



Reportable:	Yes/No
Circulate to Judges:	Yes/No
Circulate to Magistrates:	Yes/No

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE HIGH COURT, KIMBERLEY)**

CASE NO.: 800/2014

**Date heard: 15-06-2018
Date delivered: 15-03-2019**

In the matter between:

Tsantsabane Local Municipality

Applicant

And

Mosegedi and Associates (PTY) LTD

Respondent

CORAM: WILLIAMS J:

JUDGMENT

WILLIAMS J:

1. This is an application for the rescission of a default judgment granted in favour of the respondent Mosegedi & Associates (PTY) Ltd against the applicant, the Tsantsabane Municipality, in the amount of R498 919, 24 for professional fees and disbursements in terms of a written consultant's agreement entered into between the parties.
2. The application is brought in terms of the Rule 31(2) (b) alternatively the common law.

Default judgment was granted on 26 January 2018 after the applicant was in default of filing a plea to the respondents declaration delivered on 27 June 2017 and the applicant had been *ipso facto* barred from pleading on 28 August 2017.

3. Rule 31(2) (b) provides that the court may on good cause shown set aside the default judgment. To succeed with an application for rescission under this subrule it is generally accepted that the applicant has to; (i) give a reasonable explanation for his default. If the default was wilful or due to gross negligence the court should not come to his assistance; (ii) the application must be *bona fide* and not made with the intention of delaying the plaintiff's claim; and (iii) he must show that he has a *bona fide* defence (it is sufficient however to make out a *prima facie* defence by setting out averments, which if established at the trial would entitle him to the relief asked for).

The reasons for the delay

4. The applicant provides a long history and time-line of the events leading up to the default judgment which I will attempt to briefly summarise,
 - 4.1. Mr H Mathobela the deponent to applicant's affidavits is the applicant's municipal manager, a position he held at the time the action was instituted by way of a simple summons issued on 24 May 2014. At the time he was

able to consult with Mr Johann Barnard who was intricately involved as technical manager on the project and who also assisted the applicant with general oversight over the project as well as the other relevant key- individuals who had knowledge of the dispute between the parties. He was thus able to instruct the applicant's attorneys to oppose an application for summary judgement brought by the respondent, who subsequently consented that leave be granted to defend the action on 12 November 2014.

- 4.2 Thereafter, after settlement proposals failed and Mr Barnard had passed away, and key individuals and employees with personal knowledge had left the employ of the applicant, the respondent filed the declaration on 27 June 2017, more than 3 years after the simple summons.
- 4.3 Mr Mathobela explains that it was then impossible to obtain sufficient information and documentation, to consult with the relevant knowledgeable individuals and instruct applicant's attorneys of record to file a plea within the specified time limits.
- 4.4 Even after the respondent filed a notice of bar on 25 August 2017, the relevant information could not be obtained to instruct the applicant's attorneys to file a plea before the applicant was *ipso facto* barred from doing so.
- 4.5 Thereafter Mr Mathobela left the employ of the applicant and a new municipal manager was appointed who had

even less knowledge of the matter. He could also not properly instruct an attorney to bring an application to uplift the bar and file a plea.

- 4.6 The applicant nevertheless requested a removal of bar on 16 September 2017, which request was refused by the respondent on 18 September 2017. The respondent served notice of default judgment on the applicant on 27 September 2017.
 - 4.7 Mr Mathobela was re-appointed as municipal manager during December 2017, when most of the applicant's employees were on holiday and he could not obtain the relevant information to formulate a plea.
 - 4.8 Notice of set down of the default judgment application was served on the applicant on 17 January 2018, for hearing on 19 January 2018. Mr Mathobela states that the matter was postponed to 26 January 2018 to give the applicant an opportunity to bring an application to uplift the bar. He states once again that he was unable to obtain the relevant information to draft the application before 26 January 2018, on which date the court refused to grant any further indulgence and default judgment was granted against the applicant.
5. The respondent, although agreeing with the time-line of events, does not agree with all the allegations made by Mr Mathobela. I need not go into all the counter-allegations however, since in my view it is clear that the explanation for the delay does not pass muster. I have had sight of the opposing affidavit to the

summary judgement application which was filed on 31 October 2014, wherein the applicant's defence to the claim is set out in almost the exact terms as the defence proffered in the application before me. The excuse that the respondent's delay of 3 years before filing the declaration had made it almost impossible to find and consult with the relevant role players, can therefore not hold water.

6. Another interesting anomaly is that according to Mr Mathobela a draft plea and counterclaim (which is attached to the founding papers) had been compiled during September 2017 before the respondent's refusal to consent to the removal of bar. This was during the time when the acting municipal manager had been appointed, who on the applicant's version had no knowledge of the matter. Where the instructions had come from to enable the applicant's attorneys to draft the plea and counterclaim is not explained. According to Mr Mathobela, he was only able to locate the necessary documentation and relevant knowledgeable individuals to assist in providing the instructions for this application during January 2018. These individuals have also not been identified.
7. I cannot but find in these circumstances that the information necessary to draft a plea had been available at least since October 2014.
8. Whether the delay was deliberate and with full knowledge of the consequences of the default or whether it was just due to the plain negligence on the side of the applicant is difficult to find since the applicant has obviously not played open cards in explaining the delay. At best for the applicant, the explanation

for the delay is extremely poor and as such the strength of the defence on the merits becomes crucial.

The defence on the merits.

9. It is common cause that the applicant appointed the respondent during 2010 as consulting engineers to perform consulting services in respect of the upgrade of a 1.6 kilometre section of a street in the Boichoko Township of Postmasburg. Inclusive in the brief was the design of a storm water drainage system and construction supervision.
10. A construction firm, Maptisi Civil, were awarded the tender to construct the works under the supervision of the respondent.
11. According to the applicant, a dispute arose regarding the performance by the respondent in terms of their agreement. Mr Barnard, the technical advisor for the applicant was involved in facilitating the process to reach a solution to the dispute, to no avail.
12. The main problem appears to be the design and construction of the storm water drainage system. The applicant alleges that after the works had been in progress for about a year, during early January 2012, it came to their knowledge that the respondent had, contrary to its obligations in terms of the agreement failed to design the storm water drainage system, nor had a storm water master plan been produced or executed by the respondent. The respondent had also failed to monitor the construction of the drainage system. Once this had come to the knowledge of the applicant, it decided to withhold all further payments until the matter had been rectified by the

respondent. The applicant attaches copies of letters sent to the respondent demanding that respondent rectify the breach. Despite these letters, it is alleged, the respondent has failed to rectify the breach.

13. The applicant alleges that since the respondent has not performed its obligations in terms of the agreement, it is not entitled to the payments claimed and had in fact been enriched by payments made. The applicant contends that the costs at present for the design and construction of an appropriate storm water drainage system far exceeds the respondent's claim and that it intends to counterclaim for damages in an estimated amount of R1.8 million.
14. The letters which the applicant sent to the respondent and referred to herein in paragraph 12 above, are dated 29 March 2012 and 21 May 2012. The letter of 29 March refers *inter alia* to the storm water drainage design and states that it is *"unbefitting and fails to operate for its intended purpose. It cannot drain storm water away. . . You are hereby instructed to issue drawings (approved by us) to the contractor to rectify this problem to collect and dispose of storm water at you costs."*
15. The letter of 21 May states in this regard, *"As pointed out on numerous occasions. . . , the road design cannot accommodate storm water. We are still waiting for a solution to be designed and constructed at the sole costs of Mosegedi and Associates."* These letters are signed by a Rev Moselane, who appears to have been the municipal manager at the time.
16. In its opposing affidavit the respondent admits that it was responsible for the design of the storm water drainage system

and oversight of its construction, but denies that it was responsible for the storm water master plan which was applicable to the entire township and designed by BVI Consulting Engineers. The respondent admits that certain problems were encountered as pointed out in the two letters referred to herein, but denies a dispute in this regard. The respondent states that if there was a dispute it should have been dealt with in terms of and as provided for in the contract governing the parties' relationship. Likewise no dispute has been raised in terms of the agreement regarding the respondent's accounts which the applicant has refused to pay.

17. The respondent states that the problems regarding the stormwater drainage system were in fact attended to, to the satisfaction of the applicant in the extent that it had issued Practical Completion and Final Completion Certificates of the project.
18. The certificates are attached to the respondent's opposing papers. The Practical Completion Certificate is dated 25 July 2012 and contains a snag list which includes amongst the works outstanding a water channel to be attended to, a drain on a kerb and a chute to drain water away from houses (all seemingly related to drainage). The Certificate of Completion is dated 15 August 2012 – and states that there are no outstanding works – that the works *“shall be considered completed to such an extent, as to revert the possession of the site to the Employer for its intended purpose of use by the Employer. . . “*

The Certificate of Completion was signed by the representative of the contractor and the respondent on 15 August 2012 and by the applicant's representative on 2 October 2012

19. The applicant failed to refer at all to these certificates. In its replying affidavit the applicant states that it was understood between the parties that the storm water drainage issues would be finalised independently from the main project and the certificates issued related to the remainder of the project. As proof of this contention an e-mail from Mr Barnard to the respondent, dated 9 August 2012, is attached and which reads as follows:

"If all is done, we will recommend that the Tsantsabane Municipality sign the Completion Certificate, because the Contractor would have fulfilled his obligations in terms of Clause 51.4 of the GCC.

However, no commitment have been received from Mosegedi and Associates regarding resolving the drainage problem, and the Municipality will not take possession in terms of Clause 51.5.4 of the GCC because of the incomplete design as pointed out in the attached correspondence more than once. In fact this short coming was acknowledged by mr Elmar Jansen Van Vuuren an pointed out to you in the letter of 20 March 2012. In your letter of 23 May 2012, you in fact undertook to have a special meeting to discuss and resolve this problem."

20. This e-mail from Mr Barnard precedes the applicant's signing off on the project by almost two months, which tends to confirm the respondent's version that all problems were rectified before the Certificate of Completion was issued. The applicant has failed to provide any proof of an arrangement whereby the storm water drainage system would be finalised separately. In fact this averment appears to be an afterthought to explain away the issue of the Certificate of Completion and is yet again an example of the applicant's failure to play open cards with the court.
21. The applicant has failed to show a *bona fide* defence and in my view the application for rescission of judgment has been brought merely to frustrate and delay the finalisation of the respondent's claim.

The following order is made:

The application for rescission of judgment is dismissed with costs.

CC WILLIAMS

JUDGE

For Applicant:

Adv M Jacobs

Weavind & Weavind Inc.

c/o Engelsman Magabane Inc

For Respondent:

Adv R Grundlingh

Scheepers & Aucamp Attorneys

c/o Roux Welgemoed & Du Plooy Attorneys