



**IN THE NORTH WEST HIGH COURT**

**MAFIKENG**

**CASE NO.: 2878/2009**

In the matter between:

**TSWAING DISTRICT MUNICIPALITY**

**APPLICANT**

**and**

**RAMALEPHATSO INDUSTRIES CC//**

**KENEILWE CONSTRUCTIONS CC**

**FIRST RESPONDENT**

**RAMALEPHATSO INDUSTRIES CC**

**SECOND RESPONDENT**

**KENEILWE CONSTRUCTIONS CC**

**THIRD RESPONDENT**

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**JUDGMENT**

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**LANDMAN J:**

[1] Tswaing District Municipality applies for condonation of its failure to deliver its plea timeously. The application is opposed by the respondents.

[2] During September 2009 the respondents instituted action against the applicant for:

- (a) payment of R76 038.00 in respect of construction work done;
- (b) payment of the amount of R1 180 242.25 in respect of contractual damages suffered by the respondents due to the applicant's repudiation of the agreement.

[3] The applicant filed its notice of intention to defend but then failed to file its plea. The respondents filed a notice of bar on the applicant. As a result of the applicant's failure to heed the bar judgment was granted against the applicant.

[4] The applicant successfully applied for the rescission of the default judgment. The applicant filed an exception to the respondents' particulars of claim. The respondents amended their particulars of claim. The applicant again neglected to file a plea.

[5] A notice of bar was served on the applicant's attorneys of record. The applicant failed to heed the notice of bar and the bar took effect. On 24 February 2012 the respondents, *inter alia*, served a notice of their intention to seek judgment by default in respect of claim 1 on the applicant. The applicant served an application for condonation of its failure to file its plea on the respondents' attorneys. This application serves before me.

[6] The applicant has not applied for the upliftment of the bar. But Mr G Maree, who appeared for the respondents, waived this point.

[7] In order to succeed with an application for condonation the applicant must, *inter alia*, show good cause i.e.:

- (a) An absence of wilfulness;
- (b) A reasonable explanation for its default;
- (c) That the application is *bona fide*; and
- (d) That the applicant has a *bona fide* defence to the respondents' claim.

[8] Mr Maree submitted, *inter alia*, that the history of the matter shows that the applicant has no real intention of pursuing its defence. There is no explanation as to why the applicant did not follow up or make any enquiries with regard to its case. This lack of behaviour, he submitted, is especially significant in the light of the applicant's actions prior to the rescission of judgment application.

[9] However, I am of the opinion that the applicant's attorneys have fully explained how it came about that the plea was not filed timeously. The applicant's attorney moved offices and there was some confusion. Counsel was briefed to draft the plea but counsel's attention was not drawn to the urgency of the matter. I accept this account.

[10] The applicant must show that it has a *bona fide* defence to the respondents' claim. It is sufficient if the applicant makes out a *prima facie* defence in the sense of setting out averments which, if established at the trial, would entitle it to have the action dismissed or diminished. See, **Grant v Plumbers (Pty) Ltd** 1949 (2) SA 470 (O).

[11] The defences raised by the applicant can be summarised as follows:

- (a) The applicant denies entering into an agreement with the respondents and denies that the party who allegedly represented it had the authority to conclude an agreement on its behalf;
- (b) Alternatively and should it be found that the applicant's alleged agent had the authority to conclude an agreement and that agreement is binding, then the applicant denies that it breached the alleged terms of the agreement or that it repudiated the agreement.

[13] Mr Maree submitted that what is of significance is that the defences raised by the applicant in its previous application to rescind the default judgment differ substantially from the defences now raised. He contended that the so-called new defences are in essence unsubstantiated bare denials.

[14] The complaint does not hold water. The respondents' case is not the same as it was when the application for rescission was brought. The particulars of claim were amended as a result of the exception. The agreement between the applicant and M3D Developments, annexure "A" to the particulars, forbids M3D Developments from ceding its rights. The sole nexus between the applicant and the respondents is alleged to have been created by an oral agreement entered into between M3D Development on behalf of the applicant and the respondents. The applicant denies that there is such an agreement and that it authorised M3MD Developments to represent it. It is a *bona fide* defence. The other acts of the applicant, taken vis-à-vis the respondents, are not inconsistent with this defence.

[15] In determining whether or not good cause has been proven a court should not look at the adequacy or otherwise of the explanation of the default or failure in isolation but must consider it in the light of the nature of the defence, which

is an important consideration and in the light of all the facts and circumstances of the case as a whole. See **Harris v Absa Bank Ltd t/a Volkskas** 2006 (4) SA 527 (T).

[16] I am of the opinion that the applicant has shown good cause for condonation to be granted. The applicant should pay the respondents' costs of opposition.

[17] In the premises I make the following order:

1. The application for condonation is granted.
2. The notice of bar is lifted.
3. The plea must be filed within 5 days of the date of this order.
4. A pre-trial conference must be held which must record the undisputed and the disputed facts in addition to those issues covered by Rule 37 of the Uniform Rules of Court.
5. A minute of the pre-trial conference together with a reply to any questions posed to the other party must be filed by 27 July 2012.
6. The applicant is to pay the respondents' costs.

A A LANDMAN

JUDGE OF THE HIGH COURT

**APPEARANCES:**

DATE OF HEARING : 31 MAY 2012

DATE OF JUDGMENT : 7 JUNE 2012

COUNSEL FOR APPLICANT : ADV MONGALE

COUNSEL FOR RESPONDENTS : ADV MAREE

ATTORNEYS FOR APPLICANT : HERMAN SCHOLTZ ATTORNEYS

ATTORNEYS FOR RESPONDENTS : VAN ROOYEN TLHAPI & WESSELS