



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

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|------------------------------|--------|
| Reportable:                  | YES/NO |
| Of Interest to other Judges: | YES/NO |
| Circulate to Magistrates:    | YES/NO |

Case number: 1650/2016

In the matter between:

**PHUMELELA LOCAL MUNICIPALITY**

**Applicant**

and

**SA FENCE AND GATE (PTY) LTD**

**Respondent**

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**HEARD ON:** 16 NOVEMBER 2017

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**JUDGMENT BY:** MATHEBULA, J

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**DELIVERED ON:** 15 FEBRUARY 2018

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- [1] The proceedings I am called upon to adjudicate are applications for condonation for the late filing of the application for rescission and rescission of an order for summary judgement. The applicant is Phumelela Local Municipality, a local municipality as contemplated in terms of section 2 of the Municipal Structures Act

32 of 2000. The respondent is SA Fence and Gate (Pty) Ltd, a business entity duly established in terms of the company laws of the Republic.

[2] The chronology of essential facts commenced with the respondent issuing summons on 10 April 2016 against the applicant for payment of the sum of R4 355 917.42. Apparently these were served against the applicant and the matter was not defended. The Registrar was approached with an application for default judgement but refused to grant it. This matter was referred to the open court before a judge. The respondent reserved the summons and the applicant responded by serving and filing a notice of intention to defend. The respondent launched an application for summary judgement in terms of rule 32 of the Uniform Rules of Court.

[3] The application served before me on the unopposed roll on 13 April 2017 and the parties agreed to the following order being made that:-

1. The matter is postponed to 15 JUNE 2017 to the opposed roll.
2. Defendant to file its opposing affidavit to the application for summary judgement, as well as application for condonation for the late filing of the notice of intent to defend on/or before 28 APRIL 2017.
3. Plaintiff to file its opposing affidavit to the application for condonation on/or before 19 May 2017.
4. Defendant to file its replying affidavit on/or before 02 June 2017.
5. Costs to stand over.

- [4] On 15 June 2017 the matter served before Gela AJ who granted the application for summary judgement in favour of the respondent in the claimed amount with costs. The applicant served and filed the application for rescission of that order on 27 July 2017. The respondent filed the notice to oppose on 10 August 2017 and the opposing affidavit on 5 September 2017. It is of cardinal importance to note that the respondent raised the objection that the applicant is ten (10) days out of time with its application and that the application is not properly before the Court.<sup>1</sup>
- [5] The applicant served and filed its application for condonation of the late filing of the application for rescission of an order for summary judgement on 27 September 2017. This was also opposed by the respondent when the necessary opposing affidavit was served and filed on 19 October 2017. The applicant deemed it fit to serve and file the replying affidavit on 21 November 2017.
- [6] It is apposite to deal with the application for condonation before the application for rescission of an order for summary judgement. However the application for condonation cannot be determined in isolation without consideration of the application for rescission of an order for summary judgement.
- [7] Both applications are supported by affidavits deposed to by the Acting Municipal Manager of the applicant. The crux of her

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<sup>1</sup> Uniform Rule 31 (2) (b) reads as follows: "A defendant may within 20 days after he or she has knowledge of such judgement apply to court upon notice to the plaintiff to set aside such judgement and the court may, upon good cause shown, set aside the default judgement on such terms as to it seems meet".

version is that the officials of the applicant received the copy of the court order dated 15 June 2017 timeously. However the Council (which is the highest decision making body) was unable to convene an urgent meeting and could only do so on 21 July 2017. As she could not act unilaterally, she did not have the necessary mandate to deal with this matter. This was compounded by the difficulty of securing meetings with or obtaining briefings from former employees and paucity of the necessary documentation relating to this claim. According to her the applicant has good prospects of success because the respondent has failed to comply with the lawful procurement processes. Lastly that the respondent will not in any manner be prejudiced seeing that a substantial period of time has elapsed between the serving of the summons and the granting of the order for summary judgement.

- [8] The respondent is resisting the application contending that the applicant has not attached inter alia confirmatory affidavits of members of the Council that indeed they were unable to convene for reasons stated at any other time except the aforementioned date. In the absence of such corroboration then the content of the affidavit in that respect amounts to hearsay evidence and should not be taken into consideration. The hotly contested terrain is that the application for rescission of an order for summary judgement does not have prospects of success. The essence is that the applicant failed to comply with the order dated 13 April 2017 to file the application for condonation on/or before 28 April 2017. This was still not attended to when the matter came before Gela AJ on 15 June 2017 and no substantial

application for postponement was before court. Lastly that the respondent will be prejudiced in the event the application for condonation and ultimately rescission is granted because payment will not be made in terms of the judgement lawfully granted.

[9] On behalf of the applicant, Mr Khokho submitted that the respondent was a juristic person and that Mr Hugo van der Merwe was not authorized to depose to the affidavits in the legal proceedings against the respondent. He pointed out that the respondent has not attached a copy of a resolution empowering him to sign the affidavits. On the aspect of the lateness of the application, he argued that the applicant was only ten (10) days out of time which was not a substantial period of time. Accordingly, the delay was caused by missing documents and administrative glitches on the part of the applicant. It was his submission that no prejudice will be suffered by the respondent in the event the application is granted.

[10] The respondent is resisting the application and Mrs de Kok submitted that Mr Hugo van der Merwe was properly authorized and the affidavits were properly commissioned. She argued that the application for rescission of the order for summary judgement did not contain a prayer seeking condonation for the late filing of the application. She argued that even on 15 June 2017 the applicant would have been unable to obtain a postponement of the matter without a substantive application before Court. In

addition the applicant had failed to comply with Uniform Rule 27 dealing with the extension of time and condonation.<sup>2</sup>

- [11] Counsel for the applicant made a submission that the deponent to the affidavits of the respondent was not properly authorised. This matter was considered and conclusively decided upon in **Eskom v Soweto City Council**.<sup>3</sup> On that occasion the court on page 705 at paragraph F-G said the following:-

**“The developed view, adopted in Court Rule 7(1), is that the risk is adequately managed on a different level. If the attorney is authorised to bring the application on behalf of the applicant, the application necessarily is that of the applicant. There is no need that any other person, whether he be a witness or someone who becomes involved especially in the context of authority, should additionally be authorised. It is therefore sufficient to know whether or not the attorney acts with authority”**

This is the correct approach also followed by the full bench of this division that it is the institution of the proceedings and not the prosecution thereof which must be authorised.<sup>4</sup>

- [12] The court has emphasised on a number of occasions that an application for condonation is not a mere formality<sup>5</sup>. It is incumbent on the applicant to satisfy the court that his non-observance of the Rules is excusable by demonstrating a sufficient

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<sup>2</sup> Uniform Rule 27 (3) reads as follows: The court may on good cause shown, condone any non-compliance with these rules

<sup>3</sup> *Eskom v Soweto City Council* 1992 (2) SA 703 (W)

<sup>4</sup> *Free State Agriculture v The President of the Republic of South Africa and 13 others* Case no A96/2016 at paragraph 11-12

<sup>5</sup> *Saloojee and Another v Minister of Community Development* 1965 (2) SA 135 (A).

cause for non-compliance. The importance of observing the Rules is to ensure that the Courts run effectively and efficiently<sup>6</sup>. In matters of this nature the principle is that the court has a discretion which must be exercised judicially upon consideration of all facts<sup>7</sup>. In its quest to dispense fairness between the parties the court laid down the following as relevant factors to be considered viz the degree of lateness, the explanation thereof, the prospects of success and the importance of the case.<sup>8</sup>

- [13] The version of the parties is contained in the affidavits filed in support of or opposition to the applications. The court is bound to accept those facts averred by the applicant that are not disputed by the respondent and the version of the respondent insofar as it was tenable and credible.<sup>9</sup>
  
- [14] The applicant brought an application for rescission of an order for summary judgement ten (10) days out of time. It is trite that whenever an applicant is aware that he has not complied with a Rule of Court, an application for condonation must be brought before the Court without delay.<sup>10</sup> This applies to all litigants before the court whether they are government officials or not.
  
- [15] The applicant despite being aware of the non-observance of the Rules applied for condonation about ten (10) weeks after 13 July 2017. This is the date that the application for summary judgement should have been served and filed. Together with that

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<sup>6</sup> Derrick Grootboom v National Prosecuting Authority and another 2013 ZACC 37

<sup>7</sup> Melane v Santam Insurance Co Ltd 1962 (2) SA 531 (A)

<sup>8</sup> See 7 above

<sup>9</sup> Plascon-Evans Paints Ltd v Van Riebeeck Paints 1984 (3) SA 623 (A) at 634 F – 635 D.

<sup>10</sup> Commissioner for Inland Revenue v Burger 1956 (4) SA 447 (A)

application the first prayer on the notice of motion should have been the condonation of the late filing of the application for rescission of an order for summary judgement.

- [16] The main reason for the late filing of the application for rescission was the unavailability of the members of the Council who could not be galvanised at short notice to hold a meeting. This meeting was necessary to provide the necessary mandate. The Municipal Manager in each and every Municipality is the Accounting Officer with enormous administrative powers to sue and defend legal proceedings on behalf of the Municipality. The Council of the Municipality is akin to a Board of Directors of a company whose main responsibility is formulation of policy and political oversight not day to day management of the Municipality. In the event the council conduct itself in such a manner it will be tantamount to micro management of the Municipality. The Acting Municipal Manager was aware of the proceedings against the applicant at least from the day the notice of intention to defend was served and filed. The application for summary judgement was opposed, although an opposing affidavit was not filed. It will be farfetched to expect that the council of the municipality must give instruction(s) with every step that is taken in a litigation matter. This explanation is the invention of the reality on the part of the Acting Municipal Manager which must be rejected. There was no confirmatory affidavit to corroborate this version or explanation why a smaller structure like the Mayoral Committee could not have taken a decision on an urgent basis. Moreso the legal representatives who were aware when they applied for rescission of an order for summary judgement are silent why an application

for condonation was not part of that main application. The period that lapsed between the two is substantial stretching over two (2) months without a proper explanation. There is absolutely no explanation about what transpired during the period from the 21 July to 26 September 2017.

- [17] The worrying aspect of the conduct of the applicant through its legal representatives is that the necessary attention to rules and/or court orders is not observed. The applicant has not complied with the court order dated 13 April 2013. Even on 15 when the application for summary judgement was granted the applicant had not complied with it or Uniform Rule 27 to request for extension of time. The late filing of the application for rescission of the order is the case on hand.
- [18] The other requirement to be met by the applicant is prospects of success in the main matter. This cannot be done without undertaking an enquiry dealing with the consideration of the merits. In the affidavit opposing the summary judgement it is averred that the respondent is relying on an invalid agreement to supply goods and services to the applicant. The allegation is that the respondent did not follow the correct procurement procedures of the applicant. Another reason provided in the affidavit for application for condonation is the non-availability of the former employees of the applicant and the difficulty to locate "certain relevant documentation". This means that the deponent to these affidavits being the Acting Municipal Manager has no insight in the documents she intend relying on in disproving the claim against the applicant.

- [19] The applicant must put up a *bona fide* defence which has good prospect of success<sup>11</sup>. This means that the applicant must make averments which, if established at trial, would sustain a relief being sought.<sup>12</sup> It is not necessary that the applicant must set out the merits fully and produce evidence.
- [20] However, in this matter, the applicant is making a veiled reference to an unlawful conduct on the part of the respondent. The essence of unlawfulness is not in any manner stated. There is no allegation that the applicant is perhaps taking steps to launch a review application setting aside the unlawful contract or embarking on other legal proceedings to remedy the anomaly. This is even difficult to understand given her version that she bears no knowledge about the transaction(s) between the applicant and the respondent. She does not have access to former employees and relevant documentation. The persons who have the knowledge about this matter did not depose to any affidavits. As a result the applicant does not make a *prima facie* defence and falls far short of the required standard.
- [21] The last issue to be considered is whether prejudice will be suffered by any party and the interests of justice. The matter has been dragging for approximately two (2) years. The applicant is not complying with the rules and has no good prospects of success. The respondent will be severely prejudiced if the matter is further delayed. The interest of justice requires that fairness be done equally between the parties within the proper framework of

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<sup>11</sup> Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 at 10 B-C

<sup>12</sup> E H Hassim Hardware (Pty) Ltd v Fab Tanks CC 2017 ZASCA 145

the rules of practice and the law. The main object of rescinding a judgement is to restore the opportunity for a real dispute to be ventilated.

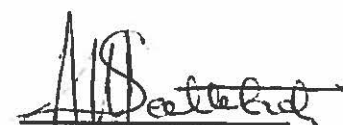
[22] Taking all circumstances and facts into consideration I have reservations about the version of the applicant. It remains unsatisfactory and falls short of the required standard. The affidavits filed of record do not contain sufficient allegations that there are good prospects of success. Applying my discretion in a judicial manner, I have come to the conclusion that the applicant cannot succeed in this application.

[23] The costs follow the result and I have no reason to deviate. The applicant is the losing party who did not succeed. This means that the applicant is also unsuccessful in the application for rescission of an order for summary judgement. The respondent incurred costs opposing that application. The same principle that the losing party must pay the costs is also applicable.

[24] Accordingly I make the following order:-

24.1 The application for condonation is dismissed with costs.

24.2 The applicant is ordered to pay the costs of the application for rescission of the order for summary judgement.

  
MATHEBULA, J

On behalf of applicant:

Adv. D Khokho

Instructed by:

Rampai Attorneys

On behalf of 1<sup>st</sup> respondent:

Adv. D de Kok

Instructed by:

Webber Attorneys

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