IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case Number: 3679/2020

In the matter between:

SARAH MMATAWANA MLAMLELI **Applicant**

and

THE NATIONAL DIRECTOR OF PUBLIC PROSEC **1st Respondent**

GERHARD GELDENHUYS N.O **2nd Respondent**

In re:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **Applicant**

and

NTHIMUTSI MOKHESI **1st Defendant**

MAHLOMOLA JOHN MATLAKALA **2nd Defendant**

PHEAGANE EDWIN SODI	**3rd Defendant**
BLACK HEAD CONSULTING(Pty) Ltd	**4th Defendant**
DIAMOND HILL TRADING 71(Pty) Ltd	**5th Defendant**
605 CONSULTING SOLUTIONS (Pty) Ltd	**6th Defendant**
SELLO JOSEPH SYDNEY RADEBE	**7th Defendant**
MASTERTRADE 232 (Pty) Ltd	**8th Defendant**
ABEL KGOTSO MANYEKI	**9th Defendant**
ORI GROUP (Pty) Ltd	**10th Defendant**
THABANE WISEMAN ZULU	**11thDefendant**
SARAH MATAWANA MLAMLELI	**12thDefendant**
MAREDI BERNARDINE SUSAN MOKHESI	**1st Respondent**
KHOMBISILE ZULU	**2nd Respondent**
BASE PROPERTY HOLDINGS (Pty) Ltd	**3rd Respondent**
MASEKO DOROTHY MOBU	**4th Respondent**
LIKEMO FAMILY TRUST	**5th Respondent**
LIATILE MACHOANE MOKHESI	**6th Respondent**

MONAMELA KATLEHO MOKHESI **7th Respondent**

KEKELETSO REABETSOE MOKHESI **8th Respondent**

TLAKS FAMILY TRUST **9th Respondent**

DINEO KELEBOGILE MATLAKALA **10th Respondent**

KHAUTA AARON MALOKA **11th Respondent**

JUDGMENT BY: MOLITSOANE, J

HEARD ON: 05 AUGUST 2021

DELIVERED ON: 02 NOVEMBER 2021

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[1] On 30 September 2020 the First Respondent obtained provisional restraint orders in terms of sections 25 and 26 of the Prevention of Organised Crime Act, 121 of 1998 (POCA) against the Applicant, Ms Mlamleli, also the Twelfth Defendant in the restraint application. On 26 November 2020, being the return date of the rule nisi of the restraint order, this court made final the order against the Applicant. The Applicant now seeks the rescission and/or reconsideration and/or setting aside of the provisional restraint order confirmed or made final.

[2] The following issues are to be adjudicated upon in this application:

a) The condonation application for the late filing of a replying affidavit;
b) The filing of the so-called 'explanatory affidavit';
c) Whether the Applicant has satisfied the requirements for the common law rescission of judgment.

[3] The replying affidavit was filed out of time and the Applicant seeks an indulgence. Uniform Rule 27(3) provides that a court may on good cause shown, condone non-compliance with the rules. The Applicant must satisfy the court that there is sufficient or good cause for excusing non-compliance with the rules. In *Mulaudzi v Old Mutual Life Assurance Company (South Africa) Limited*[1] the court said:

'A full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. Factors which usually weigh with this court in considering an Application for Condonation include the degree of non-compliance, the explanation therefore, the importance of the case, a Respondent's interest in the finality of the judgment of the court below, the convenience of this Court and the avoidance of unnecessary delay in the administration of justice.'

[4] The condonation application is not opposed. The Second Respondent, the curator bonis, filed an affidavit merely to report as to his actions in the performance of his duties. This affidavit deals with the status of the Applicant's assets at the time when the curator bonis deposed to the affidavit.

[1] 2017(6) SA 90 para [26].

[5] The Applicant attributes the delay in filing the replying affidavit on her former attorneys. According to her, her former attorneys failed to deal with her matter diligently and to take the necessary steps to ensure that a replying affidavit was prepared. As a result, she terminated their mandate. A struggle then ensued to obtain a file from her erstwhile attorneys. Upon receiving contents of the file from the office of the registrar she did all she could to launch these proceedings. I am satisfied that the Applicant has explained her default in full and has thus established good cause to explain her delay. I accordingly grant condonation for the late filing of the replying affidavit.

[6] The First Respondent filed what it termed an '*Explanatory Affidavit*.' This affidavit was filed without leave of this Court. The Applicant objected to the said affidavit. The First Respondent has since abandoned the admission of the said document in evidence. No reference will thus be made to it and it will be considered *as* pro-non scripto*.*

[7] The Applicant bears the onus in an application for rescission of judgment under the common law to establish sufficient cause for the default. In *Chetty v Law Society Transvaal*[2] the court explained this principle as follows:

> 'It is not sufficient if only one of these two requirements is not met, for obvious reasons a party showing no prospects of success on the merits will fail in an application of rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. An ordered judicial process would be negated. If, on the other hand, a party who could offer no

[2] 1985(2) SA 756 at 764J- 765D.

explanation of his default other than his disdain for the rules was nevertheless permitted to have the judgment against him rescinded on the ground that he had reasonable prospect of success on the merits.'

[8] In *Harris v Absa Bank t/a Volkskas*[3] the court said:

'The Applicant, being the party which seeks relief bears the onus of establishing 'sufficient cause' whether or not to sufficient cause' has been shown to exist depends upon whether:

a) The applicant has presented a reasonable and acceptable explanation of her default; and

b) The Applicant has shown the existence of a bona fide defence that is one that has some prospect or probability of success.'

[9] The circumstances under which the restraint order was confirmed in the absence of the Applicant seem to be undisputed. As alluded to above, the return date for the confirmation of the rule nisi granted was on 26 November 2021.The erstwhile attorneys of the Applicant were present in Court apparently waiting for the case to be called in order to apply for a postponement to file an answering affidavit. At that time the other parties were with the Judge of this court in chambers in respect of this matter. The court, in all probability being unaware that the attorneys of the Applicant were present in court, confirmed the restraint order in the absence of the Applicant's erstwhile attorneys.

[10] It appears that some of the Defendants and Respondents, like the Applicant, had not filed opposing affidavits on the return date. A request for a postponement to enable them to file opposing papers was not opposed by the First Respondent and was

[3] 2006(4) SA 527(T) at 528.

granted by the court. It is on this basis that the Applicant, who also had not filed an answering affidavit, submits that in all probability, like the other parties who had not filed the answering affidavit, she would have been granted a postponement to file same had her attorneys approached the court in chambers with such a request. I agree with this submission also in view of the fact that the First Respondent was agreeable to a postponement in respect of the other Defendants and Respondents. No evidence or submission was made that the Applicant could have been treated differently. I am satisfied that the Applicant was thus not in wilful default.

[11] It is contended that the Applicant is not bona fide as to why the judgment was granted against her. In essence she had not filed the answering affidavit in the main application. In my view that aspect will better be dealt with when she applies for condonation for the late filing of the answering affidavit when dealing with the main application. I cannot ignore the fact that had the Applicant's attorneys attended the proceedings in chambers and not waited for the Judge in court, the application for a postponement would in all probability have been granted in view of the stance taken by the First Respondent then.

[12] The next issue to decide is whether the Applicant has shown that she has a bona fide defence, and it is necessary to look at the case against the Applicant. In another judgment,[4] under the same case number as the one before me, involving the Second Defendant and the Ninth to Eleventh Respondents, this court

[4] *National Director of Public Prosecutions v Ntimutse Mokhesi and Others*- Case No: 3679 delivered on 21 September 2021 at 6 to 7.

summarised the background facts in this case, save for the alleged participation of the Applicant, as follows:

'[12] The Free State Department of Human Settlement (FDHS) approached its counterpart Gauteng Department of Human Settlement (GDHS) with a request to participate in its existing contract concerning the audit, assessment, handling, removal and disposal of hazardous asbestos contaminated rubble. This participation was sought apparently in terms of Treasury Regulation 16A.6.6(the regulation) which allows one organ of state to participate in the contract of another organ of state without following an open, transparent and competitive bidding process.

[13] On 4 August 2014 GDHS informed FDHS that its contract was coming to an end on 31 August 2014. GDHS further suggested to the latter to follow a competitive procurement process. FDHS did not participate in the contract of GDHS by the time it ran its course on 31 August 2014.

[14] On 1 October 2014, FDHS appointed Blackhead Consulting JV, an entity comprised of Black Head Consulting(Pty) Ltd and Diamond Hill trading 71(Pty) Ltd (Black Head JV), to carry out the project as requested in the participation of the GDHS contract. This project became colloquially known as the Asbestos project. This appointment paved the way to the conclusion of a contract between the FDHS and Black Head Consulting JV valued at R255 million. The amount of R230 million was paid to Black Head Consulting JV pursuant to this agreement and the balance is the subject of pending litigation between FDHS- and Black Head Consulting JV in this court.

[15] It is contended on behalf of the applicant that Blackhead Consulting JV never intended to perform in terms of the contract and subcontracted the performance of the work for a contract price of R44 208 856.79 to an entity known as Master Trade 232 (Pty) Ltd which in turn also subcontracted the performance of the work to ORI GROUP (Pty)Ltd for R21 391 489.30. The work was never completed and as a result it is contended by the applicant that the expenditure incurred by the FDHS was irregular for the purposes of the Public Finance Management Act,1 of 1999 (the PFMA).'

[13] Although the Gauteng Department of Human Settlement advised that its contract was coming to an end on 31 August 2014, it nevertheless approved the participation. At the time when the procurement took place, the Applicant was the Member of the Executive Council of the Free State Department of Co-Operative Governance, Traditional Affairs and Human Settlement. It is contented on behalf of the First Respondent that the Applicant was obliged by law, inter alia, to compile and table an annual financial report for the Free State Department of Human Settlements before the provincial legislature. It is the case for the First Respondent that on 24 August 2015 the Applicant signed off the annual financial report prepared by the Auditor –General in which the irregularity of the Asbestos Project was brought to her attention. At the time, an amount of R91 million had already been paid to the Blackhead Consulting JV.

[14] It is contented that subsequent to signing off the Auditor General's report, an additional R139 million was paid to Blackhead Consulting JV. The essence of the charges against the Applicant is that she aligned herself with the unlawful activities of the Blackhead Consulting JV and others who assisted to perpetrate the unlawful and fraudulent scheme and enabled the commission of fraud, corruption and money laundering. She is sought to be held criminally liable for her conduct in alleged failure to act in order to prevent the unlawful transfer of State funds to people alleged not to be entitled to them.

[15] The requirements for the granting of a provisional restraint order are set as follows in section 25(1)(a) of POCA:

'A high Court may exercise the powers conferred on it by section 26(1) –

a. when –

i. a prosecution for an offence has been instituted against the defendant concerned;

ii. either a confiscation order has been made against that defendant or it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against that defendant; and

iii. the proceedings against that defendant have not been concluded.'

[16] It is common cause that the Applicant has already been charged for fraud and money laundering. The first requirement of s25 has thus been satisfied. With regards to the second requirement, the First Respondent has to show that there are reasonable grounds for believing that a confiscation order may be made against the Applicant in terms of s18(1) of POCA. The court in *NDPP v Rautenbach*[5] observed as follows: 'It is plain from the language of the Act that the court is not required to satisfy itself that the defendant is probably guilty of an offence, and that he or she has probably benefited from the offence or from other unlawful activity. What is required is only that it must appear to the court on reasonable grounds that there might be a conviction and a confiscation order. While the court, in order to make that assessment, must be apprised of at least the nature and tenor of the available evidence, and cannot rely merely upon the appellant's opinion (National *Director of Public Prosecutions v Basson* 2002(1) SA 419(SCA) it is nevertheless not called upon to decide upon the veracity of the evidence. It need ask only whether there is evidence that might reasonably support a conviction and a consequent confiscation order (even if all the evidence has not been placed before it) and whether that evidence might reasonably be believed. Clearly that will not be so where the evidence that is sought to be relied upon is manifestly false or unreliable and to that extent it requires evaluation, but it could not have been intended that a court in such proceedings is required to determine whether the evidence is probably true.'

[5] 2005(4) SA 603(SCA) para 27.

[17] The First Respondent has to show that there are reasonable grounds for believing that the court in a subsequent case may make a confiscation order in terms of s18(1). Section 18(1) provides that whenever a defendant is convicted of an offence the court convicting the defendant, may on the application of the public prosecutor, enquire into any benefit which the defendant may have derived from-

a) that offence;

b) any other offence of which the defendant has been convicted at the same trial; and

c) any criminal activity which the court finds to be sufficiently related to those offences, and if the court finds the defendant has so benefited, the court may in addition to any punishment which it may impose in respect of the offence, make an order against the defendant for payment to the state of any amount it considers appropriate and the court may make any further orders as it may deem fit to ensure the effectiveness and fairness of that order.

[18] On the other hand, s12(3) of POCA provides that a person has benefited from the unlawful activities 'if he or she has at any time, whether before or after the commencement of POCA, received or retained any proceeds of unlawful activities.' The court in *S v Shaik*[6] dealing with the interpretation of the word *'benefit'* as in this case held that a person will have benefitted from unlawful activities if he or she has received or retained any proceeds of unlawful activities. The word 'benefit' can thus not be interpreted in isolation from the proceeds of unlawful activities.[7]

[6] 2008(2) SACR 165 (CC).

[7] *NDPP v Ramluchman* (677/15) [2015] ZASCA 202 (9 December 2016).

[19] The basis for the defence by Applicant is that there are no reasonable grounds to believe that a confiscation order may be made against her in a subsequent criminal case. It is contended that the allegation in the main application do not give rise to a reasonable belief that the Applicant derived, received or retained any property, service, advantage, benefit or reward from the alleged offences. The Respondent denies that she received any benefit as envisaged by POCA.

[20] The First Respondent on the other hand contends that the Applicant acting in common purpose with the other Defendants in the main application may on reasonable grounds be convicted of the offences preferred against her. In an application for rescission of judgment the court does not interrogate the merits or demerits of the defence raised by the Applicant. The Applicant only has to satisfy the court that she has a bona fide defence. Respondent is of the view that the benefit the Applicant received is that she retained her position as the MEC. Clearly the issue whether the Applicant received a benefit for the purposes of POCA raises a triable issue that may decide the fate of the restrained order and in my view the Applicant has shown that she has a bona fide defence worthy of adjudication.

[21] In the Notice of Motion, over and above the relief sought to rescind the judgment, the Applicant seeks this court to discharge the provisional restraint order granted. In the Heads of Argument, the relief to discharge the provisional order, was correctly so, not persisted with. One of the purposes of an application for rescission of judgment is to enable a party against whom a judgment has been granted, to get the opportunity to defend the main claim.

[22] I am satisfied that the Applicant has satisfied the requirements for rescission of judgment under the common law. With regards to costs the appropriate order would be that the costs shall follow the event.

ORDER

[23] In the circumstances I make the following order:

a) The Applicant is granted condonation for the late filing of the replying affidavit;
b) The order of this court granted on 26 November 2020 is hereby rescinded and set aside;
c) The provisional restraint order against the Applicant is extended to 25 November 2021;
d) The Applicant is ordered to file her Heads of Argument in respect of the restraint application on or before 10 November 2021;
e) The Respondents are ordered to file their Heads of Argument in respect of the restraint application on or before 19 November 2021;
f) The First Respondent is liable for costs of this application.

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P.E. MOLITSOANE

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