

Reportable	YES / NO
Circulate to Judges	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape High Court, Kimberley)

Case Nr: 826/2010

Date heard: 2011/02/18

Date delivered: 2011/02/25

LEUNGO CONSTRUCTION ENTERPRISE CC

PLAINTIFF

and

GA SEGONYANE MUNICIPALITY

DEFENDANT

JUDGMENT

BESTER-TREURNICHT AJ

- 1] In this matter the applicant applies for the rescission of a default judgment granted against him on 01/07/2010 to the following effect:

1.1] Payment of the sum of R1 040 570,79

1.2] Interest a tempore morae

1.3] Costs of suit

1.4] Further and/or alternative relief

I will refer to the applicant as the Municipality and to the respondent as Leungo for ease of reference.

- 2] The Municipality applies for condonation for the late filing of the application which should have been brought twenty days after gaining knowledge of the judgment In terms of Rule 31(2)(b).
- 3] The requirements for a successful application for rescission are the following,

as set out in **Grant v Plumbers 1949(2) SA 470 (TPD)** at 476:

- “(a) *He must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the Court should not come to his assistance.*
- (b) *His application must be bona fide and not made with the intention of merely delaying plaintiff's claim.*
- (c) *He must show that he has a bona fide defence to plaintiff's 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 to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour.”*

See also **Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA)** at 9 C-F.

- 4] I deal firstly with the explanation provided by the Municipality for the default. The reasons for the Municipality's absence or default must be set out fully because it is relevant to the question whether or not the default was wilful. In **Silber v Ozen Wholesalers (Pty) Ltd 1954(2) SA 345 (A)** at 353 A it was held that the applicant should at least furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about and to assess his conduct and motives.

4.1] Mr. Kgarane, the Technical Manager of the Municipality deposed to the founding affidavit on its behalf. He admits that the summons had been properly served on the Municipality by serving a copy thereof on 24 May 2010 on Miss Von Brandis, an employee of the Municipality in charge of the business premises and that the nature and contents hereof had been explained to her.

4.2] The Municipality, being a state organ, had twenty days to file its Notice of Opposition in terms of Rule 19(2), being 5 August 2010. Mr. Kgarane avers that the Municipality only gained knowledge of the default judgment on 8 July 2010, which averment is not explained in light of the admission of proper service on Miss Von Brandis.

- 4.3] Mr. Kgarane then explains that the Municipality instructed counsel, who was allegedly available for consultation only on 31 July 2010. During consultation at the time it became apparent that further “relevant documents” were not available for scrutiny and only came to hand on 5 August 2010. This application was lodged on 16 August 2010. When considering the reasons provided for the non-compliance with the Rules, the Municipality is not entitled to use the non-availability of counsel as an excuse for not filing the application timeously. Surely the Municipality could instruct any other available counsel to timely assist in preparing the application. The nature of the documents which were allegedly not available are not explained, nor the importance thereof.
- 4.4] The reasons advanced by the applicant for condonation are terse and a far cry from being fully explained. The vagueness thereof does not serve to enable me to establish whether the conduct of the Municipality was wilful. Condonation is not for the mere asking. A full, detailed and accurate account of the causes of delay and their effects must be furnished. See **Uitenhage Transitional Local Council v South African Revenue Service 2004(1) SA 292 (SCA)** at 297 I-J. I am therefore of the opinion that the application for condonation is not proper.
- 5] For the sake of completeness and to be able to give a full overview of whether good cause has been shown, I proceed to determine whether the Municipality has produced *prima facie* evidence of a substantial defence. See in this regard **Galp v Tansley NO and Another 1966(4) SA 555 (CPD)** at 560 A-B.

“As was pointed out in Silber's case, supra , at p. 352 G, the requirement introduced by the expression 'good cause', as used in Rule 46 (5), includes but is not limited to the existence of a substantial defence. And if there is one thing which - to my mind - appears to be absolutely axiomatic it is this, viz., that the requirement of 'good cause' cannot be held to be satisfied unless there is evidence not only of the existence of a substantial defence but, in addition, of a bona fide , presently-held desire on the part of applicant for relief actually to

raise the defence concerned in the event of the default judgment being rescinded."

5.1] Leungo's claim as set out in the Particulars of Claim is based on services rendered to the Municipality as per agreement between the parties. The services entailed the preparation of a business plan for the development of 235 (*in situ*) low cost houses for the area of Bankara-Bodulong, within the managerial district of the Municipality. The Municipality would pay Leungo in accordance with provisions of the Guideline Scope of Services and Tariff of Fees for Registered Persons promulgated from time to time pursuant to the provisions of Sec 34(2) of the Engineering Professions Act, 46 of 2000. Leungo attached a schedule to the Particulars of Claim as annexure "P0C2" depicting how the claim was computed.

5.2] The defence of the Municipality is summarized in par 39 of the founding affidavit which reads as follows:

"The plaintiff never submitted the completed business plans, or the Geotech Report or the Environmental Impact Assessment Report (EIA) as per the agreement. Nor has the plaintiff submitted any supporting documentation to enable the plaintiff to satisfy itself whether or not the professional services allegedly rendered by the defendant as per the agreement were value for money or cost effective."

5.3] These broadly stated allegations lack the particularity and forthrightness expected from the Municipality to disclose a *bona fide* defence. There is no averment in the founding affidavit that it was a term of the agreement between the parties that Leungo also had to submit a Geotech Report or Environmental Impact Assessment Report (EIA). This is furthermore not portrayed in the letter of appointment, Annexure KK2.

5.4] Leungo denies the averment that the business plan as submitted was not complete. It refers in the opposing affidavit to an application between the same parties in this Division under case no 1075/2010. In

the affidavit on behalf of the Municipality in that application Mr Gabarone, the Municipal Manager, admits the averment by Leungo that the appointment to prepare a business plan for the Bankara-Bodulong project was satisfied in its final form when the business plan was submitted to the Municipality and accepted by it. This concession does away with the allegation that the business report was not submitted in completed form or that it lacked a Geotech or EIA Report. No replying affidavit was filed and therefore no denial or explanation for the concession by Mr. Gabarone.

- 5.5] The allegation by the Municipality that no supporting documentation was submitted of how the claim was computed, does not deal at all with the supporting documentation annexed to the Particulars of Claim. Leungo annexed the documentation concerned to substantiate how the claim was computed. Mr. Kgarane does not refer to the amounts reflected therein and does not deny the applicability or the correctness of the charges levied for the services rendered. Although this aspect was raised in the opposing affidavit, no replying affidavit was filed to deal with that allegation.
- 5.6] The Municipality furthermore contends that the summons is excipiable in that it lacks an averment of prior demand In terms of sec 3(1) of the Institution of Legal Proceedings Against Organs of State Act, no 40 of 2002. That factual averment is, however, not correct as paragraph 9 of the Particulars of Claim provides that “*notwithstanding due demand, the Defendant fails and/or refuses and/or neglects to pay the Plaintiff the amount of R1 040 570,79*”. There is therefore no merit in this technical contention by the Municipality.
- 5.7] I am of the opinion that the Municipality has failed to produce *prima facie* evidence of a *bona fide* defence. In view furthermore of the lack of proper reasons advanced for the condonation application as discussed above, the Municipality has not shown good cause as contemplated in Rule 31(1)(b). Due to the decision I have made in

regard hereto, I do not deem it necessary to address the other issues raised in the application.

6] I therefore make the following order:

THE APPLICATION FOR RECISSION OF THE DEFAULT JUDGMENT ON GRANTED 01/07/2010 IS DISMISSED WITH COSTS.

**A BESTER-TREURNICHT
ACTING JUDGE
NORTHERN CAPE DIVISION**

APPEARANCE FOR THE PLAINTIFF/RESPONDENT

Adv Van Rooyen instructed by Haarhoffs Incorporated, Kimberley

APPEARANCE FOR THE DEFENDANT/APPLICANT

Adv Nxumalo instructed by Madisha Legodi Attorneys, Kimberley