**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**

**(GAUTENG DIVISION, PRETORIA)**

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

31/03/16

**CASE NO: A794/2014**

31/3/2016

In the matter between:

| | |
|---|---|
| **MPUMALANGA DEPARTMENT OF PUBLIC WORKS, ROADS AND TRANSPORT** | **1ST APPELLANT** |
| **THE MEC OF MPUMALANGA PUBLIC WORKS, ROADS AND TRANSPORT** | **2ND APPELLANT** |
| **THE PREMIER, MPUMALANGA PROVINCIAL GOVERNMENT** | **3RD APPELLANT** |

**and**

| | |
|---|---|
| **CF & PS INVESTMENTS CC** | **RESPONDENT** |

---

**J U D G M E N T**

---

**KUBUSHI, J**

INTRODUCTION

[1] On 17 November 2014 the appellants noted an appeal against the entire judgment granted by the Magistrate V Joubert, dated 5 June 2014, which judgment dismissed the appellants' application for rescission of judgment. The respondent opposed the appeal and in addition, launched a declarator application for an order directing that the appeal lodged by the appellants has lapsed. In response to the declarator application the appellants launched an application for condonation for prosecuting the appeal out of time which was opposed by the respondent. However, when the matter appeared before us, the dispute in relation to the late prosecution and/or the lapse of the appeal had been resolved between the parties and as such we granted an order that the appeal be proceeded with.

PROCEEDINGS AT THE TRIAL COURT

[2] The respondent had on 1 November 2012 issued summons against the appellants in terms of a contract of lease claiming, amongst others, arrear rental in the amount of R369 442, 50. The appellants entered appearance to defend whereby the respondent applied for summary judgment. The appellants opposed the summary judgment application on the basis that the respondent had failed to comply with or to serve notice on the appellants in terms of s 3 (1) *(a)* of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 ("the Act").

[3] Before the summary judgment application could be heard, the respondent launched two interlocutory applications, which were both opposed by the appellants, namely, an application to amend the respondent's particulars of claim to include an alternative claim of damages, and an application for condonation of the respondent's failure to give notice to the appellants in terms of the Act.

[4] Both applications were enrolled for hearing on 10 April 2014. There was no appearance for the appellants on that day and the respondent obtained judgment in default in respect of the two applications. The amendment was subsequently effected and does not form part of the appeal before us.

THE APPLICATION FOR RESCISSION

[5] Pursuant the default judgment the appellants applied for a rescission of judgment in respect of the condonation application. The respondent filed a notice of intention to oppose the rescission application but did not file an answering affidavit. As a result when the parties appeared before the trial court only the appellants' papers were before court. The appellants' counsel took issue with the respondent's legal representative arguing the application without the respondent filing opposing papers.

[6] The application for rescission was premised on three grounds, namely the appellants' excuse for non-appearance, the defence and prejudice. There was no dispute in respect of the appellants' excuse for non-appearance. The trial court had only to determine whether a *bona fide* defence existed and prejudice. The issue of prejudice was not taken on appeal and I shall therefore not deal with it in this judgment.

[7] The appellants in support of their submission that they had a *bona fide* defence contended that the respondent in its application for condonation in terms of s 3 (4) *(b)* of the Act, failed to meet the criteria set out in that section and in particular that the respondent failed to demonstrate good cause as required, in that the respondent was forewarned as early as 13 February 2013 about its non-compliance with s 3 (1) *(a)* of the Act and the need to apply for condonation. This defence, the appellants contended, *prima facie*, carried some prospect of success.

[8] In opposition to the appellants' alleged *bona fide* defence, the respondent submitted that there was no reason for the trial court to rescind the condonation order due to the fact that the initial claim contained in the respondent's summons, that is, a claim based on a lease agreement was not covered by the Act and the respondent was consequently not obligated to serve the appellants with a s 3 (1) *(a)* notice. It only became necessary for the respondent to serve the notice after the amendment to its particulars of claim, which introduced an alternative claim for damages, was effected;

hence, the condonation application granted on 10 April 2014, so it was argued. In support of this submission the trial court was referred to a judgment in *Thabane Zulu and Company v Minister of Water Affairs* 2012 (4) SA 91 (KZD), in which it was held that the definition of a debt in Act 40 of 2002 only refers to a debt related to the payment of damages. It was further argued that the trial court granted the condonation because the respondent has satisfied all the requisites of s 3 (4) *(b)* of the Act.

[9] In reply to the aforesaid submissions of the respondent, the appellants' argument is that the respondent was obliged to comply with the requirements of s 3 (1) *(a)* of the Act because the Act applies to all claims whether based in delict or contract.

JUDGMENT OF THE TRIAL COURT

[10] The trial court after considering the parties' arguments dismissed the application for rescission of the condonation order and, amongst others, stated as follows in its judgement:

"The court accepts that the matter can be argued on the pleadings and the affidavit of the applicant.

The only issue in dispute is if the presence of a *bona fide* defence exists or facts supporting the rescission of the judgment on the merits.

Prior to the amendment the respondent's claim was for enforcement of the lease agreement.

Upon the defendant's plea, the oversight to include a damages claim for loss of rental for the month of September 2012 was realized, and introduced.

Payment of damages by an organ of state is regarded to be a debt in terms of the Act and notice in terms of section 3 of Act 40 of 2002 becomes relevant.

The three requirements for condonation are:

- The debt has not been extinguished
- Good cause exists for the failure by the creditor
- The organ of state was not unreasonably prejudiced by the failure

The claim has not prescribed.

The notice became evident after the plea of the defendant."

The appeal before us is noted in respect of this judgment.

THE APPEAL

[11] Three grounds of appeal are raised by the appellants, namely;

11.1 that the trial magistrate erred in finding that there was no need for the respondent's attorneys to serve its opposing affidavit and that the respondent's representative will argue from the bar.

11.2 that the trial magistrate erred in not making judgment only to the papers submitted and where the issues of the rescission of judgment application would have been laid out by the parties.

11.3 that the trial magistrate misdirected itself by focusing on the merits of the condonation application instead of dealing with the issue whether there was good reason for the default judgment obtained by the respondent on the 10th April 2014 to be rescinded so as to allow the issue of condonation to be argued by the parties.

The grounds of appeal are set out here as they appear in the notice of appeal.

THE ISSUES

[12] The issues before us are the same issues that were argued at the hearing of the rescission application. The arguments are also the same.

[13] The main issue before us is whether the defence raised by the appellants in the rescission judgment was a *bona fide* defence. There are two other issues underlying the main issue, namely, whether the trial court erred in allowing the respondent's legal representative to argue the rescission application whilst no opposing papers were filed by the respondent and whether the trial court erred in focusing on the merits of the condonation application. It is my view that the determination of the main issue, that is, whether the appellants' defence was a *bona fide* defence may dispose of the appeal before us. I therefore will deal with that issue first.

*Whether or not the defence of the appellants in the rescission application was a bona fide defence*

[14] The rescission and variation of judgments in the magistrate court are regulated in terms of rule 49 of the Magistrate Court Rules. The rule provides as follows:

**'Rescission and variation of judgments**

**49.**(1) A party to proceedings in which a default judgment has been given, or any person affected by such judgment, may within 20 days after obtaining knowledge of the judgment serve and file an application to court, on notice to all parties to the proceedings, for a rescission or variation of the judgment and the court may, upon good cause shown, or if satisfied that there is good reason to do so, rescind or vary the default judgment on such terms as it deems fit: Provided that the 20 days' period shall not be applicable to a request for rescission or variation of judgment brought in terms of subrule (5).

(2) . . .

(3) Where an application for rescission of a default judgment is made by a defendant against whom the judgment was granted, who wishes to defend the proceedings, the application must be supported by an affidavit setting out the reasons for the defendant's absence or default and the grounds of the defendant's defence to the claim. . . .'

[15] Two principal requirements for the favourable exercise of the courts discretion in determining good cause has been held to be: an explanation of the delay and a *bona fide* defence. As regards the requirement of a *bona fide* defence,

it has been held 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, a *bona fide* presently held desire on the part of the applicant for relief actually to raise the defence concerned in the event of the judgment being rescinded.[1]

[16] It is trite that in an application for the rescission of judgment the applicant must satisfy the court that he or she has a *bona fide* defence in order to show good cause. It has been held that the minimum that the applicant must show is that his or her defence is not patently unfounded and that it is based upon facts which if proved, would constitute a defence.[2]

[17] The defence raised by the appellants is, in my view, not *bona fide* in that it is patently unfounded and is based upon facts which cannot be proved to constitute a defence.

[18] The starting point should be to consider the grounds upon which the respondent satisfied the trial court that it is entitled to a condonation in terms of s 3 (4) *(a)* of the Act.

---

[1] See Mnandi Property Development CC v Beimore Development CC 1999 (4) SA 462 (W) at 464 H-I.
[2] See Ford v Groenewald 1997 (4) SA 224 (T) at 226A-C.

[19] The main ground raised by the respondent in the condonation application is that the Act does not apply in contractual claims but only in claims for damages. The submission by the respondent in this regard is that at the time of the issue of the summons the respondent was not obliged to serve a notice on the appellants in terms of s 3 (1) *(a)* of the Act because the claim was contractual. According to the respondent, the section became applicable only after the amendment to the respondent's particulars of claim, which introduced an alternative damages claim to the contractual claim, was effected. As a result, the respondent argued, the question of non-compliance did not, in the circumstances of this case, arise.

[20] The appellants on the other hand insisted at the hearing of the rescission applicant and still persists before us that the respondent was obliged to have complied with the requirements of s 3 (1) *(a)* of the Act before it issued summons. The argument of the appellants is that the Act does not cover only claims for damages but covers all claims whether in delict or damages. Consequently, it was argued, that the respondent should have served the notice.

[21] In terms of s 3 (1) *(a)* of the Act no legal proceedings for the recovery of a debt may be instituted against an organ of state unless the creditor has given the organ of state in question notice in writing for his or her intention to institute the legal proceedings in question. The notice must in terms of s 3 (2)

*(a)* of the Act be served within six months from the date on which the debt became due.

[22] The meaning of 'debt' in respect of actions against organs of state was crisply discussed in *Vhelaphi Peter Muthevhuli*: De Rebus, October 2014:25 [2014] DE REBUS 190. For a better understanding, I intend to quote the discussion *verbatim* in this judgment.

"In terms of s 1 (1) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (the Act) a 'debt' means 'any debt arising from any cause of action –

*(a)* which arises from delictual, contractual or any liability, including a cause of action which relates to or arises from any –

i. act performed under or in terms of any law; or

ii. omission to do anything which should have been done under or in terms of any law; and

*(b)* for which an organ of state is liable for payment of damages, whether such debt became due before or after the fixed date.'

Subsections 3 (1) and (2) require that a notice of intended legal proceedings must be given to the concerned organ of state by the creditor within six months from the date on which the debt became due. This is a peremptory step before legal proceedings can be instituted.

Before compliance with the requirement of s 3 (1) is needed, it must be ascertained whether the claim at hand constitutes a debt in terms of s 1 (1). This presupposes that there are claims against the organ of state which are not debts as envisaged in s 1 (1) of the Act.

In *Thabani Zulu & Co (Pty) Ltd v Minister of Water Affairs and Another* 2012 (4) SA 91 (KZD) at para 11, the court held that: 'Paragraph *(a)* of the definition [of the Act] is widely worded

and makes it clear that a debt is any liability whatsoever. It is, however, followed by para *(b)* and the question which arises is how the two paragraphs relate to each other. They can be read either disjunctively or conjunctively. The paragraphs are linked by "and" and not "or". Ordinarily, paragraphs or phrases linked by "and" are read conjunctively and those by "or" disjunctively. Accordingly, although the courts have read "and" to mean "or" and vice versa in appropriate circumstances, there must be compelling reasons to change the words used by legislature.'

The court in para 12 held that: 'Using the ordinary meaning of the words in the definition, therefore, the two paragraphs must be read conjunctively. When this is done, para *(b)* qualifies or limits the generality of para *(a)* in two ways. First, it restricts debts to those which constitute a liability to pay damages and, secondly, it restricts debts to those where an organ of state is the debtor. On an ordinary reading of the definition it boils down to this. A debt is the liability of an organ of state to pay damages, arising from any cause of action.'

In the *Zulu* matter, what was claimed against the organ of state was arrear rental in terms of a lease agreement. The court held that s 3 (1) of the Act was not applicable as arrear rental was non-damages debt, but the claim for arrear rental was for specific performance.

The Supreme Court of Appeal quoted paras 11 and 12 in the Zulu matter with approval in *Vhembe District Municipality v Stewarts & Lloyds Trading (Booysens) (Pty) Ltd* (SCA) (unreported case no 397/13, 26-6-2014) (Van Zyl AJA). This means that all the claims arising out of a contract with an organ of state, as long as they are for specific performance and not damages, are not covered by the word 'debt' under s 1 (1) of the Act. Consequently, this means that the Act would not be applicable and creditors need not comply with its provisions.

I submit that, as soon as a claim for specific performance or non-damages is due, the creditor may immediately proceed with an application to enforce payment or issue summons, without wasting time and costs by complying with the Act, as such compliance would be legally unnecessary.

See also *Nicor IT Consulting (Pty) Ltd v North West Housing Corporation* 2010 (3) SA 90 (NWM) and *Director-General, Department of Public Works v Kovacs Investment 289 (Pty) Ltd* 2010 (6) SA 646 (GNP) for more"

[23] Once the trial court had accepted that the respondent's defence in the condonation application was *bona fide* it had to reject the defence of the appellants in the application for rescission of the condonation order.

[24] On the basis of the above discussion, to which I am aligned, I have to conclude that the trial court's decision in dismissing the application was correct. The appellants' defence did not carry any prospects of success. This ground on its own is dispositive of the appeal.

[25] The appeal is dismissed with costs.

**E.M. KUBUSHI**

**JUDGE OF THE HIGH COURT**

I agree

**R. NONYANE**

**ACTING JUDGE OF THE HIGH COURT**

**APPEARANCES**

| | |
|---|---|
| **HEARD ON THE** | **: 13 OCTOBER 2015** |
| **DATE OF JUDGMENT** | **: 31 ~~OCTOBER~~ March 2016** |
| **APPLICANT'S COUNSEL** | **: ADV. S SIGABA** |
| **APPLICANT'S ATTORNEYS** | **: MACBETH ATT INC** |
| **FIRST RESPONDENTS' COUNSEL** | **: ADV. F. DU TOIT** |
| **FIRST RESPONDENTS' ATTORNEY** | **:CHRISTO SMITH ATTORNEYS** |