THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE

Case No: 397/13

In the matter between:

VHEMBE DISTRICT MUNICIPALITY **Appellant**

and

STEWARTS & LLOYDS TRADING (BOOYSENS) (PTY) LIMITED **First Respondent**

SHERIFF OF THOHOYANDOU, RALIPHASWA TG **Second Respondent**

Neutral Citation: *Vhembe District Municipality v Stewarts & Lloyds* (397/2013) [2014] ZASCA 93 (26 June 2014).

Coram: Ponnan, Leach and Theron JJA, Van Zyl and Swain AJJA

Heard: **19 May 2014**

Delivered: **26 June 2014**

Summary: Practice – judgments and orders – default judgment – rescission of – Uniform rule 31(2)(b) – applicant failing to give reasonable explanation for default and show existence of *bona fide* defence – defence to be disclosed with sufficient particularity – claim not a 'debt' as defined in Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 – 'debt' confined to a claim for damages.

ORDER

On appeal from: The Limpopo High Court, Thohoyandou (Ebersohn AJ sitting as court of first instance):

The following order is made:

The appeal is dismissed with costs.

JUDGMENT

Van Zyl AJA (Ponnan, Leach and Theron JJA and Swain AJA concurring)

[1] This is an appeal against the dismissal of an application to rescind a default judgment granted in terms of rule 31(2) of the Uniform Rules of Court. The judgment was granted by the Limpopo High Court in an action instituted by the first respondent, Stewarts and Lloyds Trading (Booysens) (Pty) Ltd, in November 2010 in which it sued the appellant, the Vhembe District Municipality (the municipality), for payment of R698 885 together with interest and costs. The return of service reflects service of the combined summons to have been effected by the Sheriff of Thohoyandou, the second respondent, on a Mrs Ramukhotheli at the address of the municipality as reflected in the summons.

[2] When the appellant failed to enter an appearance to defend the action within the prescribed time period, the first respondent applied for and was granted judgment by

default. It thereafter obtained a writ of execution which the Sheriff served on the appellant by leaving a copy thereof with a Mr Mulaudzi, the legal advisor of the municipality. Service of the writ was effected at the same address where the Sheriff had earlier served the summons. The return of service rendered by the Sheriff also reflects that when the appellant failed to satisfy the writ, he proceeded to place certain of the appellant's moveable assets under attachment.

[3] The attachment prompted the appellant to file an application with the Limpopo High Court, Thohoyandou for the rescission of the default judgment. That court (Ebersohn AJ) dismissed the application and refused the appellant leave to appeal. This appeal is with the leave of this court.

[4] Rule 31(2)(*b*) provides that: 'A defendant may within twenty days after he or she has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet'. In order to succeed an applicant for rescission of a default judgment must show good cause. As it was put in *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) para 11, the courts generally expect an applicant to show good cause: (a) by giving a reasonable explanation for the default; (b) by showing that the application is made bona fide; and (c) by showing a bona fide defence to the plaintiff's claim which prima facie has some prospect of success.

[5] The appellant's application for rescission was in all some 12 pages. It consisted of: the notice of motion; an affidavit by the municipal manager of the municipality, which spanned all of four pages; two annexures in the form of the writ of execution and the notice of attachment; and a one page confirmatory affidavit by the appellant's attorney. The municipal manager contended: first, that there had not been proper service of the summons on the appellant in terms of the uniform rules of court inasmuch as the 'Combined Summons and Particulars of Claim were not brought to my office for

attention'; second, that there was non-compliance with the provisions of s 115(3) of the Local Government: Municipal Systems Act 32 of 2000; and third, the appellant had a bona fide defence to the first respondent's claim. None of those contentions found favour with the high court. For the reasons that follow the high court's conclusion on each of those grounds cannot be faulted.

[6] As the appellant's first two contentions cover common ground, it will be convenient to consider them jointly. According to the municipal manager, the judgment only came to his knowledge when the Sheriff attached the appellant's property in March 2012. He stated that Mrs Ramukhotheli, on whom the Sheriff served a copy of the summons, is unknown to him, and that a person by that name does not appear on the list of persons employed by the appellant. He further stated that the sheriff knew the identity of the person upon whom legal process had to be served, and that Mrs Ramukhotheli was not that person.

[7] The sufficiency of the appellant's explanation for its default is to be assessed in the light of two facts, namely the admission by the municipal manager that the summons reflected the appellant's 'official receipt date stamp' dated 3 February 2011 (the date when the summons was served by the Sheriff) acknowledging receipt of the summons, and secondly, that the summons was served at the same address where the writ was subsequently served being where the municipal manager is based, and which, in his own words, is 'the proper address' of the appellant for the service of legal process.

[8] In its opposition to the application for rescission the first respondent challenged the appellant to disclose its list of employees to support its contention that Mrs Ramukhotheli was not one of its employees. The deponent to the opposing affidavit added 'it is highly unlikely and improbable that an impostor would be occupying a desk at the Applicant's principal place of business and receiving legal documents on behalf of the Applicant'. Those allegations did not elicit a response from the appellant. The

appellant's apparent lack of candour was exacerbated by its failure to disclose the identity of the person who was authorised to accept service of legal process on behalf of the appellant or who was entrusted with the 'official receipt date stamp' of the appellant, as well as any detail with regard to what systems it had in place to ensure that important correspondence, in particular court processes, were brought to the attention of the appropriate person within the establishment of the appellant.

[9] Section 115(3) of the Local Government: Municipal Systems Act provides that: 'Any legal process is effectively and sufficiently served on a municipality when it is delivered to the municipal manager or a person in attendance at the municipal manager's office'. The high court found that on the evidence service of the summons as contemplated both by the Uniform rules of court and by s 115(3) did in fact take place. It correctly found that, on the municipal manager's own version, the address at which the summons was served on Mrs Ramukhotheli is where he was 'based'. And, absent any evidence to the contrary (of which there was none), Mrs Ramukhotheli who affixed the official stamp of the appellant to the summons was plainly a person in attendance at the municipal manager's office. That is also the same address where the municipal manager had said proper service of the writ was effected. Ebersohn AJ's conclusion therefore that there had been proper service on the appellant cannot be faulted.

[10] That brings me to the appellant's third contention, namely, that the first respondent should have been non-suited on account of its alleged failure to comply with the provisions of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (the Act). The appellant is an organ of state as contemplated in the Act. Accordingly, so the contention went, the first respondent had to comply with the provisions of s 3 of the Act before instituting proceedings against it. Section 3(1) reads:

'No legal proceedings for the recovery of a debt may be instituted against an organ of state unless –

(*a*) the creditor has given the organ of state in question notice in writing of his or her or its intention to institute the legal proceedings in question; or

(*b*) the organ of state in question has consented in writing to the institution of that legal proceedings-

(i) without such notice; or

(ii) upon receipt of a notice which does not comply with all the requirements set out in subsection (2).'

[11] Subsection (2) in turn reads:

'A notice must -

(*a*) within six months from the date on which the debt became due, be served on the organ of state in accordance with section 4(1); and

(*b*) briefly set out –

(i) the facts giving rise to the debt; and

(ii) such particulars of such debt as are within the knowledge of the creditor.'

[12] The high court, relying on the judgments in *Nicor IT Consulting (Pty) Ltd v North West Housing Corporation*;[1] *Director General, Department of Public Works v Kovac Investments*,[2] and *Thabani Zulu & Co (Pty) Ltd v Minister of Water Affairs & another*,[3] found that the first respondent's claim was not a 'debt' as envisaged in the Act, and that it was accordingly not required to give notice as required by s 3 of the Act.

[13] A 'debt' as defined in the Act means any debt arising from any cause of action:

'(*a*) which arises from delictual, contractual or any other liability, including a cause of action which relates to or arises from any-

(i) act performed under or in terms of any law; or

[1] *Nicor IT Consulting (Pty) Ltd v North West Housing Corporation* 2010 (3) SA 90 (NWM).
[2] *Director General, Department of Public Works v Kovac Investments* 2010 (6) SA 646 (GNP).
[3] *Thabani Zulu & Co (Pty) Ltd v Minister of Water Affairs & another* 2012 (4) SA 91 (KZD).

(ii) omission to do anything which should have been done under or in terms of any law; and

(*b*) for which an organ of state is liable for payment of damages . . . .'

[14] In *Thabani Zulu*, Rall AJ stated:

'[7] The Act deals with legal proceedings against organs of state for the recovery of debts. In doing so it attempts to create uniformity on two aspects. The first is the requirement to give notice of a proposed action for the recovery of a debt and the second is the prescription of debts. Speaking generally, this is achieved by repealing the laws dealing with notice requirements, making a single requirement applicable to all debts and making the Prescription Act apply to the prescription of all debts.'

The learned judge added:

'[11] Paragraph *(a)* of the definition is widely worded and makes it clear that a debt is any liability whatsoever. It is, however, followed by para *(b)* and the question which arises is how the two paragraphs relate to each other. They can be read either disjunctively or conjunctively. The paragraphs are linked by "and" and not "or". Ordinarily, paragraphs or phrases linked by "and" are read conjunctively and those by "or" disjunctively. Accordingly, although the courts have read "and" to mean "or" and vice versa in appropriate circumstances, there must be compelling reasons to change the words used by the legislature.

[12] Using the ordinary meaning of the words in the definition therefore, the two paragraphs must be read conjunctively. When that is done, para *(b)* qualifies or limits the generality of para *(a)* in two ways. First, it restricts debts to those which constitute a liability to pay damages and, secondly, it restricts debts to those where an organ of state is the debtor. On an ordinary reading of the definition it boils down to this. A debt is the liability of an organ of state to pay damages, arising from any cause of action.'

[15] In my view the correctness of Rall AJ's approach cannot be faulted. His approach, moreover, is consistent with the traditional justification for notice provisions, which Didcott J explained in *Mohlomi v Minister of Defence*[4] as follows:

[4] *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) para 9.

'An insistence on notices of the kind required by s 113(1) is by no means peculiar to the particular proceedings that it governs. Similar conditions precedent to the institution of actions are and have long been familiar features of our statutory terrain, especially the part occupied by departments of State, provincial administrations and local authorities once they become prospective defendants. The conventional explanation for demanding prior notification of any intention to sue such an organ of government is that, with its extensive activities and large staff which tends to shift, it needs the opportunity to investigate claims laid against it, to consider them responsibly and to decide, before getting embroiled in litigation at public expense, whether it ought to accept, reject or endeavour to settle them.'

[16] As correctly observed by Rall AJ in *Thabani Zulu*,[5] the evidence in damages cases is more likely to depend on the memory of people than on documents, and it is accordingly desirable that the defendant be given timeous notice of the proceedings in order for it to be able to investigate the contemplated claim, and to secure the necessary evidence. By contrast as Lever AJ put it in *Nicor Consulting* (para 26) 'a claim for payment in terms of a contract is more likely to rely on documentary evidence, such as contracts, delivery notes and correspondence, as well as possible legal issues, such as whether or not the relevant functionary had the necessary authority to enter into the contract or not'.[6] I accordingly hold, as the high court did, that as the first respondent's claim is not a damages claim the Act does not apply to it. It was therefore unnecessary for the first respondent to have complied with s 3 of the Act.

[17] That leaves the appellant's final contention, namely, that it had a bona fide defence to the first respondent's claim. The first respondent sued on a written agreement of cession in terms whereof a close corporation known as Blue Nightingale 472 Trading and Shuttering (trading as Faiaud Transport Services) ceded and assigned to the former its right, title and interest in and to all moneys due to it by the appellant under a contract for the installation of a water reticulation system at Mashamba in the Limpopo Province.

[5] Para 17.
[6] Lever AJ in *Nicor Consulting* para 26.

[18] In its founding affidavit the appellant set out its defence as follows:

'10.1 I aver that the Applicant does not owe the 1st Respondent an amount of R698 885-00 as indicated in the Writ of Execution and therefore intend to defend the action if any against the Applicant;

10.2 I aver further that the only amount brought to the attention of the Applicant for payment was an invoice of R215,259.04 which was duly paid under certificate no. 14 prepared on the 28th May 2009;

10.3 The Applicant is not formally informed of any other deliveries of materials to the site by the 1st Respondent which the Applicant is liable to pay as required under conditions of direct payment item 4 and 6 on the cession form.'

[19] The high court found that this response to the allegations in the particulars of claim lacked candour and amounted to nothing more than a bare denial that the amount claimed was owing. This finding cannot be faulted. In its answering affidavit the first respondent placed the appellant's allegations in dispute, more particularly that it had made payment of the amount of R215 259.04 in May 2009. In reply this was met by a response which amounted to a mere repetition of what was stated in the founding affidavit coupled with an averment that it is not necessary in rescission proceedings to fully deal with the merits of the case, or to prove the defence raised, and that 'it is sufficient to set out facts, which if established at the trial, would constitute a good defence'. But what had been set out by the municipal manager in his affidavit were not facts. They were bald averments. Nowhere in his affidavit does he state that he has personal knowledge of the contract in question or details of the reticulation project foundational to the contract. Nor, in the absence of personal knowledge, does he divulge the source of his knowledge. No confirmatory affidavit is filed by him in support of those bald averments. The unsubstantiated averments in the municipal manager's affidavit were thus wholly inadequate to support the appellant's assertion that it had a bona fide defence to the first respondent's claim.

[20] For these reasons the appeal must fail. In regard to the costs of the appeal, the first respondent asked that it be awarded costs on an attorney and client scale. In all the circumstances, however, I am not persuaded that such shortcomings as there may have been in the appellant's conduct are such as to warrant it being mulcted with a punitive order of costs by this court.

[21] In the result the appeal is dismissed with costs.

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D VAN ZYL

ACTING JUDGE OF APPEAL

APPEARANCES

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	Instructed by:
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