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THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Reportable: YES/NO
Case No: 1719/2015

In the matter between:

RAMALEPHATSO INDUSTRIES CC

First Applicant

SIZAMPILO PROJECTS CC

Second Applicant¹

And

NYUMBA MOBILE HOMES & OFFICES (PTY) LTD

Respondent

In re

NYUMBA MOBILE HOMES & OFFICES (PTY) LTD

Plaintiff

And

MEC FOR THE FREE STATE DEPARTMENT OF HEALTH

First Defendant²

FEZILE DABI DISTRICT MUNICIPALITY

Second Defendant

MAZIBUKO WESSELS ARCHITECTS

Third Defendant

RAMALEPHATSO INDUSTRIES CC

Fourth Defendant

SIZAMPILO PROJECTS CC

Fifth Defendant

¹ The applicants operated as a joint venture in this case.

² It was ordered by Van Zyl J on 6 May 2016 that all references in the combine summons to the first defendant as a party to the action to be struck out on the basis of a misjoinder of the first defendant as a party to the action.

GRAHAM TAKATSO LEHETLA

Sixth Defendant

CARLTON PULE SHAKWANE

Seventh Defendant

Coram: Opperman J

Heard: 27 October 2023

Delivered: 29 December 2023. This judgment was handed down in court and electronically by circulation to the parties' legal representatives *via* email and released to SAFLII on 29 December 2023. The date and time of hand-down is deemed to be 15h00 on 29 December 2023

Judgment: Opperman J

Summary: Application for leave to appeal

JUDGMENT

[1] This case may not be allowed to go on appeal because there is no reasonable prospect that another court would reach a different conclusion. There does not exist any compelling reasons before this court why an appeal of the case should be heard and the application for leave to appeal be granted.

[2] Mr Graham Takatso Lehetla ("Mr Lehetla" or "TK") and Mr Carlton Pule Shakwane ("Mr Shakwane") are the sole members of the applicants. They conducted their business as a *joint venture* in the cause that brought the matter to litigation. They have done nothing but displayed a contempt for the litigation, the process, the respondents, and the court in the case *a quo* in which the default judgment was granted.

- [3] In the current application that now lies for leave to appeal the applicants did not show good cause for their default to exist, nor a prospect of success should the matter be allowed to go on trial. It was, furthermore, pointed out in the application for rescission judgment that the applicants allegedly committed the same legally unbecoming conduct during the contracts *inter partes* and towards their obligations in terms thereof, as to the justice system. The alleged breach of their contractual obligations formed the basis for the case and a subsequent series of similar behavior followed; but this time aimed against the justice system.
- [4] Commercial certainty is the unfettered right of the respondent to claim compliance with contracts and court orders and be aided with access to swift justice in assertion thereof. The sustenance of a democratic economy is crucial. In *Basson v Chilwan and Others* 1993 (3) SA 742 (A) at 762H, Eksteen JA referred to: “The paramount importance of upholding the sanctity of contracts, without which all trade would be impossible ...”.
- [5] Justice Ackermann in *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) SA 984 (CC) at paragraph [26] described equal protection under the law as: “a central consideration in a constitutional state”. These statements aim for reasonable certainty, so that parties can go about their business knowing the rules of the game; constitutional economic integrity is vital.
- [6] The constitutional right of the applicants lies in the use of courts to settle disputes; the right to access to courts in terms of section 34 of the Constitution of the Republic of South Africa, 1996. Furthermore, to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court. *The respondent has the same right and it may not be obstructed by the unexplained or willful absence of the other party at a trial.*
- [7] The above sets the atmosphere in which the norm of “good cause” must be applied on the facts of this case. The criteria includes at least both a reasonable and acceptable

explanation for the default and a *bona fide* defence on the merits which *prima facie* carries some prospect of success.

- [8] Each case must be adjudicated on its own merits and there is no *numerus clausus* of factors. The law is that the court has a wide discretion in evaluating good cause to ensure that justice is done. The explanation for default must be stated and be reasonable. The default may not be willful and an attempt to delay justice.
- [9] The right to appeal is not there just for the taking. Slotting in with the above is the fact that: ...On the contrary, it would be inimical to the interests of justice to permit or encourage the applicants to continue on their misguided path in the current litigation. It is purposeless, and nothing more than an abusive imposition on the court's resources and an unwarranted derogation from the *prima facie* rights of those of the respondents who are applicant's judgment creditors.³
- [10] The right to appeal is, among others, managed by the application for leave to appeal. It may not be abused but the hurdle of an application for leave to appeal may never become an obstacle to justice in the post-constitutional era. Access to justice is access to justice.
- [11] The Supreme Court of Appeal in *Ramakatsa and others v African National Congress and another* [2021] JOL 49993 (SCA) ruled in March 2021 that:
- [10] Turning the focus to the relevant provisions of the Superior Courts Act (the SC Act), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice. This Court in *Caratco*, concerning the provisions of section 17(1)(a)(ii) of the SC Act pointed out that if the Court is unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. Compelling reason would of course include an important question of law or a discreet issue of public importance that will have an effect on future disputes. However, this Court correctly added that "but here too the merits remain vitally important and are often decisive". I am mindful of the decisions at High Court level debating whether the use of the word "would" as oppose to "could" possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there

³ *Mannatt and Another v De Kock and Others* (18799/2018) [2020] ZAWCHC 54 (22 June 2020) at paragraph [9].

are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. *A sound rational basis for the conclusion that there are prospects of success must be shown to exist.* (Accentuation added)

[12] The fact remains that the judicial character of the task conferred upon a presiding officer in determining whether to grant leave to appeal is that it should be approached on the footing of intellectual humility and integrity, neither over-zealously endorsing the ineluctable correctness of the decision that has been reached, nor over-anxiously referring decisions that are indubitably correct to an appellate court.⁴

[13] As I said in the judgment for rescission; litigants may not be allowed to turn their backs on the justice system and the court and walk away as, and when, and how it suits them. It should not be necessary for the court to protect the rule of law against litigants. Access to courts in terms of section 34 of the Constitution of the Republic of South Africa, 1996 is a basic human right. The Constitutional Court⁵ was clear and unyielding when it was ruled that:

[2] In this matter, this Court is being asked to rescind the judgment and order that it handed down in respect of contempt of court proceedings launched against former President Jacob Gedleyihlekisa Zuma for his failure to comply with an order of this Court. Ironically, the judgment now impugned, contains a thorough exposition of the rule of law and its fundamental importance to South Africa's constitutional democracy. Indeed, it says, "[n]o one familiar with our history can be unaware of the very special need to preserve the integrity of the rule of law" in South Africa. Yet, with the finality of its decision questioned, this Court, once again, finds itself tasked with defending the integrity of the rule of law.

[103] **...If our law, through the doctrine of peremption, expressly prohibits litigants from acquiescing in a court's decision and then later challenging that same decision, *it would fly in the face of the interests of justice for a party to be allowed to willfully refuse to participate in***

⁴ *S v Smith* 2012 (1) SACR 567 (SCA) at [7].

⁵ *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* [2021] ZACC 28.

litigation and then expect the opportunity to re-open the case when it suits them. It is simply not in the interests of justice to tolerate this manner of litigious vacillation. (Accentuation added)

[14] The applicants have, wisely so, abandoned their grounds for leave to appeal that attacked the default judgment on the basis that it was granted erroneously in terms of rule 42(1) of the Uniform Rules of Court. The grounds for leave to appeal as per paragraphs 2.1 to 2.11 were thus abandoned. They now base their application for leave to appeal on paragraphs 2.12 to 2.26 that rely on the rescission of judgement as directed by common law principles.⁶ I will not repeat the basis of their arguments as I have dealt with it in the judgment previously during the application for rescission.

[15] To reiterate; this is what happened that caused the default judgment:

1. On 13 November 2022 Mr Lehetla, according to him, was advised that the matter was on the roll for March 2023.
2. The notice of set down for the trial was served on the applicants' attorney on 30 November 2022.
3. On the same day the attorney addressed an email to Mr Lehetla to inform him of the trial. ***The attorney confirmed that he attached the notice of set down to the email. Mr Lehetla had to have full knowledge and understanding of the dates.***
4. Although Mr Shakwane alleges that he never received the notice of withdrawal the respondent's attorney made enquiries with the erstwhile attorneys of the applicants and was informed that the joint venture was at all times represented by Mr Lehetla. Mr Lehetla informed the erstwhile attorney that he is the responsible person, and all contact and communication should be with him. The erstwhile attorney's invoices were always sent to Mr Lehetla but paid by both applicants. This information was confirmed under oath by said attorney in annexure "AA23" on pages 270 to 271 (paragraph 3) of the bundle indexed on 14 June 2023.⁷

... I specifically confirm that although I legally represented the 4th to 7th defendants in the matter, my only communications were with the sixth respondent, known to me as TK. TK informed me

⁶ Applicants' heads of argument at paragraphs 1.3 and 1.4.

⁷ "The Bundle"

that he was authorised to instruct me on behalf of all the mentioned defendants, and I had no reason to doubt his assurance.

5. At paragraph 8.5 of his statement⁸ Mr Shakwane admitted that: “There was however little communication between my attorney’s and myself as the sixth defendant occasionally informed me what the progress of the matter was.” *It is trite that a litigant must take responsibility for the management of his case; he may not sit back and wait for news.* He paid the invoices submitted by the attorneys and must have had some inquiries as to the detail of the services rendered.
6. Mr Shakwane stated his address in his confirmatory affidavit to be at 32 Mostert Street, Nelspruit, Mpumalanga Province. The address that his attorney had of him according to the notice of withdrawal is Stand 30, Kabokweni and Sizampilo Projects CC at 119 Nkhohlakalo Trust, Kabokweni.
7. It is vital to realize that Ramalephatso Industries CC and Sizampilo Projects CC entered into the contracts that caused the action as a joint venture. The one’s business was the business of the other. “GTL03” at page 42 of the bundle shows the letterhead of “Sizampilo Projects & Ramalephatso Industries” as one entity with email [t\[...\]@yahoo.com](mailto:t[...]@yahoo.com). It is also undisputed that Mr Lehetla took the lead in the communications with the attorneys. The notice of withdrawal as per page 269 of the bundle “AA22” was served on this address. Perusal of the papers before the court shows that communication was to this address.
8. In addition, “GTL03” shows that the joint venture has only one physical address, one landline number, one fax number, one cell phone number and one email address: [t\[...\]@yahoo.com](mailto:t[...]@yahoo.com). The joint venture operates under one registration number namely: 1998/[...]. The address is “Suit No: 140 CALTEX BUILDING, 32 BELL STREET, NELSPRUIT”. If the applicants wanted service and communication at any other address, they had to indicate this to their attorney and in the contract.
9. In an email of 30 November 2022, the legal representative requested Mr Lehetla that counsel be appointed, and consultations be finalized.

⁸ Page 151 of the Bundle.

10. Mr Lehetla responded immediately and as follows:
 Your email is noted.
 But as I explained to you earlier via our telephone conversation, I suggest I should get my Own Affordable Advocate to work with you on this matter, I can pay your Fees directly.
11. On 19 January 2023 the attorney had not received any further instructions from Mr Lehetla and addressed another email to him wherein he enquired about the appointment of an advocate and in addition, requested him to make payment of the deposit in respect of the attorney's fees as was agreed.
12. Later in the day on 19 January 2023 Mr Lehetla responded that he will visit Bloemfontein "sometime next month to understand the attorney's account". No mention was made of the appointment of an advocate. "Next month" was February 2023; the trial was to commence on 7 March 2023.
13. The legal representative send a second email on the same day to Mr Lehetla and explained the account. The legal representative emphasized the following:
 You did not yet get an advocate as promised. May I remind you that we are in Court in March. Advocates are running a busy schedule and I truly hope you find an advocate in time. I wanted to book an advocate during November 2022, but you said the deposit is extravagant.
 You must very URGENTLY give me instructions if you want to proceed with the matter.
 The bottom line is that I will Withdraw as attorney of record timeously, in order for you to get a new attorney on this case ASAP.
14. Mr Lehetla responded on 20 January 2023:
 Your mail was noted but I took the Decision to *terminate your mandate* because of your exorbitant costs which small companies like us can't afford.
 I will be in Bloemfontein second week of February to search someone who can take over from you with reasonable fees as you're aware that this is a shit case with no MERITS. Furthermore if there is any justified funds I still owe you it can be arranged how it can be sorted out but to my little knowledge I paid all your invoices you provided *to us* unless there's extra work you done *for us* which I am not aware of.
 If there is any clarity my line is open.
 G.T. Lehetla (Accentuation added)
15. *The services of the attorneys were summarily terminated by the applicants. The attorneys did not withdraw on their own volition. The applicants were now aware, and very well so, that they are without legal representation and cannot hide*

behind any notice of withdrawal that was allegedly not issued in accordance with rule 16 of the Uniform Rules of Court.

16. Their attorney of record withdrew after the termination of their mandate, and they did not appoint new legal representatives. They did not attend the trial.
17. It is not known to this court on what basis the court granted the default judgment on 7 March 2023. It is not known whether the court had information that is not available to this court and how the plaintiff convinced the court of proper service. It is therefore impossible to infer that the court made a mistake. The parties elected not to put the information forth in this application. In applying the provisions of rule 42 it should always be borne in mind that the court cannot sit as a court of appeal and that it cannot review the order.⁹

18. Mr Lehetla confessed that:

8.15 I do however acknowledge that there was an obligation on the fourth defendant to appoint a different attorney when it could not afford the services of Mr. Van Vuuren and that is (sic) should have enquired about the exact trial date. What really mattered was the court date and the appointment of an attorney. I therefore admit that the fourth defendant was negligent in this regard.

[16] The cause of action came from a contract awarded in 2011 for the construction of temporary wards and a new forensic mortuary at the Metsimaholo District Hospital, in Sasolburg, Free State Province, to the Sizampilo/Ramalephatso Joint Venture as the main contractor by Fezile Dabi District Municipality.

1. The respondent was appointed by the joint venture as subcontractor on 22 November 2011 for the construction of prefabricated general wards and a temporary mortuary at the hospital. The contract price is R 5 107 547.00. The contract apparently specified a specific term of the appointment and payment

⁹ Rule 42 does not affect the substantive law; it goes to procedure. In Civil Procedure, *Civil Procedure in the Superior Courts*, Part B High Court, UNIFORM RULE 42 VARIATION AND RESCISSION OF ORDERS, Grounds, Last Updated: August 2023 - SI 77, <https://www.mylexisnexis.co.za/Index.aspx>, Harms pointed out in footnote 2 at B42.2: “There are a number of dicta that give the impression that this basic principle does not apply, forgetting that the rule is merely procedural and does not affect the substantive law: *Bakoven Ltd v GJ Howes (Pty) Ltd* 1992 (2) SA 466 (E); *Nyingwa v Moolman NO* 1993 (2) SA 508 (Tk GD); *Suleman v Minister of Interior* [1996] 1 All SA 553 (Tk) and *Njomane v Lobi* [1996] 2 All SA 252 (Tk); *Mutebwa v Mutebwa* [2001] 1 All SA 83 (Tk), 2001 (2) SA 193 (Tk). But see *Stander v Absa Bank* 1997 (4) SA 873 (E) 884; *Dawson & Fraser (Pty) Ltd v Havenga Construction (Pty) Ltd* 1993 (3) SA 397 (B GD); *Naidoo v Somai and Others* 2011 (1) SA 219 (KZP)”

would be made to the respondent within 30 days after receipt of an invoice approved by the site engineer.

2. The appointment was accepted by the respondent on 13 December 2011 and subject to specified amendments to the initial quotation and specified payment terms. These payment terms were reflected in the acceptance letter as a percentage that the joint venture had to be paid upon the completion of the building and during different stages of the contract.
3. Construction of the temporary structures commenced during January 2012. As is evident from the affidavits, counter allegations are made by the applicants and the respondent about the delays and the workmanship that resulted from the performance of the works.
4. What however remains common cause is that payment in the sum of R 4 920 615.12 of the initial contract price of R 5 107 547.00 was paid. The balance was kept as retention for certain specified snags compiled by Mazibuko Wessels Architects, to be corrected.
5. A dispute arose between the joint venture and the respondent regarding the liability to correct the snags and the respondent, as subcontractor, requested the principal agent to have the Municipality make direct payments to it as it did not trust the joint venture. This then culminated in the conclusion of a cession agreement on 26 June 2013.
6. The applicants, in terms of the cession agreement, jointly ceded the rights title and interest they had against the Municipality, to the respondent in the amount of R 624 965.53 together with interest thereon.
7. The cession in addition provided that the respondent, as cessionary, undertook to repair any material latent structural defects attributable to it, arising within three months of the date of such cession, without any further costs to the applicants.
8. The applicants, as cedents, in turn undertook to ensure that any defects, whether latent or not, which is not exclusively attributable to the cessionary, be repaired within seven days after receipt of notification of the said defects and take all such necessary steps as to not further delay and/or prevent any payment to the cessionary.

9. Apart from the retention in relation to the temporary mobile units, there were certain monies that the Municipality owed to the joint venture based on the main contract. On 12 September 2013 two snag lists were issued by the architects, one for the joint venture and the other for the respondent.
10. The joint venture allegedly attended to its snag list and completed the works which were accordingly approved. The joint venture was subsequently paid its retention monies and left the site.
11. The Municipality alleges that it was required to utilize a third-party contractor to finalize the project and that it has fully discharged its payment obligations to the joint venture.
12. In April 2015 the plaintiff issued summons against the first to seventh defendants as cited in the main action. In terms of the particulars of claim as they then stood, the plaintiff/respondent pleaded that the applicants breached the terms of the cession agreement in that apart from paying an amount of R 271 835.68 the applicants neglected to pay the balance.
13. The respondent, in addition, alleged that the Municipality, despite having knowledge of the cession agreement, breached its obligations by failing and or refusing to make payment of the amounts reflected in the cession agreement.
14. In their plea, the applicants denied that payment was to be made by the applicants and pleaded that the Municipality had to make payment after all the obligations were met in terms of the cession agreement.
15. During November 2021, almost six years later, the respondent amended its particulars of claim, now relying on the applicants alleged breach of the terms of the 'main agreement', in that the latter failed and/or refused to make payment to the respondent in the amount of R313 268 09.
16. According to counsel for the joint venture in *casu* the applicants' erstwhile attorney ***failed to seek instructions from the applicants to make consequential adjustments*** to the initial plea consequent upon the respondent's amendment. This therefore had the effect of the plea filed by the applicants, as it currently stands, being based on the cession as the cause of action and not on the initial appointment as sub-contract. Notwithstanding the averment that blames the

attorneys for the oversight, *the prelude to the default above shows that the applicants did not co-operate fully with their attorneys.*

- [17] The lackadaisical handling of the applicants of their case and their defense is of concern; if they had a *prima facie* defence on the facts, they could have addressed the matter expeditiously and avoided any delay.
- [18] Application of the Plascon Evans – dictum¹⁰ on the affidavit of one Pieter Le Roux for the respondent and the facts that are common cause convinces the court that the applicants have not proven, on the merits of the case, that a *bona fide* defence which *prima facie* carries a prospect of success, exists.
- [19] Rule 16 that was being used as a defense by the applicants deals with the representation of parties by attorneys. Its objective is to provide the parties with a definite and convenient address at which they are entitled to serve the further processes in the case. This smokescreen to obtain a rescission judgment of the March – 2023 order serves as an example of the dubious manner in which the applicants operate. They have not explained up until the writing of this judgment why they chose to ignore the date of the 7th of March 2023.
- [20] On the undisputed facts the notice of set-down that depicted the dates for trial was already served and procedurally correct. The dates for trial did come to the notice of the applicants; they had proper knowledge thereof. The notice of withdrawal is also peripheral due to the further fact that the applicants ended the mandate of the attorneys, and the attorneys did not withdraw on their own volition.

¹⁰ *Plascon-Evans Paints LTD v Van Riebeeck Paints (PTY) LTD* 1984 (3) SA 623 (A). The Plascon-Evans rule allows courts to make determinations on disputes of fact in application proceedings without hearing oral evidence. The rule states that in motion proceedings, a final order may be granted if the facts stated by the respondent, together with the admitted facts in the applicant's affidavits, justify the order. There are exceptions to the rule, such as when allegations or denials are far-fetched or clearly untenable. The Plascon-Evans rule applies only to final relief and not interlocutory matters.

- [21] The applicants had adequate and legally appropriate knowledge of the dates of trial. The service in terms of rule 16 of the withdrawal of the attorneys is irrelevant to their knowledge of the dates of trial. The order was not erroneously granted. As counsel for the applicants correctly pointed out in their heads of argument; it is about knowledge of the dates. The notice of set down was properly served on the applicants by the email forwarded by their own attorneys to them.
- [22] Their default was blatantly disrespectful to the rule of law and the interest of the other litigants. The default has caused a delay in the case that is to the prejudice of the respondent and the administration of justice; it is a delay of months if not a year and unacceptable. The default closed the doors of access to justice in terms of section 34 of the Constitution to the respondent.
- [23] The application must be dismissed on the first leg already in that there is not a reasonable explanation before this court for the default; the lack of prospects of a *prima facie* defence bolsters the dismissal of the application for rescission and with costs. Litigation started in 2015 and the interest of justice demands finality to be reached.¹¹
- [24] **ORDER**
- The application for leave to appeal is dismissed with costs and the applicants are ordered to pay the costs of the application for leave to appeal jointly and severally.

M OPPERMAN J

¹¹ Zuma -case *supra* footnote 3 at paragraph [104] of the case.

APPEARANCES

On behalf of the first & second applicants

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