

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

HC-MD-CIV-ACT-CON-2019/00462

In the matter between:

**BICON NAMIBIA CONSULTING ENGINEERS
& PROJECT MANAGERS (PTY) LTD**

PLAINTIFF/RESPONDENT

and

NKURENKURU TOWN COUNCIL

DEFENDANT/APPLICANT

Neutral Citation: *Bicon Namibia Consulting Engineers & Project Managers (Pty) Ltd v Nkurenkuru Town Council* (HC-MD-CIV-ACT-CON-2019/00462) [2020] NAHCMD 323 (30 July 2020)

CORAM: MASUKU J

Heard: 30 June 2020

Delivered: 30 July 2020

Flynote: Civil Procedure – rescission of judgment – Rules of Court - Rule16 of the Rules of the High Court – requirements thereof discussed – Local Authorities Act, 1992 – compliance with requirements thereof regarding award of tenders – whether non-compliance therewith should found the basis for granting rescission of a default judgment.

Summary: The applicant, Nkurenkuru Town Council moved an application for the rescission of a judgment granted against it in this court by default.

There was no question that the process initiating the proceedings was served on the applicant. After the default judgment was granted, the applicant lodged an application for rescission in terms of rule 16 of the High Court Rules, which application was opposed by the respondent, Bicon Namibia Consulting Engineers & Project Managers (Pty) Ltd.

Held: that an applicant for rescission in terms of rule 16 has to show 'good cause', which has three requirements, namely, a reasonable explanation for the default; that the application for rescission is *bona fide*; and that the applicant has a *bona fide* defence to the plaintiff's claim.

Held that: the applicant, in the matter had failed to satisfy the court that there was a reasonable explanation for the delay in this matter. This was because of poor drafting, which left a lot of important matters and necessary detail unmentioned.

Held further: that an applicant must, in giving a reasonable explanation, take the court into its confidence and hide nothing from the court, even those facts that amount to lapses on its part. It is where the court is armed with comprehensive facts as to what happened that the court can exercise its discretion appropriately.

Held: that although badly pleaded, the applicant alleged on oath that there had been a breach of the procurement procedures outlined in the Local Authorities Act, 1992 and the Regulations made thereunder in the awarding of the contracts in question to the respondent.

Held that: an applicant, in establishing a *bona fide* defence, is not required to show that it has a stone wall defence. It is sufficient if it sets out averments, which if established at trial, would entitle the applicant to a defence.

Held further that: the applicant having alleged that there was non compliance with mandatory provisions regarding the award of contracts where local authorities are involved, this, according to the Supreme Court judgment of *President of Namibia v Anhui Foreign Economic Construction Group*

Corporation Ltd would found a basis for setting aside the award of the contracts. This meant that the applicant has a *bona fide* defence.

Held: that because the applicant had satisfied the court that it had a *bona fide* defence, the applicant could not, in the circumstances, be said not to have been *bona fide* in lodging the application.

Held that: where the applicant fails to show that there is a reasonable explanation for the delay, the court, where it finds that the applicant does have a *bona fide* defence, should adopt 'the better view', which posits that the failure to provide a reasonable and acceptable explanation for the delay should not be an absolute bar but a factor to be taken into account.

Held further: that although the applicant had failed to show a reasonable explanation for its delay, in view of the *bona fide* defence, which if proved, goes to the root of the principle of legality and the rule of law, should be allowed and not be foreclosed at this stage.

The court thus granted the application for rescission with costs, including costs of the respondent for the judgment by default.

ORDER

1. The default judgment entered by this court in favour of the Respondent in case No. HC-MD-CIV-ACT-CON-2019/00462, on 25 April 2019, is hereby rescinded and is set aside.
2. The Applicant is ordered to file its notice to defend within a period of seven (7) days from the date of this order.
3. The matter must thereafter, be allocated to a Managing Judge to manage the case further.
4. The Applicant is ordered to pay the costs of this application, consequent upon the employment of one instructing and one instructed legal practitioner.

5. The Applicant is further ordered to pay the Respondent's costs of the default judgment.
6. The application is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU J:

Introduction

[1] The sole question for determination in this application is whether the applicant, Nkurenkuru Town Council, is entitled, by virtue of the papers filed of record, to an order rescinding and setting aside a judgment of this court, in favour of the respondent, Bicon Namibia Engineering & Project Managers (Pty) Ltd, granted by default on 25 April 2019.

[2] For the purposes of this judgment, the parties will be referred to as follows: Nkurenkuru Town Council, will be referred to as 'the applicant' and Bicon, as 'the respondent.

[3] It is perhaps necessary to mention that the respondent vehemently opposes the application for rescission and on grounds that will be adverted to as the judgment unfolds.

Background

[4] It would appear that the facts giving rise to this application are common cause. The parties entered into a partly written and partly oral agreement on 8 August 2011. In terms of the said agreement, the respondent was contracted to offer professional engineering services and supply of technical drawings/designs for the applicant.

[5] It is the respondent's case that it duly complied with its part of the bargain regarding the said contract but that the applicant, despite the former issuing an invoice, on 23 February 2016 in the amount of N\$ 1 113 136.36, the applicant failed to effect payment in the said amount, despite demand.

[6] It is the respondent's further case that the applicant is indebted to it in the amount of N\$ 358 136.05, interest thereon and costs. This amount relates to another claim and in respect of which the respondent claims that it and the applicant, in October 2015 entered into another agreement for the rendering of professional engineering services and supply of technical drawings and designs. The respondent again alleges that it complied with its undertakings in relation to the said contract, but the applicant did not. It there claimed the amount stated at the beginning of this paragraph.

[7] The combined summons, issued by the respondent, incorporating both claims, was duly served on the applicant on 13 February 2019. According to the return of service, the said process was served on a Mr. Henrich Mukuve, described as the Managing Director of the applicant. It is common cause that despite this service, which is not denied by the applicant, the suit was not defended.

[8] In the face of the absence of a notice of intention to defend, the respondent, as it was entitled to, moved an application for judgment by default. That application served before Ueitele J, who was satisfied that the papers were in order and on 14 March 2019, granted the respondent's claim by default.

Basis of the application

[9] In terms of the founding affidavit filed by the applicant, and which is deposed to by Mr. Mukuve, referred to above and confirmed by Mr. Petrus Sikongo Sindimba, the Chief Executive Officer of the applicant, the application is brought in terms of the provisions of rule 16 of this court's rules.

[10] Mr. Mukuve, in his affidavit, denies that he is the Managing Director of the applicant as alleged in the return of service. He states that he is the Manager Finance, HR and Administration of the applicant. In essence, he admits service of the process but alleges that the technical person responsible for the project, a Mr. Shihinga, was, at the time of service of the process, on compassionate leave as his child had passed on. On return, 'sometime in February 2019' it is Mr. Sikongo's case that he requested Mr. Shihinga to compile a report on the process served.

[11] Thereafter, he continues, a report was received and a decision was made to notify the Ministry of Urban and Rural Development, with a view to seeking legal assistance from the Ministry. On 23 April 2019, he continues, a letter was dispatched to the Ministry, encompassing the report so to speak, compiled by Mr. Shihinga. The Ministry referred the matter to the Office of the Government Attorney on 8 May 2020, and counsel was instructed to consider the matter and prepare an application for rescission.

[12] It is the applicant's further case that it was not in wilful default in defending the matter and that it is plain from what is stated above that at all material times, it was desirous of defending the claim. Whilst accepting that it does not have a perfect explanation for the delay, the applicant states that the delay was not motivated by any disregard of the court and its processes.

[13] The applicant further deposes that it is facing financial constraints, which among other things, resulted in the costs of the works by the respondent being reduced significantly. This financial embarrassment if I can refer to it as such, so the applicant contends, resulted in it not having funds to pay for legal services and had to go cap in hand, so to speak, to the Ministry, to seek assistance with the defence of the matter.

[14] The applicant further states, albeit in veiled terms, that there was non-compliance with procurement laws related to local authorities, considering that the money in question, for the projects in issue, is sourced from public funds. The applicant, in what appears to be an appeal to the court's conscience, further alleged that the court should have regard to the public interest in

dealing with this matter and take into account the 'current economic situation that the country is facing, for the matter to go to trial.' The applicant appears to allege, again in veiled terms, that the amounts claimed were beyond the charges contemplated by law.

[15] In dealing with good cause, the applicant chose to incorporate what it had stated in regard to the wilful default, recounted above. The applicant states that good cause exists in terms of the common law for the rescission of the default judgment, which I must confess, I do not understand in the context of this matter.

[16] Turning to address the issue of a *bona fide* defence, the applicant states on oath that the contract entered into by the parties was not in compliance with the provisions of s 31A of the Local Authorities Act, 1992. That provision, stripped to the bones, requires that any contract entered into by a local authority, pursuant to a resolution of a local authority council, shall be signed by the chief executive officer of the local authority or town council. In this case, the applicant states, the said contract, was not so signed.

[17] The applicant further alleges that there was also non-compliance with the regulations, particularly 19 and 20. In this regard, the applicant states that there was no proper award of the consulting work to the respondent by the Local Tender Board as contemplated by regulation 19. It is the applicant's further case that there was no exemption granted by the Local Tender Board in procuring the respondent's services, not having complied with the provisions of the regulations. In sum, on this aspect, the applicant states that the procurement evidenced by letter dated 21 November 2014 was contrary to the statutory scheme and thus void *ab initio*.

[18] As a parting shot on this issue, the applicant submits that the non-compliance with the relevant laws regarding the procurement of the respondent's services should not be condoned, particularly viewed from the prism that taxpayers and ratepayers shall be affected negatively if the application was to be refused. Finally, the applicant states that it filed security as required by rule 16(2) in the amount of N\$ 5000. It accordingly prays for

the judgment to be set aside and for it to be granted an opportunity to defend the matter.

The respondent's case

[19] The respondent's answer to the application, is deposed to by Mr. Holger Von Leipzig, a director of the respondent. I will, for purposes of this application, deal directly with the issues that impact on the application for rescission. I do so considering that the respondent gave a background regarding the dealings between the parties. Where that background becomes necessary, reference, to the limited extent, may be made thereto.

[20] In addressing the merits of the application for rescission, it is the respondent's position that the applicant failed to make out a case for rescission, either in terms of rule 16 or the common law and that properly considered, compliance with the requirements of neither was met by the applicant. The respondent further points out that the relief sought by the applicant is somewhat at variance. This is because in one part it seeks leave to file a notice to defend, whereas in the other, it seeks leave to file its plea.

[21] Regarding Mr. Shihinga's bereavement as alleged by the applicant in its papers, the respondent, whilst professing no knowledge of same, protest that the best evidence relating to the bereavement, is not placed before court to confirm the said incident. It is the respondent's case that both Messrs. Shihinga and Sindimba were aware of the project and had been involved in it. In this regard, the court was referred to an annexure, HVL 25, to record Mr. Sindimba's 'self-evident knowledge' of the project, as the respondent phrased it.

[22] The respondent punches holes in the manner in which the receipt of the summons is dealt with by the applicants. It is recorded in this regard that there is no mention of whether Mr. Sindimba was informed about the combined summons at the time and the latter makes no mention of this fact at all in his affidavit. A further issue raised is that there is no reason advanced as to why both Messrs. Mukuve and Sindimba did not defend the matter,

particularly in light of the time by which the matter should have been defended as stipulated in the summons.

[23] The respondent further takes issue with the fact that there are no time lines given regarding the actions taken eventually towards the defence of the matter nor are there valid reasons given by the applicants why the matter was not defended within the stipulated time periods. In this further regard, no information is placed before court regarding the report that was compiled and when the decision to seek legal assistance as alleged was made. No particular information is placed before court as to why the matter was not defended.

[24] The respondent further cries foul that the applicant was chary with information as the court is not informed of many important events, not less, including when the matter was referred to the Ministry and later to the Government Attorney. There is no information as to when counsel was instructed. Furthermore, no explanation is tendered as to why the application was only moved on 7 June 2020, when the affidavits were signed on 23 May 2020.

[25] It is the respondent's case that the applicant is in wilful default in defending the matter and that it is plain that the applicant flagrantly disregarded the court's rules and processes. As a further consequence, the respondent states that in the circumstances, there is no sufficient or reasonable explanation provided by the applicant for its default. The court, should, in view of the foregoing, so claims the respondent, not come to the applicant's rescue.

[26] Taken as a whole, it is the respondent's case that the applicant's explanation is contradictory and should not be accepted. This is because the first explanation is the absence of Mr. Shihinga and later, that there were no funds to pay for legal services. When these explanations are placed in the scales, so the respondent alleges, it is clear that the applicant is 'looking for excuses rather than disclosing a bona fide defence.'¹

¹ Para 96 of the answering affidavit.

[27] Regarding the alleged non-compliance with procurement laws, the respondent denies and pours scorn over those allegations. It is the respondent's case that the applicant's letter dated 16 June 2010 referred to the relevant tender that had been approved, hence the conclusion of the written agreements. As an alternative, it is the respondent's case that if the procurement laws were not complied with as alleged, the applicant has not identified the respects in which there was non-compliance therewith. In any event, further alleges the respondent, the applicant is estopped from relying on such non-compliance and that the court should turn its face from the applicant's stance in this regard and refuse the application.

[28] On the question of public interest, the respondent adopts the position that it is in the public interest that entities such as the applicant pay for services rendered to them and that they should comply with contracts signed and undertakings made. It would not be in the public interest, says the respondent, for this matter to go to trial because the applicant does not have a *bona fide* defence to the applicant's claim. Furthermore, the respondent denies that it did not render the services claimed for nor as alleged that the services were charged beyond the value contemplated by the Act.

Determination

[29] It is clear from the applicant's papers that the applicant relies for the relief it seeks, on the provisions of rule 16. In this respect, it is necessary to quote the relevant provisions. It reads as follows:

'(1) A defendant may, within 20 days after he or she has knowledge of the judgment referred to in rule 15(3) and on notice to the plaintiff, apply to the court to set aside that judgment.

(2) The court may, on good cause shown and on the defendant furnishing to the plaintiff security for the payment of the costs of the default judgment and of the application in the amount of N\$5 000, set aside the default judgment on such terms as to it seems reasonable and fair, except that –

- (a) the party in whose favour default judgment has been granted may, by consent on writing lodged with the registrar, waive compliance with the requirement for security; or
 - (b) in the absence of the written consent referred to in paragraph (a), the court may on good cause shown dispense with the requirement for security.
- (3) A person who applies for rescission of a default judgment as contemplated in subrule (1) must –
- (a) make application for such rescission by notice of motion, supported by affidavits as to the facts on which the applicant relies for relief, including the grounds, if any, for dispensing with the requirement for security;
 - (b) give notice to all parties whose interests may be affected by the rescission sought; and
 - (c) make the application within 20 days after becoming aware of the default judgment.’

[30] In view of the discussion above, it is clear that the issue of security for costs is not relevant as the applicant filed security for costs required by the rules of court. It also does not appear that the respondent takes issue with the time when the applicant moved the application, namely, whether the 20 day period, appearing in rule 16(1)(a) and (3)(c) was complied with. I do not, in the circumstances, find it necessary, to deal with that issue either. There can also be no doubt that the applicant complied with the provisions of subrule (3) above.

[31] Having engaged in a process of elimination, the only issue that the court has to determine, is whether the applicant has shown good cause for the default judgment to be rescinded. In dealing with the element of good cause, our courts² have adopted and relied on the *cause celebre* judgment of *Grant v Plumbers*,³ where it was pointed out that in order to hold that good cause has been established, the applicant must:

- (a) give a reasonable explanation for the default;
- (b) show that the application for rescission must be *bona fide*; and

² Minister of Home Affairs, Minister Ekanjo v Van Der Berg 2008 (2) NR 548 (SC) p 573.

³ 1949 (2) SA 470 (O).

(c) show that he or she has a *bona fide* defence to the plaintiff's claim. In this regard, it suffices if the applicant can show to the satisfaction of the court that the averments he or she makes in the application, if proved at trial, would entitle him or her to the relief asked for. Furthermore, the applicant need not fully deal with the merits of the case and produce evidence that the probabilities weigh in his or her favour. See also *Krauer and Another v Metger (2)*.⁴

[32] I need to consider whether the applicant has fully met the requirements for good cause as stated above and it is to that enquiry that I turn.

Reasonable explanation for default

[33] There is no need to beat about the bush. The applicant has filed a wholly unsatisfactory affidavit regarding the reasonable explanation for the default. This shortcoming rightly attracted trenchant criticism from the respondent. The explanation is lacking in detail as it does in content. No specific dates are given as to when some steps referred to were taken. There is also no clear or convincing explanation as to why the notice to defend was not filed.

[34] Part of the explanation proffered, is that one of the officials responsible for the project lost a child, which is in any circumstance, a regrettable incident. That does not, however, mean that the applicant must be chary in making the necessary disclosures relating to that incident. There is no indication when the said officer was on compassionate leave and when he resumed duty. In point of fact, the officer concerned says nothing at all to confirm even this sad event.

[35] It has been stated times without number that an applicant in a case such as this, as in the case of condonation, must make clean breast to the court, hoarding and hiding nothing from the court, even if there may have been lapses on the part of the applicant. These must be owned up to by the applicant. The court is able to properly exercise its discretion in favour of a

⁴ 1990 NR 135.

party where that party has fully taken the court in its confidence. In this case, the applicant's explanation has gaping holes that render exercising the court's discretion very difficult. Mr. Phatela for the applicant was made very much alive to these difficulties during the hearing.

[36] In this regard, it is well to refer to *Katzao v Trustco Group International Ltd and Another*⁵ where the court, dealing with the explanation for default said, 'In examining an applicant's explanation for his default, it has been held that it is clearly incumbent upon an applicant to disclose with a degree of particularity what it was that prevented him from attending court or being represented in court.' I identify myself with this line of reasoning.

[37] Mr Phatela, who appears to have been drafted in the matter after the papers had been filed, was literally faced with a *fait accompli*. In argument, he made allegations about a possibility of some of the officials colluding in the matter eventually not being defended. These are allegations that the court is not properly able or authorised to put in the mix for the reason that they have not been placed on affidavit for those implicated to be allowed to deal with the allegations. I will, accordingly say no more of them in this connection or at all.

[38] I come to the considered view that the applicant has failed to tender a reasonable explanation as to why it did not defend the matter. The issue of it not having resources and having to go cap in hand to the Ministry, is not accompanied with particularity and necessary detail to create a clear picture in the mind of the court as to what really went on. There is accordingly no reasonable explanation placed before me in this matter. The applicant could and should have done a lot better in prosecuting this part of the application.

Bona fide defence to the respondent's claim

[39] In this part of the application, the applicant claims in its papers that the applicable law and regulations relating to procurement of goods and services by town councils was not followed in the awarding of the tender to the respondent. In particular, mention is made of s 31A of the Local Authorities

⁵ 2015 (2) NR 402 (HC) para 39.

Act and regulations 19 and 20, which deal with the involvement of the Local Tender Board.

[40] Ms. De Jager, for the respondent, again correctly criticised the applicant for lack of particularity. In this regard, reference was made to s 31A 'of the Act', without specifying which Act. Furthermore, reference was made to regulations 19 and 20, without again stating which regulations in particular. The reader, including the respondent and the court, is left to surmise as to which pieces of legislation and subordinate legislation are referred to. This is out of order. Parties and the court should not be left to speculate on primary legislation and subordinate legislation referred to in papers filed before court. These must be fully cited, chapter and verse, if not page number, where appropriate.

[41] Despite the lack of specificity, the respondent appears to have concluded and not unreasonably, that the Act in question was the Local Authorities Act, 1992⁶ ('the Act') and the regulations made thereunder. A further criticism levelled again by the respondent is that the respects in which it is alleged that these legal provisions were breached is wanting.

[42] I am first to admit, and this seems to be a recurring theme, that the applicant's papers were poorly drafted. The papers are accompanied by a poor draftmanship and lack of particularity, which characterises every sinew of this judgment. The applicants should have done better.

[43] Despite the criticism levelled, what the applicant does say in its founding affidavit, is that the respondent did not enter into the contract sued upon in terms of s 31A of the Act. The said provision reads as follows:

'Any contract to be entered into by a local authority council pursuant to a resolution of the local authority shall be signed by the chief executive officer of the local authority and be co-signed by – (a) in the case of a municipal council or town council, the chairperson of the management committee or any staff member of that council generally or specially authorised thereto by the council concerned; (b) in the

⁶ Act No. 23 of 1992.

case of a village council, the chairperson thereof or any staff member of that council generally or specially authorised thereto by that council, and any contract so signed shall be deemed to have been duly executed on behalf of the local authority council.'

[44] It is alleged on the applicant's behalf that this provision is peremptory and in this case, the Chief Executive Officer of the applicant did not sign the contract with the respondent, neither did the chairperson of the management committee co-sign the contracts in question.

[45] The applicant further alleges that regulation 19 requires contracts awarded by local authorities should be awarded by a local Tender Board. This, the applicant claims, was not done in respect of the contracts forming the basis of the default judgment granted. This, the applicant claims, constitutes a *bona fide* defence to the respondent's claims.

[46] I have, in dealing with the respondent's case earlier in the judgment, stated what the respondent's position on this issue is. It is important to mention that allegations that certain laws and regulations were flouted in the signature of the contract is not an issue that the court would take lightly. In saying so, the court must not be understood to say that it is a finding at this stage that there was, as alleged by the applicant, non-compliance that would serve to vitiate the contracts in question and thus affect the default judgment granted.

[47] It must be recalled that according to *Grant*, an applicant must set out averments, which, if established at trial, would entitle him to a defence. 'He need not deal with the merits of the case and produce evidence that the probabilities are actually in his favour'. This shows that the bar is not, at this stage very high and that the applicant need not show that it has a stone wall defence to the claim. There is thus no need, where the applicant meets the threshold, to deal with the matter at this stage as if the actual trial is underway.

[48] The issue of estoppel that the respondent raises in its papers, can, in my considered view, be properly dealt with at the stage of the trial, with the

applicant having been granted leave to defend, as it has shown that its defence carries a prospect of success at the trial.

[49] In view of the considerations captured above, I come to the conclusion that when the matter is considered as a whole, the applicant has met the requirement relating to a *bona fide* defence to the claim. It has, in my view met the standard stated in this regard in *Grant*.

[50] Having regard to the foregoing, particularly the finding that the applicant has satisfied the leg relating to the *bona fides* of its defence, I am of the considered view, that that finding is not inconsistent with a conclusion that the applicant cannot be said to be *mala fide* in bringing this application. I am of the considered view that a finding that the application is being brought for the express purpose of delaying the respondent's enjoyment of its judgment, in the circumstances, would be perverse. I accordingly find for the applicant in this regard as well.

[51] The next question to answer is what should happen in the circumstances, where the court has found that there is no reasonable explanation for the delay but where the court has, at the same time, found that the applicant has shown that it has a *bona fide* defence to the claim and that it cannot be said to have launched this application for purposes of delay?

[52] It must, in answering this question, be remembered that in *Grant*, it was stated that where there is gross negligence on the part of the applicant, the court should not come to the applicant's assistance. There has been no such allegation or finding of fact in the instant case, I should pertinently mention.

[53] To answer this question, I refer to the learned authors Herbstein & Van Winsen⁷ where the learned authors deal with the issue as follows:

'It has been held that there is no room for the exercise of a discretion in favour of an applicant who was in wilful default, but that approach has been

⁷ Herbstein & Van Winsen, The Civil Practice of the Supreme Court of South Africa, 4th ed, Juta & Co, 1997, p691-692.

questioned and the better view seems to be that wilful default or gross negligence on the part of an applicant for default will not constitute an absolute bar to the grant of rescission; rather, it is but a factor – albeit a weighty one – to take into account, together with the merits of the defence raised to the plaintiff's claim, in the determination whether good cause for rescission has been shown.'

[54] I am inclined to the 'better view' expressed above. I am of the considered view that although there has been a very poor explanation of the delay by the applicant in the present case, which appears to boil down to poor draftsmanship of the papers on behalf of the applicant, the merits of the defence raised by the applicant would appear to be formidable, if proved at the trial.

[55] In this regard, I take into account, without finding it as a fact that the applicant states that the said provisions of the Act and the regulations were not followed, the comments of the Supreme Court in *President of Namibia v Anhui Foreign Economic Construction Group Corporation Ltd*,⁸ bear resonance. The Supreme Court commented as follows in relation to a contract that had been awarded and challenged:

'It is common cause that the provisions of the Tender Board Act had not been followed and would need to be followed for valid procurement in capital construction projects involving Government. It is also clear from the affidavit by the Minister of Finance that Treasury approval had also not been granted under s 17 of the State Finance Act. That failure to follow the procedures set out in the Tender Board Act is fatal to the validity of an award made by the Ministry or its Permanent Secretary. For this reason alone, the award set out in the Permanent Secretary's letter of 3 December 2015, viewed in context with his letter of the same date to the NAC, is unlawful and invalid and should be set aside.'

[56] What is plain from the above judgment, is that where there has been failure to follow the mandatory provisions of a piece of legislation governing the award of tenders, that may, on its own, found a legal basis for the setting the tender award aside. In a case like this, where such a defence is alleged by the applicant, and which the court is not armed in this type of proceedings,

⁸ (SA 59 – 2016) [2017] SA NASC (28 March 2017), para 41.

with the forensic tools necessary, the court should, even if there be no reasonable explanation for the delay in defending the matter, grant the application for rescission.

[57] In this regard, it would be just to err on the side of caution and allow the defence of the matter. If at the end, the applicant is unsuccessful, it will be served its just desert, added to it the cherry on top, namely, an unfavourable costs order. It would leave an unpalatable aftertaste to my judicial palate to refuse the application at this stage where the applicant may well be able to show that there was a breach of the law in the awarding of the contracts to the respondent *in casu*. The rule of law and the principle of legality, should, where properly and genuinely raised, be given a fair chance to be investigated and where appropriate, be ruled out that than to be completely foreclosed by refusing the application at this stage.

[58] In the premises, whatever shortcomings are evident in the applicant's papers regarding the explanation for its delay, I am of the view that it is safer and in full accord with the dictates of justice to adopt the better view and to allow the applicant, for the reasons advanced above, to have its day in court and to prosecute its defence. This should leave the taxpayers in this case, fully satisfied, whichever direction the final judgment goes, that justice was served. If the public purse has to be committed to paying the respondent's claim, it must be in terms of the relevant laws and any reasonable suspicions or allegations to the contrary, must have been excluded.

Costs

[59] I now move on to the issue of costs. A party in the applicant's shoes literally seeks an indulgence from the court. Even though it be successful in the application, that does not, apart from other serious considerations, preserve it from liability for costs of its successful application.

[60] In the present matter, it is very clear, even from the discussion in the judgment that the respondent was amply justified in opposing this application and its opposition cannot be described as being cantankerous, ill-founded or

abusive. It was well within its rights to oppose the application and advanced good grounds for doing so.

[61] In the premises, it is proper that the applicant should despite its success, pay the respondent's costs, including the costs of obtaining the default judgment.

Admonition

[62] It remains for the court to throw a word of caution to public officers to ensure that they do not treat the business of their employers with levity. The requisite degree of seriousness and promptitude in dealing with such matters that stand to cost the employer if not properly or conscientiously attended to, is necessary and desirable. The bungling that took place in this matter is a grave cause for concern and should ideally be met with some sanction for those who may, after an internal enquiry, be found to have dropped the ball. This measure is particularly poignant when one has regard to the very trying times of austerity in which we find ourselves as a country and region.

Order

[63] In the premises, and having regard to the issues to discussed above, it appears that the appropriate order to grant is the following:

1. The default judgment entered by this court in favour of the Respondent in case No. HC-MD-CIV-ACT-CON-2019/00462, on 25 April 2019, is hereby rescinded and is set aside.
2. The Applicant is ordered to file its notice to defend within a period of seven (7) days from the date of this order.
3. The matter must thereafter, be allocated to a Managing Judge to manage the case further.
4. The Applicant is ordered to pay the costs of this application, consequent upon the employment of one instructing and one instructed legal practitioner.

5. The Applicant is further ordered to pay the Respondent's costs of the default judgment.
6. The application is removed from the roll and is regarded as finalised.

T.S. Masuku
Judge

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