

SOUTH AFRICA / JUDGMENT

Bellini Estate Body Corporate v Emalahleni Local Municipality (1164/2022) [2025] ZAMPMHC 6 (31 January 2025) [2025] ZAMPMHC 6

COURT

Middelburg High Court, Mpumalanga

BEFORE

Vukeya

CASE / FILE NUMBER

1164/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA

DIVISION: MIDDELBURG LOCAL SEAT

CASE NO: 1164/2022

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED

DATE: 31/1/2025

SIGNATURE

In the matter between:

BELLINI
ESTATE BODY CORPORATE
APPLICANT
And
EMALAHLENI
LOCAL MUNICIPALITY
RESPONDENT
IN

RE: EMALAHLENI
LOCAL MUNICIPALITY
PLAINTIFF
BELLINI
ESTATE BODY CORPORATE
DEFENDANT

JUDGMENT

Vukeya J

[1] This is an application for the rescission of a default judgment granted by this court in favour of Emalahleni Local Municipality (“the respondent”) against Bellini Estate Body Corporate (“the applicant”) on 1 September 2023 (stamped on 12 September 2023). Placing its reliance on Rule 42 of the Uniform Rules of Court (“the rules”), the applicant avers that the judgment was granted erroneously by the court and that the court may not have been aware of an error that existed when granting the

judgment.

[2] The applicant avers that the error occurred when default judgment was sought and granted on the strength of a summons that was not served at its domicile citandi et executandi. It also denies that the person on whom the summons was served, is known to it or its managing agent. According to the applicant, the sheriff served the summons on a third party who has no involvement in the business of the applicant.

[3] It is the applicant’s submission that the application is also brought in terms of Rule 31 (2) (b). It alleges that it has substantial defences against the respondent’s claims and that the respondent has no claim against the applicant in respect of Municipal services allegedly supplied by it and that the monies claimed should have been collected from the applicant’s members. According to the applicant the Municipality has not complied with its obligations in terms of section 95 of the Local Government: Municipal Systems Act 32 of 2000 (“the Systems Act”), and is in breach of this section in that the statements of account do not include all of the prescribed information required in terms of this section of the Act.

[4] The respondent opposed the application for rescission of judgment and filed its answering affidavit. In its answering affidavit, it alleged that the applicant has failed to illustrate that there is good cause to have the judgment rescinded. It makes the following contentions:

4.1. The applicant did not provide a reasonable explanation for the delay in entering a defence,

4.2. The applicant has failed to show that the defences are bona fide and have not been made with the intention to delay the plaintiff’s claim, and

4.3. The applicant has also failed to demonstrate that on the merits, there is a bona fide defence that prima facie carries some prospects of success.

- [5] A replying affidavit was filed by the applicant responding ad seriatum to the respondent's answering affidavit. Amongst other averments made in the replying affidavit was that the applicant sought to have the default judgment rescinded on two grounds, namely, that the judgment was obtained erroneously and that the applicant has a substantial defence to the respondent's claim. The details of the averments made in the replying affidavit have become a cause of disagreement in an interlocutory application the details of which I discuss hereunder.
- [6] It is therefore prudent at this point, that I pause and mention that the respondent seeks an order in terms of Rule 6 (15) to strike out the applicant's replying affidavit on the grounds that, it introduces new matter. Before proceeding to determine the Rescission application, I first deal with the application to strike out hereunder. For purposes of the determination of this application, I shall continue to refer to the parties as I refer to them in the rescission application.

Application to strike out

- [7] In terms of Rule 6 (15) the court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court may not grant the application unless it is satisfied that the applicant will be prejudiced if the application is not granted.
- [8] The respondent seeks an order to strike out the applicant's replying affidavit on the ground that it introduces new matter and constitutes an entirely new basis for the granting of condonation that was not raised in the founding affidavit. The respondent avers that one of the fundamental pillars of the applicant's rescission application is that it cannot be liable for the amounts alleged to be owing to the respondent on the basis that the respondent failed to comply with the terms of section 95 of the Systems Act, by not providing the applicant with statements. This implies that the respondent has not rendered invoices to it and that liability shall ensue at the rendition of such invoices.
- [9] The application to strike out is directed at the following paragraphs:
- 9.1. The third sentence in paragraph six and its remainder;
- 9.2. Paragraph 7 and its annexure "RA1";
- 9.3. Paragraphs 8 to 16, 34 and 36 up to and including 38.
- [10] The paragraphs, which are the subject matter of this application, are 6 – 16, 34, and 36 up to 38 of the replying affidavit of the applicant. The defences raised in these paragraphs are summarized hereunder.

- [11] The applicant avers that it was not in wilful default for not opposing the action as it has a good and bona fide defence to the respondent's claim and it has prospects of success. According to the applicant, the judgment granted against it by default was so granted despite a dispute having been lodged with the respondent on 15 November 2017, 24 July 2018, 15 August 2018, 6 September 2018 and these disputes remain unresolved. The disputes were based on the fact that the applicant was being double charged by the respondent.
- [12] The respondent contends in the striking out application that, in its replying affidavit the applicant alleges that it had received municipal statements, and this, the respondent laments, immediately contradicts paragraphs 36 and 37 of the founding affidavit. I pause to highlight these two paragraphs and they read as follows:
- "36. As recorded above, the respondent is in breach of these provisions. A good example of the respondent's breach is annexure "A" to its particulars of claim. In paragraph 12 the respondent pleads that annexure "A" is "the latest consumer account. One would therefore expect annexure "A" to comply with the prescripts of the Systems Act. A perusal of annexure "A" illustrates that it includes almost none of the prescribed information.*
37. As such, and only to the extent that the applicant may be liable to pay (which remains disputed) any municipal charges, such liability can only arise once valid invoices are issued."
- [13] There were, according to the replying affidavit, power cuts during May 2019 and September 2021 that prompted the applicant to bring various urgent applications to have power restored. The applicant further avers that it made certain payments under protest while it had lodged disputes and raised queries against the billing process and the amounts charged by the respondent. According to the replying affidavit of the applicant, it addressed many emails to the respondent in which it queried the respondent's billing process.
- [14] In its answering affidavit against the application to strike out, the applicant stated that the reply provided comes as a result of the averments made by the respondent in its answering affidavit, particularly, paragraphs 30 and 31. These paragraphs read thus:
- "30. ...the applicant should have endeavoured to pursue the correct avenue in disputing the municipal charges at the instance of their occurrence, which have been to lodge a formal dispute following receipt of the municipal account statements. These processes are catered for in the Municipal Systems Act No. 32 of 2000 which the applicant is familiar with as it refers to same in its affidavit.*
31. To this end, the applicant does not state that any formal disputes relating to municipal charges have been formally lodged by the applicant and it must be accepted that the amounts charged are not in dispute. Should the amounts charged not be in dispute, it cannot be found that the applicant has any bona fide defence."

- [15] The applicant further contends that the respondent's response to these allegations is incorrect as the applicant, in the replying affidavit, presented evidence to show the extent of its engagements and the fact that the disputes raised by it remain unresolved. The applicant further denied that the replying affidavit raises matter that also contradicts the founding affidavit and asserts that the allegation of a contradiction is the result of the respondent's incorrect understanding of the case advanced by the applicant.
- [16] In its heads of argument, the applicant submitted that the respondent ought to have brought an application in terms of Rule 6(5)
- (e) to file a further affidavit to deal with any alleged further matter raised in the replying affidavit. It argued that the respondent is not in a position to contend that it has been prejudiced as it had not made an application to court to file further affidavits when it could have done so. The applicant referred the court, amongst others, to the case of *Tantoush v Refugee Appeal Board and Others*
- [2007] ZAGPHC 191; 2008 (1) SA 232 (T) in which Murphy J remarked as follows at paragraph 51 of his

judgment:

"[51] As these averments were made in the replying affidavit the second respondent strictly speaking had no entitlement to respond to them and in the normal course they could not be denied or explained by the respondents. Nevertheless, if the allegations by Ms Peer were untrue, or if an adequate explanation were possible, leave of the court could and should have been sought to answer them - see Sigaba v Minister of Defence and Police and Another 1980

- (3) SA 535 (Tk) at 550F. The respondents did not request to be given an opportunity to deal with these averments. Their failure to do so tilts the probabilities towards the applicant's version that the consultation occurred, that it lasted 20 minutes and that Ms Bhamjee objected."
- [17] The respondent, in its heads of argument, contended that the applicant failed to make out its case in the founding papers. Relying on the case of *Obsidian Health (Pty) Ltd v Makhuvha and Another*, (33905/2019) [2019] ZAGPJHC 395 (25 October 2019 at para 18 and 19, the respondent argued that the applicant in motion applications

cannot make out a new case in reply especially where the contents of the reply contradict what has been set out in the founding affidavit. Windel J said the following in the above judgment:

"[18] An applicant is bound by the case made out in its founding affidavit. It must stand or fall by the allegations contained in its founding affidavit and it is not allowed to make out its case in the replying affidavit. A court will not allow the introduction of new matter in reply when no case at all was made out in the original application or if the reply reveals a new cause of action. In Poseidon Ships Agencies (Pty) Ltd v African Coaling and Exporting Co (Durban) Pty and Another[5] Broome J held as follows;

"The correct approach to the problem was enunciated clearly by CANEY J in *Bayat and Others v Hansa and Another* 1955

(3) SA 547 (N) at 553D:

'... the principle which I think can be summarised as follows... that an applicant for relief must (save in exceptional circumstances) make his case and produce all the evidence he desires to use in support of it, in his affidavits filed with the notice of motion, whether he is moving *ex parte* or on notice to the respondent, and is not permitted to supplement it in his replying affidavits (the purpose of which is to reply to averments made by the respondent in his answering affidavits), still less make a new case in his replying affidavits.'

It is true that in certain circumstances it would be unjust to confine an applicant to the contents of his launching affidavit. An example of further highly relevant facts coming to light later, and being introduced despite objection, is to be found in *Registrar of Insurance v Johannesburg Insurance Co Ltd* (1) 1962 (4) SA 546 (IV) where, in an application made by the Registrar of Insurance for the liquidation of the respondent insurance company, a report prepared by a firm of accountants was admitted. Another example of the Court authorising an applicant to introduce new material in reply is to be found in *Kleynhans v Van der Westhuizen* NO 1970

(1) SA 565 (0) at 568E where the Court considered that, as the ramifications of the respondent's affairs were extensive and complex, it was impossible for the applicant to have had all the facts at his disposal before he launched sequestration proceedings. See also *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others* 1974

(4) SA 362 (T) at 369A - B.

But none of these cases go the length of permitting an applicant to make a case in reply when no case at all was made out in the original application. None is authority for the proposition that a totally defective application can be rectified in reply. In my view it is essential for applicant to make out a *prima facie* case in its founding affidavit."

[18] The respondent therefore prays for the particular paragraphs referred to above, to be struck out from the applicant's replying affidavit.

[19] It is trite that the court has a discretion in an application to strike out matter from an affidavit found to be scandalous, vexatious or irrelevant. The respondents has argued that the listed paragraphs they wish to be struck out introduce new matter and constitutes an entirely new basis for the granting of condonation.

[20] In *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others* 2013 (2) SA 204 (SCA) the court said:

"[26] Counsel for Finishing Touch urged us to reject this explanation as it had been raised for the first time in the replying affidavit. It is true that the explanation was proffered by BHP in reply, but the rule that all the necessary allegations upon which the applicant relies must appear in his or her founding affidavit is not an absolute one. The court has a discretion to allow new matter in a replying affidavit in

exceptional circumstances. A distinction must be drawn between a case in which the new material is first brought to light by the applicant who knew of it at the time when his founding affidavit was prepared, and one in which facts alleged in the respondent's answering affidavit reveal the existence or possible existence of a further ground for the relief sought by the applicant. (See Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger 1976

(2) SA 701 (D) at 705A – B)

... I also cannot comprehend how the state respondents' waiver of compliance, even if there were any non-compliance with the rule relating to service, could avail Finishing Touch who could never have been prejudiced by it.”

[21] What is of importance is that the rule is not absolute. Greater flexibility is permitted because the rule may be deviated from under exceptional circumstances and at the discretion of the court as long as there is no prejudice to the other party. In trying to define the exceptional circumstances that may arise where a court in its discretion may allow new matter in reply, as can be seen above, the SCA made a distinction between circumstances where new facts have been brought to light in a replying affidavit for the first time:

- 1) That were known to the applicant at the time of deposing to the founding affidavit; and
- 2) Circumstances where facts which are alleged in the answering affidavit reveal the existence or possible existence of a further ground for the relief which the applicant seeks.

[22] It is trite that an applicant must make out his or her case in the founding affidavit and may not do so in the replying affidavit. The introduction of new matter will not be allowed if the new matter sought to be introduced amounts to an abandonment of the existing claim and the substitution thereof of a fresh and completely different claim based on a different cause of action. (See Triomf Kunsmis (Edms) Bpk v AE & CI Bpk 1984 (2) SA 261 (WLD) at 270A and Johannesburg City Council v Bruma Thirty-Two (Pty) Ltd 1984 (4) SA 87 (T) at 91F – 92F). One of the important consideration is whether the applicant was in possession of the new facts when the

founding affidavit was prepared or whether the answer broadened the

issues.

[23] It is difficult to find that the applicant has introduced new matter in the replying affidavit, which is not in its founding affidavit. I expand on this statement hereunder. In defence, to the striking out, the applicant avers that the respondent prompted it to do so by stating that it should have endeavoured to pursue the correct avenue in disputing the municipal charges at the instance of their occurrence. I agree with the applicant because this particular averment suggests that the applicant has failed to pursue the correct avenues to dispute the charges. What other way to reply to an averment of this nature would have been available to the applicant than to produce evidence to that effect?

- [24] The respondent further stated that at least up to the time of launching the application, the applicant did not state that any formal disputes relating to municipal charges had been formally lodged. The applicant therefore responded by presenting evidence in the form of correspondences and other documentary evidence to show that this was done. According to the respondent the court had to accept that the amounts charged were therefore not in dispute. It also requested the court to reject the applicant's defence and to find that it did not have a bona fide defence. This is drastic. If the applicant has continuously disputed the accounts and the billing system and has proof to that effect, why must it be barred from doing so in the replying affidavit, especially when prompted to do so by the respondent. It must be remembered that the applicant, when applying for rescission of a judgment need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour.
- [25] My view is simply that the applicant did not bring new matter or new defences to the respondent's claim, it only enlarged upon what the respondent revealed in his answering affidavit which attracted the response contained in the replying affidavit. Prejudice to any of the parties is also one of the considerations to be made when deciding on the question whether to strike out a replying affidavit on the ground that it introduces new matter. Striking out the applicant's replying affidavit, on the grounds that It introduces new matter, will prejudice the applicant while the respondent has an option to apply in terms of Rule 6 (5) (e) to file an additional affidavit.
- [26] It is therefore my view that the striking out application has no merit and that it falls to be dismissed with costs.

Application for Rescission of judgment

- [27] For an applicant to succeed in an applicant for rescission of a judgment taken against him by default, he must show good or sufficient cause for its rescission. This generally requires that the applicant must: (1) give a reasonable explanation for his default;
- (2) show that his application is made bona fide; and (3) show that on the merits he has a bona fide defence that prima facie carries some prospect of success. The courts, in such applications still retain a discretion which must be exercised after a proper consideration of all the relevant circumstances.
- [28] In terms of rule 42 (1) of the Rules, the court may rescind or vary an order or judgment granted by default. This rule applies where the judgment in question was sought erroneously or granted erroneously in the absence of the party affected by it. The rule also applies where there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission and also where the judgment was granted as the result of a mistake common to the parties. Under these circumstances, the court may rescind the judgment mero motu or upon the application of any party affected by an order.

- [29] The applicant seeks an order to rescind a judgment granted by default against it on 1 September 2023 and avers that the judgment was granted as a result of a procedural error which the court was unaware of when it granted the order. Firstly, the applicant denies that the summons was served at its domicilium citandi et executandi and secondly, it contends that it has substantial defences against the respondent's claims.
- [30] In the first instance, the applicant alleges that the summons was not served on it as alleged by the respondent. It contends that according to the Sheriff's return of service, it was served on an employee of AIV properties, Ms HJZA. It denies having any employee whose name is HJZA and further contends that the AIV address at Emalahleni is not its chosen domicilium citandi et executandi. The applicant alleges to have chosen its domicilium at the offices of AIV Properties in Randburg, according to its Annual General Meeting held on 26 August 2021. Because of this alleged error, the applicant submits that the judgment was erroneously sought and granted and therefore stands to be rescinded.
- [31] In an answer to the above averment, the respondent stated that the applicant placed its reliance on one return of service while there was a second one properly served on Eliza. It alleges that the return of service attached to the founding affidavit may have come as a result of the Sheriff having incorrectly spelt Eliza's name. It is the respondent's further contention that it is not a requirement in our law for the sheriff to verify whether the applicant knows the person found in its premises.
- [32] It may be so that the summons was served either at the applicant's domicilium citandi et executandi, or perhaps not. The difficulty I have in making this determination is the manner in which the Sheriff's returns filed for purposes of obtaining judgment against the applicants are endorsed at the bottom of each page. Under normal circumstances, one would have not mentioned this because the applicant in its founding papers did not raise this as an issue, and that, I am mindful of. However, because the return of service has become a cause of disagreement in the application for rescission of judgment, it is important that I deal with the concerning issue. This is done in order to ensure a proper administration of justice.
- [33] Annexures "FA2" of the applicant's founding affidavit and "AA1" and "AA2" of the respondent's answering affidavit, are all endorsed as follows:
- "Draft return in electronic format, issued without prejudice of rights and with reservations. The above return is rendered for notification only, not for judicial purposes, thus unverified and subject to editing. Errors and omissions excluded. The above information may be legally privileged. If you have received it in error, kindly inform sender. Please refrain from any disclosure, copying, distribution or taking any action in reliance thereon."* [my underlining]
- [34] What the above endorsement means is that the respondent was not entitled to rely on the abovementioned annexures to obtain judgment against the applicant. The return of service was rendered only to inform the respondent of the outcome of the service and not to be used for judicial purposes or to take any action against the applicant while relying on it. This has obviously prejudiced the applicant because, firstly, this document was produced with

errors, namely, that it was served on Ms HJZE and secondly, because it was not issued for the purpose for which it was used and it should not have been accepted.

- [35] I have already mentioned that, none of the parties raised this as an issue. However, it will be unjust, in my view, to ignore this factor and to look away from it while it sparks doubt as to the legitimacy of the return of service in light of the fact that its contents became a cause of disagreement in the application. It is therefore difficult to conclude that indeed the summons was served accordingly on the applicant or not because the rejection of this return of service means there was no proper return of service before the court when the default judgment was granted.
- [36] In light of the above, I find that the summons was not properly served on the applicant as required in terms of rules because, even on the face of it, the return of service is invalid.
- [37] In respect of rescission of the judgment in terms of Rule 31 (2) (b), the applicant is entitled to apply to court to set aside a judgment granted by default against it and the court may, upon good cause shown, rescind the default judgment on such terms as it deems fit. The applicant therefore has a duty to give a reasonable explanation of his default, his or her application must be bona fide and not made with the intention of merely delaying plaintiff's claim. He or she must also show that he has a bona fide defence to plaintiff's claim. It is sufficient if he makes out a prima facie defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour. (See *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765B–D; *Federated Timbers Ltd v Bosman* NO 1990 (3) SA 149 (W) at 155G–H).
- [38] The applicant submits that it has shown good cause why the judgment should be rescinded. It raises as its defence, an assertion that it has raised several disputes with the respondent since approximately November 2017 and has complained about incorrect accounts, overcharging and the cutting of power, amongst others. It further states that the respondent has failed to provide the applicant with clear and correct statements as required in terms of Section 95 of the Systems Act.
- [39] The respondent, however, contends that the applicant fails to make out a case for the granting of rescission in terms of Rule 31 (2) (b) on good cause and on a bona fide defence. It was submitted on behalf of the applicant that the alleged disputes raised through correspondence by the applicant reveal that the Municipality has been steadfast in its debt collection and credit control steps against the applicant. This reveals that the dispute raised by the applicant, was either rejected or that it was not entertained by the respondent.
- [40] In *Saphula v Nedcor Bank Ltd* 1999 (2) SA 76 (W) at 79C–D the court stated that:
- “It has always been the hallmark of a bona fide defence, which has to be established before rescission is granted, that the defendant honestly intends to place before a court a set of facts, which, if true, will constitute a defence. The requirement that the applicant for rescission must show the existence of a*

substantial defence does, however, not mean that he must show a probability of success: it suffices if he shows a prima facie case, or the existence of an issue which is fit for trial. The applicant need not deal fully with the merits of the case, but the grounds of defence must be set forth with sufficient detail to enable the court to conclude that there is a bona fide defence, and that the application is not made merely for the purpose of harassing the respondent. (See Standard Bank of SA Ltd v El-Naddaf 1999 (4) SA 779 (W) at 786B–D where Marais J held that the degree of detail must depend on the circumstances. See also Duma v Absa Bank Ltd 2018 (4) SA 463 (GP) at paragraph [8]).

- [41] Firstly, the applicant indicated that it acquired knowledge of the judgment on 20 October 2023 and launched this application which was filed on 27 November 2023. This means the application was launched at least 6 days after the applicant acquired the knowledge of the existence of the judgment. It explains that although it had the knowledge of the judgment on 20 October 2023, it did not have a copy of the judgment itself and further details of the judgment.
- [42] The applicant's Attorney immediately addressed a letter to the respondent's Attorneys requesting to be furnished with a copy of the judgment. This is not a matter where the appellant did nothing for a long period. It immediately reacted and when the default judgment was finally furnished to the applicant, it proceeded to launch the current application. The explanation is a reasonable one. The applicant has therefore given a reasonable explanation both for his delay in bringing the rescission application, and his failure to oppose the claim.
- [43] Secondly, the applicant has raised defences against the respondent's claim. Amongst these defences is that the respondent has been in breach of section 95 of the Systems Act by failing to provide it with detailed and accurate statements of account. It further alleged that it lodged several disputes with the respondent as far back as August 2018, 15 November 2017, 6 September 2018 and 24 July 2018 and that this dispute remains unresolved. These disputes involve the amount claimed by the respondent.
- [44] Without even paying much attention to the rest of the defences raised by the applicant, my view is that the above has merit. It suffices to show the existence of an issue that is fit for trial. My view is that the defence raised against the respondent's claim constitute a bona fide defence and that the applicant has set out averments which if established at the trial would constitute a defence, and is entitled to an order rescinding the default.

[45] In the result, I make the following order:

45.1. The application to strike out is dismissed, with costs;

45.2. The application for rescission of judgment is granted, with costs.

VUKEYA LD

JUDGE OF THE HIGH COURT

APPEARANCES:

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