28/11/17

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 40307/2011

Date:

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

28/11/2017 .....
DATE SIGNATURE

In the matter between:

MTEC RUSTENBURG CC **FIRST APPLICANT**

N T TSEBE **SECOND APPLICANT**

DIKGWETLO TRADING CC **THIRD APPLICANT**

And

CAPRICORN DISTRICT MUNICIPALITY **RESPONDENT**

JUDGMENT

PRETORIUS J.

(1) This is an application in which the first and second applicants seek condonation for the late filing of the notice in terms of section 3(4) of **Institution of Legal Proceedings Against Certain Organs of State Act**[1]. Should the court grant such condonation the first and second applicants will be able to proceed with their claim against the respondent.

THE PARTIES:

(2) According to the founding affidavit the first applicant is MTec Rustenburg CC, a closed corporation.

(3) The second applicant is the deponent to the founding affidavit and the only member of the first applicant. The third applicant is Dikgwetlo Trading CC, who seeks no redress.

(4) The respondent is the Capricorn District Municipality with its place of business at 41 Biccard Street, Polokwane.

PROSPECTS OF SUCCESS:

(5) The applicants have to show reasonable prospects of success in the

[1] Act 40 of 2002

pending action for purposes of establishing "good cause" in terms of section 3(4)(b) of **Institution of Legal Proceedings Against Certain Organs of State Act**[2].

(6) Section 3(1) and 3(4) of the **Act**[3] provides:

"Notice of intended legal proceedings to be given to organ of state

(1) No legal proceedings for the recovery of a debt may be instituted against an organ of state unless-

(a) the creditor has given the organ of state in question notice in writing of his or her or its intention to institute the legal proceedings in question; or

(b) the organ of state in question has consented in writing to the institution of that legal proceedings-

(i) without such notice; or

(ii) upon receipt of a notice which does not comply with all the requirements set out in subsection (2).

(4)(a) If an organ of state relies on a creditor's failure to serve a notice in terms of subsection (2) (a), the creditor may apply to a court having jurisdiction for condonation of such failure.

(b) The court may grant an application referred to in paragraph (a) if it is satisfied that-

(i) the debt has not been extinguished by prescription;

---

[2] *Supra*
[3] *Supra*

(ii) good cause exists for the failure by the creditor; and

(iii) the organ of state was not unreasonably prejudiced by the failure.

(c) If an application is granted in terms of paragraph (b), the court may grant leave to institute the legal proceedings in question, on such conditions regarding notice to the organ of state as the court may deem appropriate."

(7) In **Minister of Safety and Security v De Witt**[4] the court held:

"[13] The discretion may only be exercised, however, if the three criteria in s 3(4)(b) are met: that the debt has not been extinguished by prescription (at issue in this case); that good cause exists for the creditor's failure; and that the organ of State has not been unduly prejudiced. The Minister does not rely on either of the latter two criteria in this appeal."

(8) This court can thus only grant condonation if the debt has not been extinguished by prescription; good cause exists for the failure by the creditor and the organ of State was not unreasonably prejudiced.

BACKGROUND:

(9) On 30 April 2008 a tender was awarded to the third applicant, in

[4] 2009(1) SA 457 (SCA) at paragraph 5, 11 and 13

association with MTec in Polokwane. According to the first and second applicants the project commenced on 6 May 2008. During September 2008 a dispute regarding payment arose where the respondent informed the representative of the first applicant in an email dated 15 September 2008:

> *"Upon receiving the 3rd payment certificate this morning, the following came to mind and my understanding is that this issue has been addressed with you last week Thursday by Glen Mohlabi, our legal officer.*
>
> *CDM has a letter wherein Dikgwetlo withdrew from the Joint Venture at the time of the court case between yourselves. Partly, to my understanding at least, why we are reluctant to pay is because we have never received a letter that rescinded that first letter from Dikgwetlo. In other words, based on that letter from the Dikgwetlo partner, there is no JV and you cannot submit invoices in the JV name.*
>
> *You've told me personally that all is well with the JV relationship but that letter from your partner is causing a problem. Between you two as JV partners, you'll have to submit another letter indicating all is well between the partners and that the JV is functioning. In fact, in the letter, withdraw the old one.*
>
> *Then, and only then can payment take place and we can also*

finalise the contract between us. Notwithstanding any other issue that I may be unaware off, I am sure this will solve any uncertainty that we may still have."

(10) On 16 September 2008 the respondent received a letter from MTec Holdings (Pty) Ltd, setting out that the third applicant had unilaterally withdrawn from the Joint Venture. This letter was written by the second applicant as the managing director. Ms Tsebe recorded in the letter, *inter alia*:

"M-TEC Holdings was and is still the appointed representative of the JV as per provisions of the JV agreement and such powers as vested upon M-TEC still subsist."

(11) The respondent responded to this letter on 6 October 2008 and made it clear that it was the third applicant who was awarded the tender. It was further set out that MTec at no time was eligible to tender for the contract under a Joint Venture status *"because MTech was not registered with the CIBD"*. It was explicitly set out in this letter that there was no contract with MTec and that *"the continued operations are without a legal basis"*. Once again MTec Holdings (Pty) Ltd responded to this letter on 22 October 2008, the letter in response was once more signed by the second applicant as *"Managing Director"* of MTec Holdings (Pty) Ltd. This was followed on 3 November 2008 by a letter from MTec Holdings (Pty)Ltd setting out that the contract had,

according to MTec Holdings (Pty) Ltd not been cancelled. On 20 November 2008 a further letter was sent from MTec Holdings (Pty) Ltd dealing with the project.

(12) On 23 January 2009 a letter was sent from Hahn and Hahn Attorneys, which set out:

> *"In this matter we act on behalf of M-TECH HOLDINGS ("our client.")"*

(13) On 12 July 2009 a letter was once more written by Ms Tsebe, the second applicant, to the respondent. It was written in her capacity as managing director of MTec Holdings (Pty) Ltd.

(14) In a letter dated 14 March 2011 the attorneys on behalf of MTec Holdings (Pty) Ltd threatened to issue summons. In this letter it was requested from the respondent:

> *"In light of the provisions of Section 3 of Act No 40 of 2002, kindly indicate if your client is prepared to consent to the institution of the legal action herein without the required notice."*

(15) There is a plethora of letters from the attorneys, all on behalf of MTec Holdings (Pty) Ltd. This puts paid to counsel for the applicants' argument that attorneys Hahn and Hahn made a mistake when

referring to MTec Holdings (Pty) Ltd in the correspondence, as the second respondent herself as managing director, repeatedly referred to MTec Holdings (Pty) Ltd in her correspondence. There was no correspondence whatsoever between a representative of MTec CC and the respondent.

(16) It is thus clear that the first respondent, who is before court, is not a party to the proceedings and has never been a party to the Joint Venture. This is according to the second respondent's correspondence, as well as the correspondence by the attorneys on her behalf and therefore the first respondent has no interest in this application.

(17) For the sake of completeness I will deal with the delay since this application was launched on 14 July 2011. The delay explained in the founding affidavit by the second respondent, representing MTec Holdings (Pty) Ltd relates to MTec Holdings (Pty) Ltd and not to the first applicant, as is obvious from all the correspondence attached. The answering affidavit was served on 14 September 2011 and the replying affidavit was served on 30 September 2011. There is no explanation as to why it took 6 years to have the matter heard. There was an application for joinder of the third applicant, who seeks no relief. The respondent's heads were already filed in January 2012. The applicants fail to explain the delay since January 2012, an

inordinate delay of 5 years. No reason is given for not setting down the application in the period from January 2012.

(18) In **Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd**[5] Majiedt AJA held:

> *"[35] In general terms the interests of justice play an important role in condonation applications. An applicant for condonation is required to set out fully the explanation for the delay; the explanation must cover the entire period of the delay and must be reasonable.*
>
> *[36] 'Good cause' within the meaning contained in s 3(4)(b)(ii) has not been defined, but may include a number of factors which will vary from case to case on differing facts. Schreiner JA in dealing with the meaning of 'good cause' in relation to an application for rescission, described it thus in Silber v Ozen Wholesalers (Pty) Ltd:*
>
> *[37] The prospects of success of the intended claim play a significant role - 'strong merits may mitigate fault; no merits may render mitigation pointless'.*
>
> *[39] Condonation must be applied for as soon as the party concerned realises that it is required. The onus, to satisfy the court that all the requirements under s 4(b) of the Act have been met, is on an applicant, although a court would be hesitant 'to assume prejudice for which [a] respondent itself does not lay a*

[5] 2010(4) SA 109 (SCA) at paragraphs 35 - 39

basis'."

In these circumstances if the principles, as set out in the **Rance case**[6] are applied, the delay cannot be condoned as there is no explanation for a delay of 5 years.

(19) The applicants at no stage dealt with the interest of justice, not in any of the affidavits, nor during argument in court. It can never be in the interest of justice for an applicant to wait for 5 years, before pursuing an application it had instituted.

(20) I have considered all the facts, arguments and authorities as well as the delay and the wrong entity being before court. I find that the first applicant is the wrong party before court, as a result of which the second applicant can have no locus standi, representing the first applicant. The unexplained delay since April 2012 exacerbates the situation. The third claim for enrichment does not concern the respondent, as the land purportedly belongs to the Blouberg Local Municipality and not to the respondent. I find that there is no prospect of success, where the matter has been delayed for at least 5 years.

(21) In these circumstances it cannot be in the interest of justice for applicants to institute proceedings and to wait 5 years before pursuing such an application. In any event I have found the first applicant, and

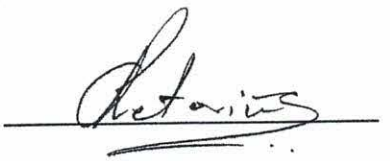
---

[6] *Supra*

consequently the second applicant, have no authority and the first applicant has no interest in the matter, as MTec Holdings (Pty) Ltd, should have been cited as the applicant.

(22) In the result I make the following order:

The application is dismissed with costs.



Judge C Pretorius

Case number	: 40307/2011
Matter heard on	: 7 November 2017
For the Applicant	: Mr B Lesomo
Instructed by	: Seokane Lesomo Inc
For the Respondent	: Adv EC Labuschagne SC
Instructed by	: Matabane Inc
Date of Judgment	: