IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

10/11/16

Case Number: 87025/14

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

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

(3) REVISED.

10/11/16
DATE

SIGNATURE

In the matter between:

CITY OF TSHWANE METROPOLITAN MUNICIPALITY	APPLICANT
and	
BORWA CONSTRUCTION CC	RESPONDENT
In re:	
BORWA CONSTRUCTION CC	APPLICANT
and	
CITY OF TSHWANE METROPOLITAN MUNICIPALITY	FIRST RESPONDENT
PD NAIDOO AND ASSOCIATES (PTY) LTD	SECOND RESPONDENT

Coram: HUGHES J

JUDGMENT

HUGHES J

[1] In terms of the Uniform Rules of Court Rule 42 (1) (a) the applicant seeks to rescind the order of Louw J granted on 18 February 2015. The application was opposed by the respondent. In addition to the rescission sought the applicant also seeks a declaratory for the warrants of execution and the executions are to be declared null and void and of no legal effect with the proceeds of the execution to be returned.

[2] Briefly, the respondent, Borwa, sued the applicant, City of Tshwane, for retention held by the applicant in the amount of R2 508 171.92. The application was served on the applicant on 9 December 2014 and was set down on the unopposed roll for 22 January 2015. The parties filed their intention to defend in the main application and by agreement of all the parties the application was postponed. It was enrolled for 18 February 2015 and there was no appearance on behalf of City of Tshwane. Further, no opposing papers had been filed by City of Tshwane.

[3] The applicant alleges that what they understood the terms of the postponement were that, 'that the applicant would file an answer by the 18 February 2015, where after the matter would be removed from the Unopposed Roll and be placed on the Opposed Motion Roll; the respondent's attorney would also then decide whether or not to file replying papers.'

[4] This is disputed by the respondent. The respondent submits that the applicant was well aware that the matter was enrolled on the unopposed roll for 18 February 2015. That the applicant did not attend court that morning but the second respondent in the main application, PD Naidoo and Associates (Pty) Ltd, appeared and handed over their answering affidavit at court. This is why judgment was only granted against the applicant by Louw J. After judgment was granted the matter was recalled after 12h00 on that same day and counsel who appeared then for the applicant informed Louw J that her instruction to appear were only received after 9h00 that very day and she had been liaising with the counsel representing the second respondent in the main application in the weeks preceding the application.

[5] The respondent has raised a technical defence of non-joinder in this application for rescission. I do not propose to non-suite the applicant but rather intend to deal with the rescission application in the interest of justice to bring finality to the litigants.

[6] From the heads of argument filed by the applicant it can be gleaned therefrom that this rescission application is premised on Rule 42 (1) (a) and the Common law. The trite principles in terms of the Common law is that the applicant needs to present a reasonable and acceptable explanation which is closely linked to showing no wilful default and that it has a *bona fide* defence, whilst Rule 42 (1) (a) states that rescission may be granted where an order or judgment was erroneously sought or granted in the absence of the affected party.

[7] The case made out by the applicant is that according to its attorney they were under the impression that the matter '[It] was... tentatively meant to be enrolled on to the Unopposed Motion Roll of the 18 February 2015' and as such they sought an extension for filing their answering affidavit. In advancing this argument I was directed to a letter they had transmitted to the respondent on 8 February 2015. In this correspondence from the applicant to the respondent it is clearly recorded that the application date is 18 February 2015 as per the subject matter of this letter. It is further recorded that 'We are of the intention to file our Answering affidavit on or before 18 February 2015 as agreed,' it goes further to state that 'We humbly request that you consider indulging us with an extension, on the filing date, in the event that we are compelled to request same.' [my emphasis] The respondent's argue that no answering affidavit has ever been filed by the applicant however the second respondent in the main application filed its answering affidavit at court upon the respondent on the 18 February 2015. The applicant argues that in the circumstances set out above they were not in wilful default taking into account that they had indicated that they were experiencing difficulties with the compilation of their answering affidavit.

[8] I am indebted to the applicant pointing out that wilful default is *'indifference as to what the consequences would be rather than a wilfulness to accept them'*. In this instance it is undisputed that the applicant's counsel pitched up at court after the

order was granted; it is also undisputed that the applicant had been liaising with the second respondent to assist in the drafting of its answering affidavit; it is undisputed that the correspondence of 8 February 2015 was sent to the respondent and it is further undisputed that an order was made on 22 January 2015 stating that the matter was postponed to 18 February 2015. In the light of the aforesaid the attorney for the applicant could not have been under the impression that the matter was tentatively meant to be enrolled on 18 February 2015. There was the order of the 22 January 2015 which is clear, there is also their own admission of the application date in their letter of 8 February 2015 together with their own anticipation that they would have had to request (in my view this could only be from the court) an indulgence to file their answering affidavit, as they were already requesting same from the respondent in that correspondence.

[9] The cherry on the top is correspondence from the applicant's attorney dated 17 February 2015, a day before the matter was due to be heard, where Mr Sandile Ngwane states:

'We note from your letter dated 21 January 2015 that the matter has been set down on the unopposed roll for the 18 February 2015 as agreed. We have, however, not received a Notice of Set Down to that effect. The postponement was granted on the basis of giving our client an opportunity to file an Answering affidavit by the 18th whereby the matter would be removed from the roll so as to afford your client an opportunity to reply to our Answering Affidavit. We confirm that our Answering Affidavit will be served on your office by close of business tomorrow as agreed '.

The respondent disputes such an agreement and submitted that a telephone discussion was had between Mr Ngwane and Mr Bertus Louw after receipt of this correspondence. Mr Louw told Mr Ngwane that the matter would be proceeding and he should attend court and do the necessary. Mr Ngwane agreed to the specific date of 18 February 2015 for the postponement and that there was no agreement for the applicant to file on 18 February 2015. This conversation of 17 February 2015 was confirmed in an email to the applicant's attorney at 8:52am. These correspondence and the contents therein were not disputed by the applicant.

[10] In light of that set out above, in my view, the applicant by not attending court on 18 February 2015 adopted *indifference as to what the consequences would be*

rather than a willingness to accept them. In the circumstances I can but only conclude that the applicant indeed was in wilful default when it failed to appear in court on 18 February 2015. See *De Witts Auto Body Repairs (Pty) v Fedgen Insurance Co Ltd 1994 (4) SA 705 (E)* at *708G*.

[11] However, as stated by Moseneke J as he then was in *Harris v Absa t/a Volkskas 2006 (4) SA 527 at 529 para [5]*

"...An acceptable explanation of the default must co-exist with evidence of reasonable prospects of success on the merits."

Thus even though a negative finding has been made as regards the applicant's wilful default it must be looked at together with the bona fide defence advance.

[12] The principle of a *bona fide* defence in Common law is portrayed in the applicant's submissions advanced that the order was sought and granted erroneously. I therefore proposed to deal with this below. The premise that the applicant places reliance on Rule 42 (1) (a) is that the judgment was erroneously granted by the court and in advancing its argument to sustain this they submit that the founding affidavit lacked the averments to sustain the cause of action for the relief sought by the respondent. Further, that the respondent failed to allege proper performance with its contractual obligations.

[13] The bona fide defence of the applicant is that on the respondent's own papers in the main application default judgment should not have been granted. They submit that the respondent had failed to show compliance with the provisions of clauses 49.5.3, 51.2 and 51.3.1 and 52.1. These clauses primarily deal with the payment of the retention monies, the certificate of completion, the certificate of practical completion and the works requested by the engineer for completion in order to make the cite safe and without danger. The applicant's case is that Louw J failed to consider the relevance of these clauses when he gave the judgment on the papers before him.

[14] The respondent's argue that there is no basis upon which the applicant can rely on that Louw J did not apply his mind to the papers and erroneously granted the relief sought in the main application. They submit that the papers in the main

application made out a case for fictional fulfilment of the terms of the agreement and based on that submitted on their papers Louw J granted the order. The contract with the relevant clauses now relied upon by the applicant was before the court in the main application. What was also before the court in the main application was a City of Tshwane Construction Payment certificate dated 15th June 2013 indicating the amount due to the respondent as that amount which was so ordered in the main application. Of interest is the fact that the applicant does not address the basis of the respondent's case of fictional fulfilment that was before Louw J in its application for rescission. However, in the heads of the applicant this is given some attention, being that as it may, I intend to deal with it as both parties require finality.

[15] In dealing with the cause of action set out in the main application of the respondent I have regard to what is set out in paragraphs 5.1 to 6.10. I do not intend to regurgitate these paragraphs in this judgment. Save to state that the case made out was that the respondent had performed its obligations in terms of the contract until the works were stopped on 4 October 2010 by written notification. The respondent put up a letter from the engineer being the second respondent in the main application of the contract coming to an end on 31 May 2012. The respondent sets out his request for the relevant certificate of practical completion and completion certificate, this was met with a response from the second respondent that the respondent provide them with 'proof that the Works do comply'. The compliance they sought was that the 'Works conform to the standards set out in the Contract'. The respondent in the main application also stated that the works were stopped by the same second respondent requesting this proof. The stopping of the works prohibited the respondent from completing the work in terms of the contract. All of the above has not been contested as there is no answering affidavit by the applicant.

[16] The applicant contends in its heads that to succeed with a claim of fictional fulfilment the respondent bears the onus of proving that 'by the deliberate commission or omission, prevented the Respondent from complying with the Clause 51.1 written instruction, issued on 4 October 2010, with the intention of avoiding its obligations under the Building Contract.' The applicant further argues that no evidence has been presented by the respondent that the applicant or its agents being the second respondent in the main application impede and/or obstructed the

respondent from complying with the time sensitive written instructions of 4 October 2010. The applicant contends that it was "within the respondent's capabilities between the period of 4 October 2010 and 1 May 2012 to comply with the Engineers (second respondent's) written instructions". The respondent's non-compliance is the basis for the decision of the second respondent not to issue the Certificate of practical completion required by the respondent.

[17] The respondent as applicant in the main application submits that they received written notification on 4 October 2010 to stop all works in relation to the project with the second respondent. In this application the respondent further stated that on 31 May 2012 they then received a letter from the second respondent advising that their contract had come to an end on 1 May 2012. Thereafter respondent requested the certificate of practical completion on 29 June 2012 to which the second respondent on 11 July 2012 responded as follows: "In terms of the GCC section 51.1 a practical completion certificate can only be issued when a/the Works have reached a stage which allows for their use for their intended purpose (albeit the Works conform to the standards as set out in the Contract Document). Please provide us with proof that the Works do comply and the Practical Completion Certificate will be issued." The respondent contends that as the instruction came from the engineers employed by the applicant, in essence they were prohibited from completing the project in the remaining time available in terms of the contract. Thus they could not reach the stage where the certificate was asked for. The argument goes further in that they submit that in any event the work had been completed and certified as complete.

[18] The respondent as applicant in the main application stated that it was not advised of the reason why they had to stop the project however what they were told to do when the project was stopped was to backfill the trenches that they had dug up and laid the pipes, basically undoing the work they had been assigned to do.

[19] The case made out by the respondent in the main application that was before Louw J is one of fictional fulfilment. It must also be stated that the only papers before Louw J were that of the respondent being the applicant in the main application. The answering affidavit of the second respondent was handed to the presiding officer on

the same day that the matter was heard. Even with that affidavit at his disposal Louw J granted the order sought by the respondent.

[20] The law relating to fictional fulfilment was initially settled in *Gowan v Bowern 1924 AD 550 and MacDuff & Co Ltd (in liquidation) v Johannesburg Consolidated Investment Co Ltd 1924 AD 573 at 591* Innes CJ said the following:

"[B]y our law a condition is deemed to have been fulfilled as against a person who would, subject to its fulfilment, be bound by an obligation, and who has designedly prevented its fulfilment, unless the nature of the contract or the circumstances show an absence of *dolus* on his part"

Wessels JA in *Gowan at 572* stated:

I do not think that the Civil law goes further than this:-

If a promise is made subject to a casual condition the promissor may not for his own benefit, in order to escape the consequences of the contract, actively do something to prevent the fulfilment of the condition. To do so is *dolus*.

[21] Thus in the main application, the respondent as applicant, from the papers before Louw J had to show that the applicant and the second respondent by deliberate commission or omission prevented it from concluding the project in order that the Works reach a stage which allows for their use for their intended purpose, and in doing so the applicant and the second respondent had the intention of avoiding its obligations under the agreement with the respondent.

[22] On my analysis the second respondent stopped the Works on the project of the respondent. The respondent was not informed of the reason for the suspension of the Works. The respondent was instructed to backfill the trenches which they had dug up and laid pipes, essentially in my view, undoing what the respondent had done. When the contract came to an end two years later the respondent was advised by the second respondent to remove their site establishment and structures from the site.

[23] I do not follow the applicant's argument that the respondent could have completed the Works between the times they were told that the work was suspended to the time they were told that the contract came to an end. It clearly was not capable of happing as the Works were suspended and stopped. This also goes to the point made by the second respondent that "a practical completion certificate can only be

issued when a/the Works before the project could come to an end. Works have reached a stage which allows for their use for their intended purpose", how was this supposed to come about when the second respondent had stopped the work.

[24] There was much made by the applicant that the respondent had not completed the tasks that were set out in the notification of stoppage of the Works. As regards this the respondent replied that this was in fact incorrect as only the setting up of the CCTV's was outstanding and the time limit on that was to take place 30 days from the stoppage notification of 4 October 2010. This submission of the applicant was not before Louw J and even so I am of the view that since they had to put up the CCTV's 30 days after the stoppage they would have had to have the second respondents co-operation to gain access to the site as this was contrary to the stoppage notification instructed completion by "[F]riday 08th October 2010".

[25] How could the second respondent expect the respondent to make sure that the Works on that site were the extent for what they were intended for when the project had been stopped prior to the completion thereof? This in the face of the respondent having to undo what the project was intended for when they were instructed by the second respondent to backfill and compact the trenches dug up by the respondent. It is unconceivable to expect that site to be in a condition for which it was intended as per the contract between the parties.

[26] By the response of the second respondent when a request for the retention was made it is clear to me that when the stoppage notification was given it was done so to prevent fulfilment of the respondent's duties in respect of the contract. An additional factor that points in that direction was the undoing of the tasks that the respondent was contracted to do. This would clearly ensure that the site was not for what it was intended.

[27] The above to my mind illustrates that the second respondent, as agent of the applicant, intentionally prevented the respondent from fulfilling its duties as regards the contract and as such it intended to avoid its obligation toward the respondent to settle the retention having provided a payment certificate of the retention amount due on 15th June 2013.

[28] In the result I find that the respondent on its papers before Louw J had made out a proper case for fictional fulfilment and the order granted by Louw J was not erroneously granted as contended by the applicant.

[29] In the exercise of my discretion and for the reasons I have set out above I find that the applicant has not made out a case for rescission both on the grounds for Rule 42 (1) (a) and the Common Law.

[30] Turning to the issue of costs, the respondent has requested costs on an attorney and client scale. I do not believe that this matter warrants an order as requested by the respondent. The respondent must not lose sight of the fact that they sought an indulgence from this court in the filing of their papers against this application. Having concluded that it would be in the interest of justice for both to be granted an opportunity to be heard instead of bogging down the matter with technicalities I conclude that the normal party and party cost order for the victor is appropriate.

[31] Consequently the following order is made:

[1] Both the applicant and the respondent in the rescission application are granted condonation for the late filing of their papers; replying affidavit and answering affidavit respectively.

[2] The application for rescission of the order of Louw J dated 18 February 2015 is dismissed with costs. Such cost to be on a party and party scale.

W. Hughes

Judge of the High Court Gauteng, Pretoria

Appearances

Counsel for the applicant:	Adv T Mkhwanazi
Instructed by:	Kunene Rampala Inc.
Counsel for the respondent:	Adv G Naude
Instructed by:	VFV Attorneys
Date heard:	15 September 2016
Date delivered:	10 November 2016