



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
REPUBLIC OF SOUTH AFRICA**

Case Number: 57757/2016

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: YES/NO
- (3) REVISED
- DATE: 28 MAY 2021
- SIGNATURE:

In the matter between:

THE TRADITIONAL COUNCIL OF THE

BAPO BA MOGALE TRADITIONAL COMMUNITY

Applicant

And

CONNECT COM PROJECT MANAGEMENT CC

Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

- [1] The applicant launched this application to, in essence, rescind a judgment granted by default on 26 July 2018.

BACKGROUND

- [2] The application is a traditional council constituted in accordance with the laws and customs of a traditional community which is recognised in terms of section 3 of the North West Traditional Leadership and Governance Act, 2 of 2005 read with the Traditional Leadership and Framework Act, 41 of 2003.
- [3] The respondent is a close corporation that specialises in Information Technology.
- [4] In May 2012 the parties entered into two Service Level Agreements, to wit:
- 4.1 a Network Support and Maintenance Contract; and
- 4.2 a Network Infrastructure Implementation Contract.
- [5] According to the respondent, it rendered the services in terms of the contract until the contract was repudiated by the applicant. In consequence of the repudiation, the respondent issued summons against the applicant during July 2016 for payment of an amount of R 10 478 403, 68 with interest and costs.

- [6] The applicant defended the claim and duly filed a plea on 13 September 2016.
- [7] In preparation for the trial, the respondent caused a notice calling for the discovery of documents to be served on Motalane Kgatiya Attorneys ("MKA"), the applicant's then attorneys of record. The notice went unanswered and the respondent brought an application in terms of rule 35(7) to compel the applicant to deliver its discovery affidavit. The application was served on MKA on 1 February 2018.
- [8] MKA did not oppose the application and an order compelling the applicant to discover was granted on 8 February 2016. Notwithstanding the order, MKA did not take any steps to comply with the court order. In the result, the respondent served an application to strike the applicant's defence on MKA on 6 July 2018.
- [9] MKA still did nothing and an order striking the applicant's defence together with judgment by default was granted on 26 July 2018.

CONDONATION

Facts

- [10] Once the applicant's defence was struck, default judgment was obtained by the respondent in terms of the provisions of rule 31(2)(a). This entailed that the

applicant had to launch the present application within 20 days from the date on which it acquired notice of the judgment.

[11] Mr Petrus Uka Mogale, the council chairperson of the applicant, stated in the answering affidavit, that the judgment first came to the knowledge of the applicant when the applicant's movable goods were attached. Mr Mogale does not state the exact date on which the movables were attached, but the respondent referred to three instances when writs were served on persons ostensibly representing the applicant, to wit:

11.1 on 21 September 2018 on a Mr Madumo, who is a member of the applicant and the head of its legal department;

11.2 on 16 October 2018 on a certain Mr Botes, who informed the Sheriff that the vehicles and equipment that were attached belonged to a company, Bapo Freight and Logistics (Pty) Ltd and not to the applicant; and

11.3 on 24 October 2018 on Ms Thato Booysen, an employee of the applicant at the Royal Palace.

[12] Mr Mogale stated that the council consisted of laypersons and when the summons was served a certain Dimakatso was appointed to liaise with the attorneys who would represent the applicant. The council was under the firm impression that the matter was attended to properly and professionally.

- [13] When the attachment came to the notice of the applicant, the applicant contacted Dimakatso who gave the applicant the assurance that MKA is dealing with the matter and that there is no cause for concern.
- [14] The applicant realised that the matter was not properly dealt with and approached Manamela Attorneys for assistance. Manamela Attorneys requested a deposit of R 350 000, 00 in order to draft the rescission application, an amount the applicant could simply not afford.
- [15] The applicant then decided to approach the attorneys acting on behalf of the respondent directly and a meeting was arranged for the middle of 2019. The matter could not be resolved at the meeting and the applicant was informed that, unless, a payment was made, the applicant's assets will be sold.
- [16] The applicant made a payment of R 1 million during the end of August 2019 in order to stay the sale of its movable property. The applicant had at that stage paid a total amount of R 2, 8 million to the respondent, which in the applicant's view was an exorbitant amount for the services that were rendered by the respondent. According to the applicant the respondent had only provided three computers, software and an undertaking to provide services for five years.
- [17] During September 2019 the applicant instructed its current attorneys Langenhoven Pistorius. Due to limited funding, the applicant was advised to try and negotiate an

amicable solution. To this end, Mr Pistorius undertook to set up a meeting with the respondent, during which meeting he will confront the respondent with the exorbitant amount for the services rendered in the hope that protracted litigation could be avoided.

[18] On 17 September 2017 Mr Pistorius addressed a letter to the respondent's attorneys indicating that the applicant is desirous of resolving the matter amicably.

[19] Shortly after the letter of 17 September 2019 and on 30 September 2019 the respondent attached the bank account of the applicant which account had a balance of approximately R 450 000, 00.

[20] It became clear to the applicant that the matter could not be resolved amicably and a consultation was arranged with counsel and the application for rescission was prepared and signed. Mr Mogale stated that Mr Pistorius and counsel were prepared to assist the applicant at reduced fees, which enabled the applicant to launch the present application.

Legal principles

[21] An applicant that requests condonation for the late filing of a pleading, must:

[21.1] provide an explanation of the default sufficiently full to enable the court to understand how it really came about, and to assess the applicant's conduct

and motives [See: *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 A at 353A]. This requirement entails that the enquiry into the applicant's conduct and motives, must establish that the application is *bona fide*,

and

[21.2] set out a *bona fide* defence.

[22] Mr Khoza, counsel for the respondent, submitted that the applicant's explanation for the delay lacks both candour and particularity. The applicant does not state the specific date on which the judgment came to its attention and does not in sufficient detail explain all the steps it took since the judgment had come to its knowledge.

[23] Although the applicant did not state the exact date on which the judgment came to its knowledge, it did explain the steps it took after the judgment came to its knowledge. I, however, agree with Mr Khoza that the detail contained in the explanation in respect of exact dates is open for criticism.

[24] This is, however, not the end of the matter. The court must also have regard to the merits of the applicant's defence in order to establish whether the applicant has shown good cause for the condonation to be granted. [See: *Gumede v Road Accident Fund* 2007 (6) SA 304 C at 307C – 308A].

[25] Insofar as the merits of the applicant's defence are concerned, the applicant states that it did not have the necessary financial means to enter into a contract for R 10 million. The applicant contends that the person entering into the contract was not duly authorised to do so.

[26] The applicant is further of the view that the three computers, software and an undertaking to provide services for five years could at most cost R 3 million of which it has already paid R 2. 8 million.

[27] The applicant, furthermore, raised the non-compliance with the statutory prescripts in respect of the procurement of services as a defence. In this regard, the applicant relied on the following legal instruments:

[27.1] section 30(5) and (7) of the North West Traditional Leadership and Governance Act, 2 of 2005, which provides that expenditure of the applicant must be submitted to the Premier for approval that payment is necessary and that funds are available;

[27.2] the National Treasury Instruction Note on Enhancing Compliance Monitoring and Improving Transparency and Accountability in Supply Chain Management, dated 31 May 2011, aimed to improve accountability, to provide supply chain management directives to accounting officers and to ensure value for money in the procurement of goods, works and/or services in terms of the Public Finance Management Act, 1 of 1999, which provides that:

[27.2.1] procurement plans in the procurement of goods, works and/or services which exceed R 500 000, 00 must be submitted;

[27.2.2] the procurement plan must be approved by the Accounting Officer prior to submission; and

[27.2.3] the names of the bidders in respect of the advertised competitive bids must be published on the website;

and

[27.3] section 11 of the Preferential Procurement Policy Framework Act, 5 of 2000, which requires a tender to be advertised.

[28] Mr Khoza submitted that compliance with the aforesaid legal instruments is the responsibility of the relevant officials of the applicant who entered into the agreement with the respondent and does not affect the validity of the agreement. Mr Khoza, further, submitted with reference to *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2204] 3 All SA 1 SCA, that the decision to enter into the contract is an administrative decision and remains valid until set aside on review in terms of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA).

[29] The aforesaid contention was considered by the Supreme Court of Appeal in *Municipal Manager: Quakeni Local Municipality and Another v FV General Trading* [2009] 4 All SA 231 SCA and at paragraph [26] the Court held as follows:

"While I accept that the award of a municipal service amounts to administrative action that may be reviewed by an interested party under PAJA, it may not be necessary to proceed by review when a municipality seeks to avoid a contract it had concluded in respect of which no other party has an interest. But it is unnecessary to reach any final conclusion in that regard. If the second respondent's procurement of municipal services through its contract with the respondent was unlawful, it is invalid and this is a case in which the appellants were duty bound not to submit to an unlawful conduct but to oppose the respondent's attempt to enforce it. This it did by way of its opposition to the main application and by seeking a declaration of unlawfulness in the counter-application. In doing so it raised the question of the legality of the contract fairly and squarely, just as it would have done in a formal review. In these circumstances, substance must be triumph over form. And while my observations should not be construed as a finding that a review of the award of the contract to the respondent could not have been brought by an interested party, the appellant's failure to bring formal review proceedings under PAJA is no reason to deny them relief."

- [30] The question of the legality of the contract has been raised by the applicant in its plea and in this application. The legality defence constitutes a *bona fide* defence for purposes of the condonation application and I am satisfied that the applicant has established sufficient facts for the granting of condonation. Such an order will follow.

RESCISSION

- [31] The requirements applicable to an application for rescission are trite. An applicant must:

- [31.1] provide a reasonable explanation for the default. Should the default be wilful or due to gross negligence, the application would normally fail;
- [31.2] satisfy the court that the application is *bona fide* and not merely an attempt to delay the plaintiff's claim; and
- [31.3] establish a *bona fide* defence.

[See: *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765 B–D]

Default

- [32] The applicant consisting of laypeople, placed all their trust in the hands of their first attorneys of record, MKA. MKA dismally failed in fulfilling their professional duty towards the applicant.
- [33] Mr Khoza submitted that the applicant cannot hide behind its attorney of record in circumstances where it failed to inquire in respect of the progress of its case. Although Mr Khoza is correct in this regard, the principle must be applied to the facts of each case.
- [34] *In casu* the applicant entrusted a certain Dimakatso to liaise with its attorneys. It appears that everything went well until the application to compel was served on MKA. The applicant is clearly not familiar with procedural steps taken in preparation

for a trial and there would have been no urgency or necessity for the applicant to contact MKA during the period the applications were served and the court orders were granted.

[35] Its lack of understanding of the legal process becomes more evident after the first writ of execution was served. The applicant still accepted Dimakatso's assurance that MKA is attending to the matter professionally and that the applicant could rest assured.

[36] I was only after the applicant approached a new set of attorneys that the extent of MKA's neglect came to light.

[37] Should the applicant be penalised for trusting Dimakatso and MKA? I do not believe so. The applicant's default was not wilful or grossly negligent. The applicant's trust was at worst misplaced.

[38] I trust the applicant has learned a valuable lesson and that such trust will in future be better placed.

Application bona fide

[39] Although the respondent was procedurally entitled to have the applicant's defence struck and to obtain default judgment against the applicant, the dispute between the parties has not been adjudicated to date.

[40] I am of the view that the applicant's application is *bona fide* and that the facts evidences a wish to have the dispute resolved in due course. The amount claimed and the issues raised in the action is significant and the applicant's expressed intention to defend the action does not, in my view, constitute conduct aimed at merely delaying the finalisation of the respondent's claim.

***Bona fide* defence**

[41] I have dealt with this aspect *supra* and am of the view that the applicant has established a *bona fide* defence.

CONCLUSION

[42] In the result, the applicant is entitled to an order rescinding the judgment granted by default on 26 July 2018. The *causa* for the issuing of writs of execution and the attachment of the applicant's movables have fallen away and the applicant is also entitled to the remainder of the relief claimed herein.

ORDER

[43] In the premises, I grant the following order:

1. The applicant's non-compliance with the time limit contained in rule 31(2)(b) is condoned.

2. The judgment granted on 26 July 2018 is rescinded.
3. The writs of execution issued pursuant to the judgment are set aside and all movable assets of the applicant under attachment are set free from attachment.
4. Costs to be costs in the cause.



A handwritten signature in black ink, appearing to read 'N. Janse van Nieuwenhuizen', is written over a horizontal line. To the left of the signature is a large, stylized circular mark.

N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE HEARD PER COVID19 DIRECTIVES:

19 April 2021

(Virtual hearing.)

DATE DELIVERED PER COVID19 DIRECTIVES:

28 May 2021

APPEARANCES

Counsel for the Applicant

Advocate J. Brand SC

Instructed by:

Langenhoven Pistorius & Modihapula Attorneys

Counsel for the Respondent:

Advocate X. Khoza

Instructed by:

Adams and Adams