THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT

CASE NO: 2438 / 2021

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

30 MAY 2022 ....
DATE SIGNATURE

In the matter between:

CITY OF MBOMBELA **APPLICANT**

and

SMEC SOUTH AFRICA (PTY) LTD **RESPONDENT**

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10H00 on 30 May 2022.

J U D G M E N T

RATSHIBVUMO J:

[1] Following the services rendered for the Applicant by the Respondent, the bill was sent for the payment of R3 103 565.93. These services were rendered in terms of the contract entered into between the two on 23 March 2017. The Applicant's failure to pay prompted the Respondent to issue summons over this payment. The Applicant did not file a notice of intention to defend the action. A default judgment was granted by this court on 08 October 2021. The Respondent's attorneys delivered a letter notifying the Applicant of the default judgment on 22 October 2021. On 18 March 2022 the Applicant launched this application with a view to have the default judgment rescinded. The Respondent is opposed to the application.

[2] The application is brought in terms of Rule 31(5)(d) alternatively, under the common law.[1] Rule 31(5) provides as follows,

> "(5) *(a)* Whenever a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff, who wishes to obtain judgment by default, shall where each of the claims is for a debt or liquidated demand, file with the registrar a written application for judgment against such defendant: Provided that when a defendant is in default of delivery of a plea, the plaintiff shall give such defendant not less than five days' notice of the intention to apply for default judgment.
>
> *(b)* The registrar may —
>
> (i) grant judgment as requested;

[1] See p. 8 para 12 of the Founding Affidavit.

(ii) grant judgment for part of the claim only or on amended terms;

(iii) refuse judgment wholly or in part;

(iv) postpone the application for judgment on such terms as may be considered just;

(v) request or receive oral or written submissions;

(vi) require that the matter be set down for hearing in open court.

Provided that if the application is for an order declaring residential property specially executable, the registrar must refer such application to the court.

(c) The registrar shall record any judgment granted or direction given.

(d) Any party dissatisfied with a judgment granted or direction given by the registrar may, within 20 days after such party has acquired knowledge of such judgment or direction, set the matter down for reconsideration by the court.

(e) The registrar shall grant judgment for costs:

(i) in accordance with Part II of Table A of Annexure 2 to the Rules for the Magistrates' Courts plus the sheriff's fees if the value of the claim as stated in the summons, apart from any consent to jurisdiction, is within the jurisdiction of the magistrate's court; and

(ii) in other cases, unless the application for default judgment requires costs to be taxed or the registrar requires a decision on costs from the Court, in accordance with items 1 and 2 of Section B of rule 70 plus the sheriff's fees."

[3] It appears plainly clear that this sub-rule is designed to guide the Registrars and legal practitioners in respect of matters decided by the Registrars including the rescission of judgments. Interestingly, the Applicant attached to this application, a copy of the order that reflects that it was Mashile J who granted a default judgment in favour of the Respondent. An application premised on Rule 31(5)(d) is therefore misplaced and so is the condonation application flowing therefrom. A condonation for the late filing of the rescission application under this sub-rule stands to be dismissed for reasons that there is no judgment entered by the Registrar before the court.

[4] The rescission application can still be considered under common law. The Respondent argued that the applications should have been brought under Rule 31(2)(b) and could not as such be brought under common law. Its argument to that effect is grounded on *Chetty v Law Society, Transvaal*[2] which held that where the rescission application is not covered under Rule 31 or Rule 42, the only basis for that application would therefore be under the common law. This argument is misleading as it misinterprets *Chetty*. While it is true that where the application for rescission is not covered in the Uniform Rules, it can only be brought under common law; it does not preclude the court from hearing applications under common law for reason that it can be brought under the Uniform Rules.[3] The court's jurisdiction to grant a rescission of judgment can therefore be provided by the rules and/or under common law.

[5] Under the common law, a court is empowered to rescind a judgment obtained on default of by the respondent on sufficient or good cause shown.[4] There are no rigid limits set for the circumstances which constituted good cause. Broadly speaking, the exercise of the court's discretion was influenced by considerations of fairness and justice, having regard to all the facts and circumstances of the particular case. In each case, the *onus* of showing the existence of good cause rests on the applicant. The applicant has to satisfy the court that there was some reasonably satisfactory explanation why the judgment was granted by default. Generally, in order to show sufficient cause, it is incumbent upon the applicant to show that: (1) he/she has a reasonable explanation for his/her default. If it appears that his default was wilful or due to gross negligence, the court should not come to

[2] 1985 (2) SA 756 (A).
[3] *Hardroad (Pty) Ltd v Oribi Motors (Pty) Ltd* 1977 (2) SA 576 (W).
[4] *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* (CCT 52/21) [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (17 September 2021) at psra 71.

his/her assistance; (2) he/she is *bona fide* and the application is not made with the intention of merely delaying the claim; (3) he/she has a *bona fide* defence to the 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/her to the relief asked for. He/she need not deal fully with the merits of the case and need not produce evidence that the probabilities are in his favour.[5]

[6] In an attempt to deal with the wilful default requirement, the General Manager, Legal Services, who deposed to the founding affidavit gave a detailed account explaining the "custom" that is undertaken once documents meant to initiate legal proceedings are received by anyone working for the municipality. All such documents have to be forwarded to the office of the Municipal Manager who would then channel them to the office of the General Manager, Legal Services. Once on his desk, the General Manager, Legal Services would decide on the appropriate steps to be taken, including a decision on whether to defend the action.

[7] This custom was not observed in this instance as the municipal employee upon whom the summons was served did not take it to the office of the Municipal Manager and it was not channelled to him. When asked, the municipal employee indicated that he had no recollection of the matter or what he did with the summons. In a non-committal and true comic fashion, Mr. Mbatsane, a Records Clerk for the Applicant went on to depose a confirmatory affidavit in which he attests that everything in it falls within his personal knowledge. What he meant by personal knowledge was that which the General Manager, Legal Services said about him, to wit, that he has no recollection about the matter or what he did with the summons.

[5] *Chetty v Law Society, Transvaal* (*supra*) at 761C-G

[8] In dealing with this aspect, it appears as though the Applicant forgot that the onus is on it to show that the default was not wilful on its part. The affidavit reads like it wanted this responsibility out of the way as quickly as possible, paying very little attention to the detail. While the deponent to the affidavit refers to the custom on what happens when the Applicant's employees receive legal documents, he is silent on how this custom was communicated to them.

[9] Few questions remain unanswered: Is Mr. Mbatsane aware of this custom? The return of service avers that he was informed of the "nature and exigency" of the document handed over to him by the Sheriff. Was he indeed informed of this? Where is the summons now? The reason the Sheriff had to explain the nature and exigency of the summons is that it is not just a piece of paper he was served, but a court process document and in this case, involving millions of rand being claimed. Are there disciplinary or corrective measures taken against him for not adhering to the custom and not dealing with court documents the way he should have? The founding affidavit is quiet on this. The Applicant is a juristic person. The service of court processes is complete when served on its employees like it was done here. To come to court and allege lack of recollection is not enough and is not convincing.

[10] As for the *bona fide* defence which *prima facie* carries some prospect of success, the Applicant avers that the contract which forms the basis of the claim, is unlawful. It submitted that procurement of services and goods by a State organ such as the Applicant must comply with section 217 of the Constitution. That section provides that when an organ of State in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. It was further submitted that sections 111 to

119 of the Municipal Finances and Management Act, No. 56 of 2003 read with regulation 3 and the municipal supply chain management policy of the Applicant give effect to section 217 of the Constitution. The supply chain management policy requires that goods and services the value of which exceeds R200 000.00 and long term contracts (exceeding a year) may be procured by the municipality only through a competitive bidding.

[11] It was submitted by the Applicant therefore that as the contractual value between it and the Respondent was above R200 000.00, there should have been a bidding process which in this case did not happen rendering the agreement unconstitutional and invalid and therefore unenforceable. Subject to the granting of the rescission, the Applicant intends to raise unlawfulness of the agreement as a defence in its plea. It also intends to bring a self-review application based on the principle of legality.

[12] In opposing this application, the Respondent raised two main issues. The first being that the Applicant is estopped from raising any defence for reason that it already made an undertaking to pay the contractual amount to the Respondent. The second reason is that even if the agreement was to be declared invalid, the Respondent already did its part of the contract and submitted its claims to the Applicant and the amount is due and owing. In other words, the Applicant cannot avoid having to pay for the services it required and received. I now proceed to deal with the defences hereunder.

[13] The events leading to the defence of estoppel emanate from a letter written by the Applicant dated 10 May 2020. In this letter, the Applicant informed the Respondent that they have realised that the contract entered between them could be unlawful in that the letter of appointment in which the Respondent was appointed to perform the duties as per the contract was signed by a person who was no longer employed by the Applicant as a Municipal Manager on the

date it was written. The Respondent was informed that the Applicant sees the letter as fraudulent and that it would investigate the matter further.

[14] On 18 May 2020, after receiving this correspondence, the Respondent informed the Applicant that it welcomed the investigations and would as such stop with its services, just in case the contract is found to be unlawful. Two days later the Applicant wrote back and requested the Respondent not to withdraw its services as per service level agreement as the work was at advanced stage. It undertook to pay for all the work done as per the contract. In light of the above, the Respondent proceeded to do the work claimed for in the summons to its completion. It is for this reason that the Respondent claims that the Applicant is estopped from raising any defence that would see it not paying what has been claimed.

[15] The Applicant contends against this submission based on a decision by the Supreme Court of Appeal (the SCA) in *City od Tshwane Metropolitan Municipality v RPM Bricks (PTY) LTD*[6]. In this decision, the SCA held that when deciding whether the doctrine of estoppel may be raised against a statutory body, a distinction must be drawn between *(a)* acts beyond or in excess of the legal powers of a public authority; and *(b)* the irregular or informal exercise of power granted. The failure by a statutory body to comply with provisions which the legislature has prescribed for the validity of a specified transaction falls within category *(a)* and cannot be remedied by estoppel because that would give rise to a transaction which is unlawful and therefore *ultra vires*. This is to be distinguished from the failure by a statutory body to comply with all the relevant internal arrangements and formalities, which falls within category *(b)* and in respect of which estoppel may be successfully invoked.

[6] 2008 (3) SA 1 (SCA).

[16] The Respondent argued that the alleged unlawfulness *in casu* falls into category (b) above as it was failure by the Applicant to adhere to its own internal policies. I cannot agree with this submission. The policies requiring the contracts similar to the one signed by the Applicant and the Respondent to undergo a competitive bidding give effect to the constitutional requirement, without which, the conduct would be unconstitutional and invalid. In making an undertaking to honour the contract, the Applicant was giving itself powers it does not have if the contract was thus unlawful. I agree with the Applicant that the doctrine of estoppel cannot be applied in facts of this case.

[17] I take this view with serious concerns in that the conduct of the Applicant is somewhat concerning. Upon close analysis of the facts, the Applicant is uncovered as contractual party who may not have had an intention to perform his obligations in terms of the contract, but smooth-talking the other party into performance hoodwinking him to believe that he too, will perform his part. This I say because in all the years that lapsed after the agreement was signed, the Applicant had more than one reason to believe that the contract was unlawful, yet it failed to raise this during the subsistence of the contract or at least before the Respondent finished its contractual obligations.

[18] It was only after the other party has exhausted its contractual obligations which came at some financial cost that it started fighting not to perform what it made the other party to believe it would do. To achieve this, it is willing to spend on legal expenses which indirectly come from the public, causing those members of the public who are contracted to perform, to pay more money over and above the contractual expenses, in legal costs. The ground does not even look levelled. This, I find to be distasteful.

[19] It is the second reasoning that flips the scales in favour of the Respondent. The question is whether there are prospects of success if this defence is successfully raised. The SCA had to deal with the overlapping requirement of a good cause against the prospects of success in *Madinda v Minister of Safety and Security*.[7] It held,

> "The second requirement is a variant of one well known in cases of procedural non-compliance. See *Torwood Properties (Pty) Ltd v South African Reserve Bank* 1996 (1) SA 215 (W) at 227I - 228F and the cases there cited. 'Good cause' looks at all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice. In any given factual complex it may be that only some of many such possible factors become relevant. These may include prospects of success in the proposed action, the reasons for the delay, the sufficiency of the explanation offered, the bona fides of the applicant, and any contribution by other persons or parties to the delay and the applicant's responsibility therefor."

[20] In *Hlatshwayo and Others v MEC for Health Mpumalanga*[8], Mashile J summarised the requirements as follows,

> "Without detracting from the fact that ultimately the interest of justice will dictate whether or not it is appropriate to grant condonation, case authority suggests that a collective demonstration of the following factors should attract favourable consideration from a court when good cause is assessed:
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> 1. Prospects of success in the action;
> 2. Reasons for the delay;
> 3. Sufficiency of the explanation offered;
> 4. *Bona fides* of the applicant; and or
> 5. Any contribution by other persons to the delay (and the applicant's responsibility therefor)."

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[7] 2008 (4) SA 312 (SCA) at para 10.
[8] (890/2017) [2022] ZAMPMBHC 22 (30 March 2022) at para 28.

[21] It should be borne in mind that in assessing the prospects of success, the focus should be at the order granted in the default judgment, not just a declaration of unlawfulness in isolation. The court was referred by both parties to *Buffalo City Metro Muni v Asla Construction (Pty) Ltd*[9] and *Govan Mbeki Municipality v New Integrated Credit Solutions (Pty) Ltd*[10] being the decisions by the Constitutional Court and the SCA. The Applicant focused on the finding of unconstitutional and invalidity in all the two cases based on the reason that the contracts were entered into without a competitive bidding process.

[22] The Respondent on the other hand drew the court's attention to the fact that in both cases, the delay time from the date of contract until the date of self-review remained the focal point. Further to this, the courts refused to allow the declaration of invalidity to have any impact on the part of the contract that had been performed already. The delay in bringing a review in *Buffalo City Metro Muni v Asla Construction (Pty) Ltd*[11] was by 14 months which was out of time for a review under the Promotion of Administrative Justice Act, No. 3 of 2000. The Constitutional Court was willing to still consider a review under the principle of legality. It held that when the law on procurement was plainly ignored and not followed, courts were obliged to declare the contract invalid. As a just and equitable decision, it ordered that despite the contract's invalidity, it should not be set aside. This was to preserve the respondent's accrued rights thereunder.

[23] In *Govan Mbeki Municipality v New Integrated Credit Solutions (Pty) Ltd,*[12] a delay of 22 months was found to have been unreasonable. The SCA

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[9] (CCT91/17) [2019] ZACC 15; 2019 (6) BCLR 661 (CC); 2019 (4) SA 331 (CC) (16 April 2019).
[10] (121/2020) [2021] ZASCA 34; [2021] 2 All SA 700 (SCA); 2021 (4) SA 436 (SCA) (7 April 2021).
[11] *Supra*.
[12] *Supra*.

however proceeded to declare the contract invalid and had it partially set aside so as to allow the respondent to claim what was rightly due in terms of that contract. This trend when it comes to just and equitable decision has its roots in the Constitutional Court decision of S*tate Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd*[13] where a contract was similarly declared invalid and set aside. The court however declared that the order of constitutional invalidity does not have the effect of divesting the respondent of any rights it would have been entitled to under the contract, but for the declaration of invalidity**.**

[24] In this case, the delay is over five years and still counting as there is no review underway. I can only repeat the concerns raised by the SCA when it expressed concern at the phenomenon of self-reviews, which it described as a burgeoning and troubling one. It stressed that corruption and maladministration were inconsistent with the rule of law and were the antithesis of open, accountable and democratic government. The functionaries involved, it noted, were almost never subject to scrutiny and sanctions and in some cases falsely assumed the moral high ground. The problem, the court held, was that corrective action, by way of self-review, was usually sought a considerable time after an impugned decision was made and disciplinary steps against those concerned might face time problems. However, if the maladministration or corruption were discovered late by conscientious officials seeking to take corrective and appropriate action, the SCA added, courts might insist in the future that public authorities seeking time indulgences set out the steps they had taken in relation to the misconduct by errant officials that resulted in the need for corrective action, including, but not limited to, disciplinary action, and, where appropriate,

[13] 2018 (2) SA 23 (CC).

criminal proceedings; all the more so, if the corruption or maladministration was hidden from disclosure by inept or corrupt officials. Further, the SCA stated, if a service provider was complicit, then questions might be asked about what steps were taken by the public authority in relation to such complicity.[14]

[25] It is in light of the above that self-review of this contract is necessary and long overdue, so that corrective measures to prevent it from happening in the future may be adopted. On the face of it, the contract looks invalid as it did not go through the competitive bidding. The question remains as to what impact would a just and equitable decision have on the judgment granted in default in this matter. Decided cases do not favour the argument presented by the Applicant which suggested that it could be absolved from performing its contractual obligations and thereby upsetting the order in the default judgment. While the contract may be declared invalid, there is no basis for the declaration to have any impact on the parts of the contract already performed by the Respondent. The Applicant remains liable and contractually bound. In essence, I find that there are no prospects of success.

[26] For these reasons set out above, I make the following order.

[26.1] The application for rescission is dismissed.

[26.2] The Applicant is ordered to pay the costs of this application.

[14] *Govan Mbeki Municipality v New Integrated Credit Solutions (Pty) Ltd (Supra)* at para 47.

TV RATSHIBVUMO

JUDGE OF THE HIGH COURT

FOR THE APPLICANT:	**: ADV V MABUZA**
INSTRUCTED BY	**: QQ MKHTSHWA INC**
	: NELSPRUIT
FOR THE RESPONDENT	**: ADV. G BENSCH**
INSTRUCTED BY	**: WEAVIND & WEAVIND INC**
	: PRETORIA
C/O:	**DU TOIT SMUTS & PARTNERS**
DATE HEARD	**: 05 MAY 2022**
JUDGMENT DELIVERED	**: 30 MAY 2022**