IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 4051A/15

DATE: 31 MARCH 2016

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

31/3/2016 .....

DATE SIGNATURE

In the matter between:

MAKAULA ZILWA INCORPORATED First Plaintiff

MNB CHARTERED ACCOUNTANTS Second Plaintiff

And

BUSHBUCKRIDGE MUNICIPALITY Defendant

JUDGMENT

NKOSI AJ:

1. These are proceedings in terms of Rule 31(5)(d) of the Uniform Rules wherein the Defendant seeks this Honourable Court to re-consider, in an open court judgment granted by default by the Registrar in favour of the plaintiffs against it.

2. Rule 31(5)(d) of the Uniform Rules provides that:

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

3. For the sake of convenience, in these submissions, I refer to the parties as they are cited in the action at the time when default judgment was granted, *inter alia*: to the applicant as the defendant and to the first and second respondents as the plaintiffs.

4. In these submissions, the applicant dealt with the following matters

   a) Relevant facts
   b) Bona fide defence
   c) Service
   d) Condonation
   e) Failure to give notice

RELEVANT FACTS

5. During August of 2013 the plaintiffs and the defendant entered into a debt collection agreement in terms whereof the plaintiffs were to render services (referred to as debt collections) to the defendant (the Municipality) for three (3)

years. For purposes of the plaintiffs' claim, the relevant provisions of the agreement are set out as follows:

"1. SCOPE OF WORK

The BLM has appointed Debt Collectors (MAKAULA ZILWA INCORPORATED and MNB CHARTERED ACCOUNTANT INCORPORATED Joint Venture) for a period of (3) three years with effect from 18th May 2013, to assist in the rendering of the following services:

- The collection of arrear metered services charges from active and in-active customers as identified by the BLM.
- The collection of arrear un-metered service charges from active and in-active rate payers as identified by the BLM.
- The collection of arrear sundry charges from customers from active and in-active account holders as identified by BLM.

2. .....

3. HANDOVER OF DEBTS

3.1 Where the client requires the agent to collect any debt it shall:

3.2 Electronically or in writing hand over thedent in question to the agent

3.3 .....

4. The agent is to confirm receipt of the handover list either by email or letter with five (5) days from date of handover. The client will endeavour to ensure that the list contains the correct name, telephone number, physical address and postal address of the debtors, as well as the correct details of amounts outstanding

5. ....

5.14 The Agent shall ensure that any work carried out shall be in accordance with the legislative requirements applicable to the Client at that time ...

6. ...

7. ...

8. REMUNERATION

8.1 The Agent shall be entitled to a commission, which will only be payable on capital collection on behalf of the client, structured as follows:

8.1.1 20% (twenty percent) of the amount of any debt actually collected and paid to the client from any debtor

8.2 All fees and commission shall exclude Value Added Tax--------

8.3 The Agent shall not be entitled to any commission whatsoever, unless otherwise instructed, other than if money has been collected from debtors...

8.4 The Agent shall be entitled to commission on any payment from a debtor handed over.

8.5 ...

9. ADMINISTRATIVE ARRANGEMENT

9.5 The Agent undertakes to provide the client with a detailed status report within the first week of every calendar month of all debtors handed over for collection. The report must be in a format that is acceptable to the client indicating the following:

9.5.1 Account number

9.5.2 Agents reference number

9.5.3 Debtor name

9.5.4 Date of hand over

9.5.5 Capital amount handed over, date arrangement made with debtor

9.5.6 Arrangement instalment ..."

6. The plaintiffs instituted a claim for payment in the sum of R4 517 134.66 alleged to be outstanding balance of two (2) invoices in respect of debt collected from Department of Public Works ("Public Works").

7. The Defendant does not dispute the existence of the agreement but contends that it is indebted to the plaintiffs in the amounts claimed or at all.

8. On 06 March 2015, the Registrar ostensibly granted judgment by default under the abovementioned case number in favour of the plaintiffs for payment of debt in the sum of R4 517 134.66 with the interest at the rate of 9% and costs.

9. I need to digress from the facts and deal briefly with the date judgment by default was granted. The defendant was not in possession of the actual order granted. The stamp, seemingly endorsing the judgment was not legible and therefore, the defendant was under the misapprehension that the date thereof is 19 March 2015. Upon proper perusal of the warrant of execution, it was apparent that default judgment was granted on 6 March 2015 as contended by the plaintiffs. For this reason, the defendant accepts that default judgment was granted on 6 March 2015.

BONA FIDE DEFENCE

10. The plaintiffs failed to provide the defendant with documents in support of their claim on request as recorded in a letter addressed to the plaintiffs by ES Ngomane ("Ngomane"), annexed to the particulars of claims as "E" to which the plaintiffs made partial reference . It was submitted at the very outset that,

by not drawing the registrar's attention to the contents of the entire letter, the plaintiffs deliberately misled him or her.

11. In the same letter, Ngomane recorded the dispute with regard to payment of the plaintiffs' invoices forming a subject matter of these proceedings as follows:

PAYMENT FOR DEBT COLLECTION SERVICES

The following invoices submitted by yourselves for payment have reference.

1. Invoice number BLM/001/2013
2. Invoice number BLM/002/2013
3. Invoice number BLM/003/2013

The SLA between the Municipality and Makaula & Zilwa Attorneys clearly details the kind of supporting documentation to be provided by the debt collectors to substantiate their efforts and thus their claim.

In receipt of the above claims, what Applicant have been provided with is a list of payments by customers as per our statements, however it is not possible for the Applicant to verify that these payments are as a result of intervention by the debt collectors. It was further submitted that:

"The debt collectors are aware of the legislative requirements in terms of accounting for expenditure incurred. Hence in this regard we have a major challenge to do so. One of the debt collectors invoices have been paid whilst you are given an opportunity to collate all supporting documentation in terms of the SLA to support your claims for payment. This will enable the BLM to account for expenditures appropriately.

Their attention was also drawn to the fact that debt collection effort must be focused on debt that is doubtful. An incident like the Department of

Public Works claim is a good example of this". The past trend for this account is that they pay R19m,R18m, R21m and R23m annually for the past four years now. However, the debt collectors have included these payments in their invoices as payment due to them, whereas the old debt which the BLM is looking to recover from Public Works is still outstanding..."

12. When granting judgment by default, it is self-evident that the registrar was oblivious to the contents of the letter from Ngomane. In the alternative, he or she mistakenly disregarded the significance thereof. Either way, it is submittetd that he or she ought to have required that the matter be set down for hearing in open court as contemplated in Rule 31(5)(b)(vi) of the Rules of Court. It is submitted that by not doing so, he or she erred.

13. Moreover, Rule 31(5)(a) sets out the manner and circumstances under which the registrar may grant and enter default judgment. The Rule provides that:

> "(5) (a) *Whenever a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff, if he or she wishes to obtain judgment by default, shall where each of the claims is for a debt or liquidated demand, file with the registrar a written application for judgment against such defendant..."*

14. The plaintiffs' claim does not constitute a debt or liquidated claim as contemplated in Rule 31(5). Further, it has been stated that the sub-rule envisaged to empower the registrar to deal with applications for default judgment in simple and uncomplicated cases.

15. In view of the fact that this case involves interpretation and enforcement of a written agreement, where calculation of the amounts due, if any, might be intricate, it was submitted that this case could not be said to be

straightforward. Once again, the registrar ought to have referred the matter for hearing in an open court.

16. The plaintiffs have argued that "...It is undisputable that the Respondents rendered the service of municipal debt collection services. It is not the Applicant's defence that the municipal debt collection services have not been rendered by the Respondents. On this basis, the Applicant should meet judgment debt diligently without delay". The Applicant's contention was based on the amount claimed for services not rendered.

17. On the face of annexure "E", the plaintiffs are undoubtedly mistaken by asserting that there is no dispute with regard to the debt collected from Public Works which forms the subject of their claim.

18. Apart from the afore-going fact, the plaintiffs have to date, not attached or provided this Honourable Court with documents supporting their claim in accordance with the agreement. They have also not demonstrated that these documents were given to the registrar. For this reason, it was submitted that the defendant has demonstrated that it has a *bona fide* defence to the debt in respect of Public Works.

19. It has been repeatedly held that it is sufficient if the defendant makes out a *prima facie* defence in the sense of setting out averments which, if established at the trial, would disentitle the plaintiffs to the relief claimed. Further that the defendant need to deal fully with the merits of the case and produce evidence that the probabilities are actually in its favour. Stated somewhat differently, all that the defendant must show is that it has a *bona fide* defence which, *prima facie*, carries some prospect of success. This is an acceptable view.

Chetty v Law Society, Transvall [1985] 2 All 76 **(A) at p79**

Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 **(O) at 476 – 477**

20. See also **Kavasis v South African Bank of Athens Ltd 1980 (3) 394 (D)** where it was held that if there is a *bona fide* defence against a portion of the plaintiff's claim, the defendant is entitled to rescission of the whole judgment.

21. Accordingly, the plaintiff's conclusion that the defendant "fails to raise defence(s) against the Respondents' claim and judgment debt except to make a sweeping statement about a dispute that exists between the parties which the Respondents deny" is untenable. The dispute regarding the total amount claimed can only be resolved on tabling the necessary proof of such debt collection effort on the Public Works payment claim.

22. The plaintiffs also criticise the defendant for referring the default judgment to open court for reconsideration as flawed as it is "abstract, academic and raises hypothetical questions". I do not agree with this proposition.

23. It has been demonstrated that there is substance in the defendant's action. Apart from the dispute with regard to the Public Works debt, the law places certain obligations on the Chief Financial Officer of the defendant, as an accounting officer to ensure that the expenditure of the defendant is in accordance with its vote. She is obligated to take effective and appropriate steps to prevent unauthorized expenditure. The amount claimed remains questionable and disputed as demonstrated that, the Public Works payments were not made out of debt collection efforts.

24. As part of her fiduciary duties, she must exercise the duty of utmost care to ensure reasonable protection of the assets and records of the defendant; act with fidelity, honesty, integrity and in the best interests of the defendant in

managing its financial affairs and prevent any prejudice to the financial interests of the state.

Public Finance Management Act, 1999 (Act 1 of 1999)

("PFMA") Secions 38; 39 and 86 thereof

25. Recognising this fact, the Constitutional Court emphatically stated in **Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal** 2014 95) SA 579 (CC) that:

> "[36] Public functionaries, as the arms of the state, are further vested with the responsibility, in terms of section 7(2) of the Constitution, to "respect, protect, promote and fulfil the rights in the Bill of Rights." As bearers of this duty, and in performing their functions in the public interest, public functionaries must, where faced with an irregularity in the public administration, in the context of employment or otherwise, seek to redress it. This is the responsibility carried by those in the public sector as part of the privilege of serving the citizenry who invest their trust and taxes in the public administration.
>
> [38] The MEC's actions in seeking to rectify the irregularities that were brought to her attention must be viewed in this light – as a bold effort to fulfil her constitutional and statutory obligations to ensure lawfulness, accountability and transparency in her Department..."

26. Equally, the actions of the Chief Financial Officer of the defendant must be seen in this light it was submitted. Especially viewed in light of section 86(1) of PFMA which renders an accounting officer guilty of an offence and liable on conviction to a fine or imprisonment to a period not exceeding five (5) years if that accounting officer wilfully or in a grossly negligent way fails to comply with the provisions of section 38, 39 and 40.

27. Accordingly, it was submitted that the defendant has shown a *bona fide* defence and that referring default judgment for hearing in open court was not to merely delay the proceedings, for which I agree.

SERVICE

28. The summons were issued on 19 January 2015 and allegedly served on Lunia Mashego ('Mashego") on 23 January 2015.

29. The plaintiffs contend that the return of service is *prima facie* proof of service. The defendant agrees with this assertion.

30. Nonetheless, the plaintiffs and the sheriff have failed to explain the reason for the absence of Mashego's signature on the return of service which would ordinarily indicate that she acknowledged receipt of the process for, or on behalf of the defendant.

31. Apart from the absence of Mashego's signature on the return of service, it is a mystery how a letter dated 16 January 2015 instructing the sheriff to serve the process on the defendant would enclose the original summons together with two (2) copies three (3) days before the combined summons were issued.

32. In all probabilities, the registrar assumed that the defendant knew of the action when he or she granted the judgment by default. It might not have occurred to him or her to scrutinize the return or service, as he was duty-

bound so to do, not only of the attorneys representing the litigant but also of the registrar to examine the return and satisfy themselves that it is in order

33. In the result, it was submitted that there is doubt as to whether the summons was served as alleged or not. The fact that the Chief Financial Officer vows that she only got to see of the summons when the sheriff attended to their office is probable, especially with viewed with the plaintiff's contention that the sheriff attended to the defendant's offices on 13 March 2015 and on 18 March 2015, a notice of intention to defend was filed on behalf of the defendant. This is a clear variation that the defendant had intentions to defend this action at all times. The issue of service is no longer an issue in this regard.

CONDONATION

34. It is an elementary requirement that if party delivers court process late, and there is objection thereto, an application for an extension of time or condonation ought to be instituted. The defendant has not filed such an application together with the notice referring the default judgment to open court for reconsideration.

35. The Chief Financial Officer contends that she only became aware of the judgment against the defendant when the sheriff attended to their offices with a writ of execution. The plaintiffs seem to argue that the sheriff served the writ of execution on 13 March 2015. Accordingly, the referral notice was delivered nine (9) days late. That might be so.

36. In **Grant v Plumbers (Pty) Ltd** (supra) it was held that a poor explanation for the default may be compensated for by a good defence. It is a question of exercising a wide discretion by the court.

See also Creative Car Sound v Automobile Radio Dealers Association 1989 (Pty) Ltd 2007 (4) SA 546 (D) at 555C – D; Creative Car Sound v Automobile Radio Dealers Association 1989 (Pty) Ltd 2007 (4) SA 546 (D) at 555C – D; Wahl v Prinswil Belegginas (Edms) Bok 1984 (1) SA 457 (T).

37. Admittedly, there was a few days delay in referring the default judgment for hearing in open court. It is submitted that a nine (9) day delay cannot be said to be unreasonable. Nonetheless, this Court has inherent powers to determine its own process and can exercise discretion to condone or overlook the delay. The Chief Financial Officer, who clearly was appointed after the contract between the plaintiffs and the defendant was concluded, has good intentions. It is self-evident that she is striving to preserve public funds by ensuring that expenses are authorized and guard against fruitless and wasteful expenditure.

38. The plaintiffs would suffer no prejudice if the default judgment is set aside and there is comprehensive airing of the issues at trial. Any resultant prejudice claimed will be cured by either costs or interest on the capital amount.

39. On the other hand, there would be irreparable harm to the defendant and the public if the default judgment is permitted to stand. This court agrees with this view more especially that the case is not coming to an end. The exact amount claimed has to be proven with regard to the debt collection process.

FAILURE TO GIVE NOTICE

40. The plaintiffs contends that they have given notice envisaged in section 3 of the Institution of Legal Proceedings Against Certain Organs of the State Act, Act 40 of 2002 ("the Act"). The letter relied upon as notice (which is not admitted) was not placed before the registrar when the application for default

judgment was sought or granted. In a way, the plaintiffs concede that they failed to do so. Accordingly, the registrar should not have granted judgement by default against the defendant in the absence of this letter.

41. Whether or not the letter complies with the requirements of the section of the relevant legislation is, respectfully, a matter for the trial court.

42. In the premises, it was submitted that the defendant has made out a proper case for this Honourable Court to reconsider and set aside the default judgment. In the circumstances it was submitted that the defendant be granted an opportunity to defend the action and costs of this application be costs in the cause.

CONSIDERATION OF ALL SUBMISSIONS

43. Having heard both parties to the arguments the court is of the view that there are compelling reasons not to disallow the request for a reconsideration of the amount due to the Plaintiff.

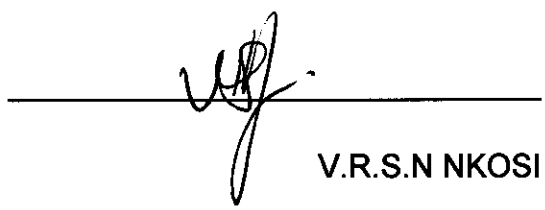
This could only happen if the dispute regarding the amounts paid by the Department of Public Works whether it was done through the debt collection process or not. The Plaintiff is called upon to prove that it is so.

It would be unfair to confirm the default judgement amount without considering the issue raised by the BLM letter worked as annexure "E".

This court is also duty-bound to exercise its discretion carefully and reasonably considering that public funds are involved. The interests of justice will be better served if the matter, and more especially the amount claimed, be determined in an open court.

As a consequent thereof the court orders as follows:

a) That the default judgement is set – aside to enable a re – consideration of the request for judgement in an open court with all the necessary documentation being presented to court as proof of indebtedness.
b) That the Defendants be ordered to pay costs of this application.



V.R.S.N NKOSI

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA