12/12/08
NOT REPORTABLE

HAAL DEUR WAT NIE VAN TOEPASSING IS NIE
(1) RAPPORTEERBAAR: JA/NEE.
(2) VAN BELANG VIR ANDER REGTERS: JA/NEE.
(3) HERSIEN.
12/12/2008
DATUM HANDTEKENING

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 49317/2007

In the matter between:

MATLHATSE TRADING ENTERPRISES CC	Applicant
And	
NOKO POWERLINES CC	1st Respondent
SHERIFF-PRETORI WEST	2nd Respondent

JUDGMENT

LEDWABA, J

[1] The first respondent obtained default judgment against the applicant on 25th March 2008 for R 564 009, 90.

[2] The applicant has now filed an application for the recession of the said judgment and the setting aside of the warrant of execution. The applicant is opposed by the first respondent.

[3] The respondent has also filed an application for the condonation of its late filing of its opposing affidavit which application was also opposed.

[4] When the proceedings commenced and the application for condonation was argued I ruled that the late filing of the opposing affidavit is condoned and I would later give reasons. My reasons are briefly as follows.

4.1 After the opposing affidavit, together with the application for condonation was filed on the 27th May 2008, the applicant's attorney, in her letter dated 28th May 2008 which was faxed to the first respondent's attorneys stated, *inter alia,* that: *"We further condone the late filing of the respondent's opposing affidavit."*

4.2 The applicant has filed a replying affidavit to the opposing affidavit.

4.3 The applicant has not been prejudiced by the late filing of the opposing application.

[5] Briefly, the factual background on the relevant facts to this application, which are common cause between the parties, is that:

5.1 Applicant won a bid for the electrification of some stands in Leokaneng village.

5.2 In about December 2005 applicant invited bidders to submit quotations for the project. First respondent was appointed as a service provider on 6th February 2006. The appointment letter, annexure 'CM2', on page 117 of the paginated papers, paragraphs 3 and 5 thereof reads as follows:

" Your firm is duly appointed for the Electrification of Leokaneng Village in accordance with the Bills of Quantities and Technical Spec for a total amount of R1, 696, 811.35 (One million ninety six thousand eight hundred and eleven Rands and thirty five cents) including 14% VAT.

. . . . This is fast trek project and must be completed by the 31st March 2006 without fail."

5.3 The respondents alleged in its papers that the agreement and contract price would be subject to variations. In October 2006, the respondent faxed a letter, annexure 'S' to applicant's attorneys the contents of which read as follows:

"As per our telephonic discussion, we are not leaving site but looking at the financial position of the project we don't want to commit our selves, until additional funds are available. After we have been told that the project has (sic) left with only R0. 01 every one will understand our position.

We understand all the frustration but looking at the point that we have been paid R 90 000.00 instead of R 400 575.50 from Invoice No 3 dated 05 May 2006 that leave (sic) us uncomfortable to complete the project.

So generally we as Noko Power Lines we are abandoning site until we are sure that there are funds available and our debt is settled.

We believe all parties will look at this matter and resolve as soon as possible in a professional manner."

5.4 The respondent submitted the invoices mentioned hereunder to the applicant for material supplied and services rendered:

(i) Invoice No. 1414 dated 27th February 2006 for the amount of R 572 633.27 (the applicant settled the account).

(ii) Invoice No. 1418 dated 11th April 2006 for the amount of R 560 410.44 (the applicant settled the account).

(iii) Invoice No. 1423 dated 5th May 2006 for the amount of R 400 575.50. (There is a dispute as to how much did the applicant pay the respondent. The respondent stated that it received R 90 000. The applicant alleged that it paid the respondent R 150 000).

(iv) Invoice No. 1493 dated 12th January 2007 for the amount of R 74 728.44;

(v) Invoice No. 1506 dated 14th October 2007 for the amount of R 178 705.29.

The sum total amount of the invoices is R 1787 052.94.

[6] The project, according to the applicant has not yet finalised. However, the respondent attach the Final Completion Certificate dated 6th April 2007, annexure 'CM 9' wherein an Engineer certified that as of 2nd April 2007 the contract works

have been completed in all respects and that, where applicable, all defects have been corrected in accordance with the contract.

[7] The summons was served on the applicant on 1st February 2008 and it did not file a notice of intention to defend.

[8] On 8th March 2008 received a registered slip from post office which when it redeemed was a notice which read as follows:

"

KENNISGEVING VAN VERSTEK

Die Eiser gee hierby kennis van versuim ten opsigte van die volgende:

1. *Die Verweerder was ooreenkomstig subreël 22(1) van reel 22 verplig om;*

2. *'n Pleit aft e lewer voor of op* ***15 Februarie 2008.***

3. *Die Verweerder is in verstek."*

I pause to state that the notice is misleading in that it creates an impression that a notice of appearance to defend was filed.

[9] A warrant of execution was received by the applicant on 31st March 2008.

[10] In an application for the rescission of a judgment, applicant bears the onus of proving 'sufficient cause'. The existence of sufficient cause depends on whether the applicant:

(i) has presented a reasonable and acceptable explanation for her default and;

(ii) has shown existence of a *bona fide* defence.

[11] The courts' approach in an application for rescission of judgment was eloquently articulated in **De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd 1994 (4) SA 705 E at 711E-I**, Jones J, whose *dicta* I am in respectful agreement, said:

'An application for rescission is never simply an enquiry whether or not to penalise a party for failure to follow the rules and procedures laid down for civil proceeding 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 negligent 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 his court is therefore primarily designed to enable him to do justice between the parties. He should exercise that discretion by balancing the interests of the parties…He should also do his best to advance the good administration of justice. In the present context this involves weighing the need, on the one hand, to uphold the judgments of the courts which are properly taken in accordance with accepted procedures and, on the other hand, the need to prevent the possible injustice of a judgment being executed where it should never have been taken in the first place, particularly where it is taken in a party's absence without evidence and without his defence having been raised and heard.'

[12] The explanation preferred by the applicant in the papers why notice to defend was not filed is, in my view, not reasonable.

Since December 2007 applicant knew that respondents intended issuing summons against it, which were ultimately served in February 2008. The deponent to the applicant's papers, Mr Mmasamelemela Christepe Moakamedi cannot, in my view, be regarded as an uneducated person especially having regard to the nature of his business and the quality of the letter he wrote. It is reasonable to assume that if he can analyse the invoices attached in the papers he could on behalf of applicant read or take reasonable steps to understand the contents of the summons or seek legal advice. The summons consists of only three pages even though a copy of the return of services was not available, it is reasonable to assume that the sheriff explained the nature and exigency of the summons.

[13] When the notice, *"KENNISGEWING VAN VERSTEK"* was received the applicant and/or his attorney should have appreciated the seriousness of the matter and filed a notice to defend during the process when enquiries were made. It was not enough just to phone, write letters and check the court file. The quality of representing clients should not be compromised.

[14] However, the presence of wilful default does not necessarily *per se,* mean absence of a 'just cause'. The court must examine the defence raises a *bona fide* or raises an issue which is fit for trial, see **Revelas and Another v Tobia 1999 (2) SA 440 (W)** and **Harris v Absa Bank Ltd t/a Volkskas 2006 (4) SA 527.**

[15] I now deal with the defence on merits put by the applicant in the papers. There is a dispute regarding the total amount that the applicant paid to the respondent. Applicant alleged that there was duplication of certain amounts and that the project has not been finalised.

[16] Significantly, the respondent submitted that the project was finalised and a Final Completion Certificate was issued by an Engineer. However, the respondent in annexure 'S' informed the applicant that it is abandoning the project because funds were not available.

[17] The last two invoices are also disputed by the applicant. The other crucial issue is that the total amount of the invoices exceed the amount in the appointment letter with the sum of about R 90 241.51.

[18] The defence raised by the applicant shows the existence of an issue which should be resolved by a trial court. In my view, the applicant has shown the existence of a just cause.

[21] **I therefore make the following order:**

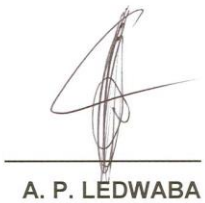
(i) The default judgment granted in favour of the respondent on 25th March 2008 is rescinded.

(ii) Applicant should file a notice to defend within ten (10) days from the date of this judgment and

a plea in terms of Rule 22 of the Rules of the court.

(iii) The warrant of execution is set aside.

(iv) Costs of this application to be costs in the cause.



A. P. LEDWABA

JUDGE OF THE HIGH COURT

Date of hearing: 8 December 2008

Counsel for Applicants': Advocate M. S. Mphahlele

Instructed by: Livhu Matodzi Inc.

Counsel for Respondnet: Advocate P. Van Reyneveld

Instructed by: Herman Potgieter & Partners

%: Cronje, De Waal & Skhosana Inc.