IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE - GRAHAMSTOWN

CASE NO: 1325/2008
DATE HEARD: 03/06/2010
DATE DELIVERED: 11/06/2010

In the matter between:

UKHAHLAMBA DISTRICT MUNICIPALITY **APPLICANT**

and

NDLAZI MHLANGA & CO CIVILS CC **RESPONDENT**

JUDGMENT

ROBERSON J:-

[1] The applicant has applied for the rescission of a summary judgment granted against it on 3 July 2008, in favour of the respondent. The application for rescission was brought in terms of rule 42 (1) and the common law.

Background

[2] The respondent issued summons against the applicant for payment of the sum of R244 362.79, in respect of work performed by it in terms of tender contract between the parties. The specific work was the construction of a bridge. The applicant's agent, Masilakhe Lelethu Consulting ("the agent"), issued a payment certificate for payment of the amount claimed, declaring in

such certificate that payment had been approved in accordance with the conditions of the contract and that work to the value of that amount had been completed. The applicant did not pay in terms of the certificate, allegedly because the certificate was not accompanied by laboratory test results in respect of the foundations of the bridge. The agent wrote a number of letters to the respondent requesting it to attend to the laboratory test. Certain defects were pointed out by the agent and the respondent was put on terms to rectify the defects, failing which another contractor would be engaged to complete the bridge.

[3] Summons was in due course issued. It was served on the applicant on 6 June 2008. On 13 June 2008, Attorneys Dold & Stone, Grahamstown, acting for the applicant, delivered a document with the heading "Notice of Opposition", in which was stated "it is the intention of the defendant to oppose the application of the plaintiff." Presumably this document was intended to be an appearance to defend, because at that stage no application for summary judgment had been made. Thereafter the sequence of events is a little confusing. An application for summary judgment dated 26 June 2008 and addressed to the Registrar and to Dold & Stone, was filed with the Registrar on that date. The date of hearing of the application was 3 July 2008. There was no receipt of the application by Dold & Stone reflected on the application papers. There was however a registered postage slip, dated 26 June 2008, attached to the application papers and addressed to the applicant directly. The applicant received the application for summary judgment on 3 July 2008.

On 26 June 2008 a document headed “Notice of Withdrawal of Opposition” was filed with the Registrar and served on the respondent’s attorneys. This document stated that “the above named respondent hereby withdraws its opposition to the said application”. Summary judgment was granted on 3 July 2008, in the absence of the applicant.

[4] According to affidavits filed on behalf of the applicant, it had first instructed attorneys Mneno & Co, Mthatha, to act on its behalf. This firm instructed Dold & Stone as local attorneys. Mneno & Co. then discovered that it had a conflict of interest and by letter dated 23 June 2008 instructed Dold & Stone to deliver a notice of withdrawal of opposition. This was a mistake, because the intention was to instruct Dold & Stone to deliver a notice of withdrawal of attorneys of record. In the meantime the applicant’s present attorneys M.I. Ntshiba and Associates had been instructed to act, but only delivered a notice of acting on 10 July 2008. They had however written a letter dated 27 June 2008 to the respondent’s attorneys, advising them that they were now acting for the applicant and that payment would be made once the respondent had rectified the defects in the bridge.

Rule 42 (1)

[5] A judgment may be rescinded in terms of rule 42 (1) (a) if the judgment was erroneously sought or erroneously granted, in the absence of the party affected thereby. The applicant relied on the fact that there was short service of the application for summary judgment. Rule 32 (1) provides that the stated

date of hearing of the summary judgment application must be not less than ten days from the date of delivery of the notice of application. In the present case, if notice was given to Dold & Stone, it was less than ten days before 3 July 2008, and similarly the notice to the applicant directly was posted less than ten days before 3 July 2008. In my view, this means that summary judgment was erroneously sought and erroneously granted. It may be that the learned Judge who granted summary judgment assumed, in spite of the short service, that the application was not opposed, because of the mistaken notice withdrawing opposition to the application. This, as we now know, was a wrong assumption. The notice was supposed to be a notice of withdrawal of attorneys of record. The lack of proof of service of the application on Dold & Stone and the posting to the applicant directly of the application, suggests that the respondent's attorneys knew that Dold & Stone were no longer acting. If the learned Judge had known the true position, namely that on 3 July 2008 the applicant did not in reality have an attorney of record, and had only received notice of the application on the day of the hearing, summary judgment would in all likelihood not have been granted. In my view, these circumstances satisfy the requirements of the sub-rule. (See *Theron NO v United Democratic Front and others* 1984 (2) 532 (CPD).)

[6] It was submitted on behalf of the respondent that the short service of the application for summary judgment could have been condoned. Reliance was placed on *Papenfus v Nichas and Son (Pty) Ltd.* 1969 (4) SA 234 (OPD). In this case it was accepted that condonation could be granted for short

service, provided that there was no prejudice to the other party. In the present case, where it is not known if the application for summary judgment was ever served on Dold & Stone, and the applicant received the application by post on the day of the hearing, the prejudice is self-evident.

[7] The application brought in terms of rule 42 (1) should therefore succeed and it is accordingly not necessary to consider the requirements for an application for rescission at common law.

Costs

[8] There seem to be number of misunderstandings which occurred on the part of both parties, and an appropriate order would be that the costs of the application be costs in the cause.

Order

[9] The following order is made:

[9.1] The summary judgment granted on 3 July 2008 is rescinded.

[9.2] The costs of the application are to be costs in the cause.

J.M. ROBERSON

JUDGE OF THE HIGH COURT

Appearances

Applicant: Adv. N. Sandi, instructed by Netteltons Attorneys, Grahamstown.

Respondent: Adv. J. Koekemoer, instructed by Mili Attorneys, Grahamstown.