however divergent with regards to the degree of lateness. The applicant contends that same is 39 calendar days and 29 court days, the respondent in turn contends that the degree is far more significant; 64 calendar days and 46 court days. Due to the decision I reach hereunder in this regard, I deem it unnecessary to determine the impasse between the parties with regards to the length of time the applicants were in non-compliance of the Rules. I am in agreement with them however that whatever the degree of lateness, it is not insignificant.

[11] In terms of the Uniform Rules applications for condonation are dealt with in accordance with Rule 27⁸. It needs no restating that condonation cannot be had for the mere asking, it is an indulgence which the court has a discretion to grant or not. The party seeking condonation has to furnish the court with a full, detailed and accurate account of the causes of the delay and their effects so as to enable the court to clearly understand how the delay came about⁹.

[12] In ***Van Wyk v Unitas Hospital and Another***¹⁰, the Court held that:

“This court has held that the standard for considering an application for condonation is the interest of justice. Whether it is in the interest of justice to grant condonation depends on the facts and circumstances of each case.

(a)...

(b) When leave to appeal is required and it has not been requested at the time of the judgment or order, application for such leave shall be made and the grounds therefor shall be furnished within 15 days after the date of the order appealed against:

Provided that when the reasons or the full reasons for the court's order are given on a later date than the date of the order, such application may be made within 15 days after such later date: Provided further that the court may, upon good cause shown, extend the aforementioned periods of 15 days.

⁸ **27. Extension of time and removal of bar and condonation**

(1) In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these Rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.

(2) Any such extension may be ordered although the application therefor is not made until after expiry of the time prescribed or fixed, and the court ordering any such extension may make such order as to it seems meet as to the recalling, varying or cancelling of the results of the expiry of any time so prescribed or fixed, whether such results flow from the terms of any order or from these Rules.

(3) The court may, on good cause shown, condone any non-compliance with these Rules.

⁹ *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA).

¹⁰ 2008 (2) SA 472 (CC) at para [20].

Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success.”

[13] Truncated, the reasons as advanced by the applicant for its non-compliance are that from the moment the judgment by default was granted, it sought legal advice on the best possible route to follow. In my view the reasons advanced by the applicant are what I can only deem to be a plethora of excuses. From the date of judgment, *dies non* or not, festive season or not, the applicant had ample time to seek and obtain legal advice, timeously file and thereby not fall foul of the Rules.

[14] Notwithstanding the significant degree of lateness and the unsatisfactory explanation therefor, I hold the view that the interests of both parties to finality, the absence of prejudice against the respondent as well as the interests of justice, dictate that I should lean to the side of the applicant and condone its non-compliance with the Rules. That being said, I would be remiss if I do not remark that this cavalierly practice of disregarding the Rules is to be deprecated.

APPLICATION FOR LEAVE TO APPEAL

[15] Section 17 (1) (a) of the Superior Courts Act 10 of 2013 sets out the test to be applied when considering an application for leave to appeal, it provides that same may only be given where the judge or judges concerned are of the opinion that

- (i) the appeal would have reasonable prospects of success; or
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

[16] As alluded to above, the present application is opposed by the respondent primarily on the ground that a default judgment is not appealable as it is capable of rescission and thus not final in its effect. They further contend that the application as launched by the applicant has no prospects of success.

[17] The applicant in turn contends that the default judgment granted was final as evinced by its effect; it may be executed upon and until set aside by a court of competent jurisdiction, remains final.

[18] In determining the aforesaid I can do no better than have regard to the judgment of Nugent JA in *Pitelli v Everton Gardens Projects CC* [2010] 4 All SA 357 (SCA) wherein the court restated “that for an order to be appealable it must have as one of its features that the order is final in its effect, **which means that it is not susceptible to being revisited by the court that granted it** (my own emphasis). The court further explained that an order is not final, for purposes of an appeal merely because it takes effect unless it is set aside. It is final when the proceedings of the court of first instance are complete and that court is not capable of revisiting the order. That leads one ineluctably to the conclusion that an order that is taken in the absence of a party is ordinarily not appealable. It is not appealable because such an order is capable of being rescinded by the court that granted it and it is thus not final in its effect. In some cases an order that is granted in the absence of a party might be rescindable under rule 42(1)(a), and if it is not covered by that rule it is in any event capable of being rescinded under rule 31 or the common law” (footnotes omitted).

[19] I do not mean to be unkind but in the present matter the applicant orchestrated its own misery from the onset. It did not file a plea after its own notice to defend was filed, it was neither moved into action when faced with the prospect of being placed under bar nor did it venture to move an application on notice for uplifting the bar, resorting instead to approaching the court on an urgent basis when indubitably it must have realised that the proverbial horse was about to bolt. What the applicant should have done in the circumstances was to approach the court which granted the default

judgment with an application for rescission. Had it done so, and only if the application for rescission failed, then that order dismissing rescission would be appealable.

[20] That being said, I am mindful of the considerable hurdle that the applicant would need to overcome in seeking an order for rescission, I am further alive to the fact that that application might not even have borne fruit. That notwithstanding, I hold the considered view that the appealability of the judgment by Boonzaaier AJ is dependent upon whether it is capable of being revisited and not upon whether such an application will succeed. A judgment by default is by its nature not final in its effect because it is capable of being revisited, albeit that condonation might be required for the delay. Once rescission has been refused, and an appeal against that order has been dismissed, the order is then not capable of being revisited.

[21] In the result I am not persuaded that the applicant has passed muster of the relief it seeks, the default judgment granted in the present matter is not appealable, accordingly the application for leave to appeal has no prospects of success and tends to be dismissed.

[22] Having dismissed the application, I feel it apposite to deal herein with a concerning aspect that occurred whilst preparing this judgment. In what I can only at best deem an alien practice, Mr Raynard the attorney for the applicant, authored and sent a letter to me, in chambers¹¹. In it he sought to revisit the proceedings and also sought to “*set the record straight*”: He further requested that *I hold over the judgment and allow the applicant to have the record of the proceedings* before Boonzaaier AJ be transcribed¹². Needless to say I did not respond to this letter as I held the view and still do, that Mr Raynard, a seasoned attorney and an officer of this court, ought to know better.

¹¹ Same was sent to the attorneys for the respondent.

¹² The attorneys for the respondent responded on the same date decrying said letter as constituting a *second bite at the proverbial cherry*.

[23] Further to this letter, I received a notice of an interlocutory application dated 21st July 2023 for leave to file a further affidavit. Appended thereto is an affidavit spanning some 10 pages deposed to by Ms Motsumi, an attorney practicing at the applicant's firm of attorneys of record, essentially seeking to traverse the same aspects traversed in their aforesaid letter as well as issues already ventilated during arguments in court.

[24] Appended to the aforesaid affidavit are what appears to be transcripts of the record of proceedings before Boonzaaier AJ. Unlike the affidavit by Ms Motsumi, I did not read the transcripts. I did so for the simple reason that the whole application and the aspects raised therein are not relevant to the issue that this court is called upon to determine. Furthermore, for purposes of this judgment and the reasons therefor the aspect of whether certain submissions were correctly or incorrectly made is of no moment.

[25] Resultantly the interlocutory application for leave to file a further affidavit is dismissed with no order as to costs.

ORDER

[26] In the result I make the following order;

1. The application for leave to appeal the default judgment is dismissed with costs.

NG GUSHA, AJ

On behalf of the applicant

Instructed by:

Adv. L Halgryn SC

Raynard & Associates Inc

BLOEMFONTEIN

On behalf of the respondent:

Adv. C Snyman

Instructed by:

Blair Attorneys
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