

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 2744/2010

In the matter between:

THAKANAGOAHA INVESTMENTS

Respondent/Plaintiff

and

**THABO MOFUTSANYANA DISTRICT
MUNICIPALITY**

Applicant/Defendant

HEARD ON:

25 AUGUST 2011

JUDGEMENT BY:

MATHEBULA AJ

DELIVERED ON:

15 SEPTEMBER 2011

[1] This is an application for rescission of judgement in terms of the Uniform Rules of Court. The judgment sought to be rescinded was obtained by the respondent on the 8th December 2010 in the sum of R513 000,00 and R2 052 000,00 respectively together with interest at the rate of 15.5% per annum calculated from the 8th August 2008 and 5th December 2009.

[2] The chronology of the events is briefly as follows: The respondent issued summons on the 2nd June 2010 against the

applicant. The summons was duly served by the sheriff upon the applicant on the 11th June 2010. It was served upon Me. Nomvula Malantjie in her capacity as the Acting Manager: Corporate Services. There is no dispute regarding the proper service of the summons.

[3] The applicant failed to defend the matter and the respondent obtained default judgment. On the 2nd March 2011 a warrant of execution was issued against the applicant and served by the sheriff on the 13th March 2011. This is the day that the default judgment came to the attention of the applicant.

[4] As a result of the fluidity of the situation, the application for rescission of judgment triggered among others the application to stay the sale in execution and the suspension of the warrant of execution. The order to stay the sale and suspend the warrant of execution was granted by Cillie J on the 5th May 2011. There is also an application for condonation of the late filing of the opposing affidavits by the respondent. These are not the main applications.

[5] At the outset it was conceded that it will not prejudice any

party if condonation is granted to the respondent. Accordingly, I granted condonation in this respect. This enabled the parties to proceed with their submissions on the main application.

- [6] The party seeking relief rescinding the judgment must firstly show good cause in order to succeed. In discharging the *onus* that party must place good and sufficient facts before the court. In essence, there must be a reasonable and acceptable explanation of the default. Secondly, that party must show a *bona fide* defence with prospects of success if such averments are established at the trial.
- [7] The first question to be answered is: Whether there is a reasonable explanation proffered by the applicant for the default? The relevant parts of the explanation appear in paragraphs 8 – 10 of the founding affidavit deposed by Mmoledi Petrus Moloi who was the Municipal Manager at the time when respondent commenced legal proceedings. Further, other people cited by him in his affidavit have also deposed confirmatory affidavits.

[8] Second question to be answered is: Whether there is a *bona fide* defence? The respondent is suing the applicant for payment having rendered certain services. The claim is based on a written agreement attached to the summons. The applicant on the other hand denies that the respondent rendered services as per agreement or alleged. There is also a dispute with the exact number of files handled by the respondent. Further, the applicant is alleging having suffered damages as a result of the breach committed by the respondent. There is a counter claim which is explained in paragraphs 11 – 19 in the amount of ±R1,8 million. I will not repeat all these paragraphs because they are part of the record.

[9] In **DE WITTS AUTO BODY REPAIRS (PTY) LTD v FEDGEN INSURANCE CO LTD** 1984 (4) SA 705 (E) at 711 E – G the test was set as follows:

“An application for rescission is never simply an enquiry or not to penalise a party for his failure to follow the rules and procedures laid down for civil proceedings in our courts. The question is, rather, whether or not the explanation for the default and any accompanying conduct by the defaulter, be it wilful or

otherwise gives rise to the probable inference that there is no bona fide defence, and hence that the application for rescission is not bona fide. The magistrate's discretion to rescind the judgments of this court is therefore primarily designed to enable him to do justice between the parties. He should exercise that discretion by balancing the interest of the parties, bearing in mind the considerations referred to in Grant v Plumbers (Pty) Ltd, 1949 (2) SA 470 (O) and HDS Construction (Pty) Ltd v Wait, 1979 (2) SA 298 (E) and also any prejudice which might be occasioned by the outcome of the application."

- [10] Mr Van Amstel made no further submission except that the summons was lost in the offices of the applicant. The circumstances that prevailed is that the normal running of the municipality was not in the hands of its officials. Mr Motlounq submitted that there was no plausible explanation as to what happened to such an important document. The fact that the official concerned was acting in his capacity should be inconsequential and disregarded. His view was that the purpose of placing the municipality under administration was not to weaken it but instead to boost it. However, he did not refer to any case law to substantiate his submission as to why the explanation must be rejected.

[11] On the issue of the *bona fide* defence I was referred by Mr Van Amstel to the alleged breach and discrepancy in the number of files which is central to the dispute between the parties. This submission was also opposed by Mr Motlounq that the applicant had no *bona fide* defence. The Memorandum of Agreement determined the relations between the parties and the steps to be taken in case of breach. The applicant had not acted in accordance with the agreement and therefore the contract had not been cancelled. Proper steps had not been taken at all. Therefore, there is no *bona fide* defence.

[12] The refusal of an application of this nature is a stringent one. It effectively closes the doors of the court to the applicant. The court should not lightly deny a litigant access to justice. However, it must be emphasised that such access will be denied to a litigant who fail to adhere to the rules of court. Each matter will depend on its own facts.

[13] In this matter, the Municipality concerned has been stripped off its authority to act as an independent entity. The authority

was vested with the Administrator who reported to the relevant Provincial Department in Bloemfontein. The Municipalities under administration are those that are in distress. The summons had to be handed to the Administrator who had to transmit the same to a Mr Venter at the Provincial Offices. It is conceivable that summons would have gone missing in that process. This is not a condonation of such behaviour but realisation that such an entity in distress one can expect the possibility of summons being lost arising in the circumstances. I could not find any wilful or gross negligent conduct on the part of the officials of the respondent in not defending this matter. Instead I could find that because of the unusual circumstances prevailing at the time it could have led to this particular situation arising. I am of the view that the respondent had no knowledge of the action being brought and did not act in any deliberate manner in refraining from entering an appearance to defend. I am of the view that the explanation is acceptable and the applicant is entitled to the relief sought.

[14] The action is based on a Memorandum of Agreement concluded between the parties. The central dispute between

the parties is services that is alleged to have been rendered and refusal to pay thereof. Further, there is a dispute on the quantity of delivery of such services. The long standing dispute between the parties is clearly documented in the correspondence exchanged between them. I refer to the attachments annexed to the opposing affidavit. In addition, there is the allegation of breach resulting in the applicant suffering damages. These averments if established at the trial, the applicant will be entitled to the relief sought. In the exercise of my discretion, I am of the view that the application measure up to the test as laid down by the court. I accordingly conclude that the applicant has a *bona fide* defence. There is a sufficient cause to set aside the judgment.

- [15] There were other applications that I referred to in paragraph [4] namely the stay of the sale in execution, suspension of the warrant of execution and condonation of the late filing of the opposing affidavit. The granting of the application for rescission of judgment means that all these applications will fall by the wayside.

[16] The principle is that the costs follow the result. It was necessary to grant the application for condonation in order to hear the main application. I am of the view that the respondent had a reasonable explanation on the late filing of the necessary documents. On the main application, I am of the view that the respondent did not act unreasonably in opposing the application.

[17] Accordingly, I make the following order:

17.1 The application for rescission of judgment is granted.

17.2 Costs in all applications will be costs in the cause.

M.A. MATHEBULA, AJ

On behalf of the respondent/
plaintiff:

Mr. I. Motloun
Instructed by:
Mabalane Seobe Attorneys
BLOEMFONTEIN

On behalf of the applicant/
defendant:

Adv. C. Ploos van Amstel SC
with:

Adv. C. Coetzer
Instructed by:
Honey Attorneys
BLOEMFONTEIN

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