IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 41419/2018

Date: 18/10/2019

In the matter between:

CITY OF TSHWANE METROPOLITAN MUNICIPALITY **APPLICANT**

AND

TLOPO CONSTRUCTION AND GENERAL SERVICES CC **FIRST RESPONDENT**

In re:

TLOPO CONSTRUCTION AND GENERAL

SERVICES CC **PLAINTIFF**

AND

CITY OF TSHWANE METROPOLITAN MUNICIPALITY **DEFENDANT**

JUDGMENT

TOLMAY, J:

INTRODUCTION

[1] This is a rescission application brought by the Applicant (Tshwane) to set aside the default judgment granted by the Registrar on 20 July 2018, alternatively that the judgment be reconsidered by the Court as contemplated in the provisions of Rule 31(5)(d). Tshwane also requested that the warrant of execution dated 15 October 2018 be set aside and that the attachment by the Second Respondent (the Sheriff) on Tshwane's bank account for the sum of R7 943 259-06 (seven million nine hundred and forty three thousand two hundred and fifty nine rand and six cents) be uplifted or suspended. Tshwane also asked to be granted leave to file its plea or exception.

BACKGROUND

[2] Tlopo Construction issued and served summons against Tshwane in two different matters under case numbers 41418/2018 and 41419/2018, on 15 June 2019, together with six additional sets of documents. Case number 41418/2018 and 41419/2018 concern the same parties. Tshwane filed a notice of intention to defend on 28 June 2018 in respect of case number 41418/2018 only. It was alleged that it laboured under the mistaken belief that there was only one action between the parties.

[3] A notice of intention to defend in case number 41419/2018 was filed on 3 August 2018. Tshwane stated that it was at that juncture unaware of the fact that a default judgment was granted against it on 20 June 2018.

[4] Tshwane said that it became aware of the existence of the default judgment

on 15 October 2018, when a warrant of execution together with a notice of attachment, indicating that an amount of R7 943 259- 02 was attached from Tshwane's banking account, was served. The application for rescission of judgment was served and filed on 18 October 2018.

[5] Tlopo Construction in their heads of argument suggested that condonation was ·required, because the application was not brought within the 20 days prescribed in the rule 31(5)(a). However Tshwane filed the application on 18 October 2018 within days of the day that they became aware of the judgment, on 15 October 2018. In my view no condonation was accordingly required.

THE MERITS

[6] As the Judgment was granted by the Registrar Rule 31(5)(d) applies which provides as follows:

"Any party dissatisfied with a judgment granted or direction given by the registrar may, within 20 days after such party has acquired knowledge of such judgment or direction, set the matter down for reconsideration by the Court."

[7] As Rule 31(2)(b) does not find application the application must be dealt with under the common law. It is trite that the following requirements must be me in order to succeed (c:1) some reasonable satisfactory e} planation for th'5 default must be given. (b) it must be shown that there is a *bona fide* defence which *prima facie* carries some prospect of success.

[8] In my view it is quite possible that due to the fact that two summonses, between the parties were served together with other documents at the same time, that this summons could have been over looked. The explanation is both

acceptable and reasonable and one cannot infer any wilful default on the part of Tshwane in failing to enter appearance to defend.

[9] Tshwane alleged that Tlopo Construction did not comply with the-: provisions of the institution of Legal Proceedings against Ce1ta1n Organs of State, Act 4 of 2002 ("the Act").

[10] Tshwane's other defences relied on. are that the deponent to the affidavit failed to establish any authority to act on behalf of Tlopo Construction, non-compliance with Uniform Rule 18(6) and prescription of a portion of Tlopo's claim against Tshwane.

[11] Regarding the alleged non-compliance with the provisions of the Act, it is important to note that the Act defines "debt" as follows:

"Means any debt arising from any cause of action -

(a) Which arises from delictual, contractual; or any other liability, including a *cause of action which relates to or arises from any-*

(i) Act performed under or in terms of any Jaw;

(ii) Omission to do anything which should have been done under or in terms of *any law;*

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

[12] Tlopo Construction did not claim either delictual or contractual damages from Tshwane. It claimed specific performance, more specifically the increased

rates as agreed between the parties. It has been held that the Act does not apply to claims due in terms of a contract.[1] Although a letter was sent in terms of the Act, it was done according to Tlopo Construction, *ex abundandi cautelae.* The defence based on non-compliance : with Sec 3 or the aforementioned Act does not have any merit and cannot succeed.

[13] The next defence raised was that the deponent to Tlopo Construction's affidavit did not have the necessary *locus standi* or authority to depose to the affidavit. This was not dealt with in argument, but in the event of' this argument still being persisted with ideal with its merits. Some of the annexures from Tshwane to Tlopo Construction respectively dated 1 July 2011 and 27 August 2014 refer specifically to the deponent, Mr Sello Prince Ramano. It is accordingly clear that he had personal knowledge of the facts relevant to the action and could accordingly depose to the affidavit. A deponent to an affidavit does not need authorisation, only personal knowledge of the facts is required. deponent is similar to a witness , in a civil trial. A witness does not have to be authorised to present evidence.[2]

[14] The third defence was that Tlopo Construction's particulars of claim is excipiable because it does not comply with Uniform Rule 18(6) which reads as follows:

"A party who in his pleadings relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleadings shall annexed to the pleading"

[1] Thabani Zulu & Co (Pty) Ltd v Minister of Water Affairs and Another 2012 (4) SA 91 (KZN) at par 12-

[15] Tshwane alleged that Tlopo Construction relied on an agreement, wherein various rates were agreed upon, but failed to fil a true copy thereof. However it must be noted that the agreement between the parties was never disputed, and Tshwane proceeded to pay the portion of its invoices that excluded the agreed price increases. The dispute between the parties is accordingly limited to these price increases. As a result there does not seem to be any merit in the argument that the particulars of claim is excipiable.

[16] Regarding the defence of the alleged prescription of the part of the claim, Tlopo Construction's argument was that the notification only occurred during March 2018, and accordingly the claim for the period 2012 to 2015 had not prescribed. Tshwane however argued that the portion of Tlopo Construction's claim which relates to the period 2012 up to, and including 15 June 2015 had become prescribed. As a result, it was argued that Tshwane may succeed with a special plea of prescription for that part of the claim.

[17] Although there is definitely an argument to be made against the plea of prescription, the law at this point only requires that the defence carries some prospect of success. In my view Tshwane complied with that requirement and as a result the Court cannot find that there is no bona fide defence regarding the claim for the period 2012 up to June 2015. Accordingly Tshwane made out a *prima facie* case regarding that part of the claim. No defence however was made out for the reminder of the claim.

COSTS

[18] The Applicant made an error, which led to the failure to file a notice of

intention to defend. Furthermore the Applicant is seeking an indulgence from the Court as a result it should pay Tlopo Construction's Costs.

[19] The following order is made:

1. **The default judgment granted and order issued by the Registrar on 20 July 2018 is set aside and varied to read as follows:**

   "Default judgment is granted in favour of the Plaintiff against the Defendant in the amount of R2 430 187-99"

2. **The warrant of execution issued by the Registrar on the 15 October 2018 is varied and limited to an amount of r2 430 187-99.**

3. **The attachment effected by Second Respondent on the Applicant's banking account is varied and limited to R2 430 187-99.**

4. **The Applicant is to file its plea within 14 day of the granting of this order.**

5. **The Applicant is ordered to pay the First Respondent's costs of the application.**

RG TOLMAY

JUDGE OF THE HIGH COURT

[2] Gaines and Another v Telkom Namibia Ltd 2004(3) SA 616 (SCA

DATE OF HEAHING:	**11 SEPTEMBER 2019**
DATE OF JUDGMENT:	**18 OCTOBER 2019**
ATTORNEY FOR APPLICANT:	**GILDENHHUYS MALATJI INC**
ADVOCATE. FOR APPLICANT:	**ADV U LOTTERING**
ATTORNEY FOR RESPONDENT:	**ALBERT HIBBERT ATTORNEVS**
ADVOATE FOR RESPONDENT:	**ADV A ELS**