

SOUTH AFRICA / JUDGMENT

# Ditsobotla Local Municipality v Carewell Holdings 5 (Pty) Ltd (1396/2022) [2023]

## ZANWHC 219 (10 August 2023)

[2023] ZANWHC 219

## COURT

North West High Court, Mafikeng

## BEFORE

FMM Reid

## CASE / FILE NUMBER

1396/2022

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## Policy

## IN THE HIGH COURT OF

## SOUTH AFRICA

## NORTH WEST DIVISION,

## MAHIKENG

## CASE NUMBER: 1396/2022

## Reportable: YES/NO

## Circulate to Judges:

YES/NO

## Circulate to Magistrates:

YES/NO

Circulate to Regional

Magistrates: YES/NO

In the matter between:-

DITSOBOTLA

LOCAL MUNICIPALITY

1st

Applicant

And

CAREWELL

HOLDINGS 5 (PTY) LTD

(Registration

No: 2013/147228/07)

Respondent

**JUDGMENT**

FMM REID, J:

**Introduction:**

- [1] This is an interlocutory application dealing with two (2) points in limine in which the respondents seek the relief as set out below.
- [2] The applicant seeks interim relief on an urgent basis to suspend five
- (5) writs of execution issued by the Registrar respectively on 6 July 2023 and 19 July 2023, pending the institution and finalisation of an application to rescind and set aside a default judgment granted by Khan AJ on 8 June 2023. The applicant (the Ditsobotla Local Municipality, “the Municipality”) in this interlocutory application is the defendant in the main action. The first respondent (“Carewell Holdings”) is the plaintiff in the main action.
- [3] This is a ruling on the two (2) points in limine as raised by Carewell Holdings. The first respondent is represented by Adv Scholtz and the Municipality is represented by Adv Mothibi.

- [4] The two (2) points in limine to be adjudicated, are:

4.1.

Rule 7 of the Uniform Rules of Court: that the deponent to the founding affidavit lacks authority in terms of Rule 7 to institute

these proceedings, in the absence of a municipal council resolution authorising him to do so; and

4.2.

Rule 30 that the applicant has conducted an irregular step in the proceedings, on the basis that the applicant has instituted duplicate

proceedings after the initial urgent application was struck from the roll with a punitive cost order.

- [5] The writs of execution sought to be suspended, are the following writs against the following amounts, held under the following bank account numbers at ABSA Bank Lichtenburg Branch, in the name of Ditsobotla Local Municipality:

5.1.

Issued on 6 July 2023 attaching in execution an amount of R15,042,987.30 (Fifteen Million Forty Two Thousand Nine Hundred and Eighty Seven Rand Thirty Cents) under account number 0[...];

5.2.

Issued on 19 July 2023 attaching in execution an amount of R15,192,476.88 (Fifteen Million One Hundred and Ninety Two Thousand

Four Hundred Seventy Six Thousand and Eighty Eight Cents) under bank account number 3[...];

5.3.

Issued on 19 July 2023 attaching in execution an amount of R15,192,476.88 (Fifteen Million One Hundred and Ninety Two Thousand

Four Hundred Seventy Six Thousand and Eighty Eight Cents) under bank account number 4[...];

5.4.

Issued on 19 July 2023 attaching in execution an amount of R15,192,476.88 (Fifteen Million One Hundred and Ninety Two Thousand

Four Hundred Seventy Six Thousand and Eighty Eight Cents) under bank account number 4[...];

5.5.

Issued on 19 July 2023 attaching in execution an amount of R15,192,476.88 (Fifteen Million One Hundred and Ninety Two Thousand

Four Hundred Seventy Six Thousand and Eighty Eight Cents) under bank account number 4[...].

[6] The total monetary amount of the writs is R75,812,891 (Seventy Five Million Eight Hundred and Twelve Thousand Eight Hundred Ninety One Rand).

[7] In correspondence attached to the application, the attorney for Carewell Holdings confirmed that the writ of execution is against an amount of R15,219,246.80, set out in paragraph [17] below.

## Background

[8] On 17 June 2022 Carewell Holdings issued summons against the Municipality and the Municipal Manager (hereafter collectively referred to as the Municipality). Carewell Holdings claimed the amount of R14,008,650.00 (Fourteen Million Eight Thousand Six Hundred and Fifty Rand) for services rendered to the Municipality in terms of a Service Level Agreement. On 30 August 2022 the Municipality entered an appearance to defend the claim.

[9] The attorneys acting for the Municipality filed a notice of withdrawal as attorneys of record on 24 April 2023. It is stated on behalf of the Municipality that the notice of withdrawal was filed without the knowledge of the Municipality.

- [10] The Municipality failed to file a plea and was placed under bar on 17 February 2023. Carewell Holdings proceeded to issue an application for a default judgment. The application for default was served on the Municipality on 26 April 2023, but the return of service reads as follows:

*“On this 26th day of APRIL 2023 at 13:10 I served this NOTICE OF APPLICATION FOR A RESERVE PRICE ITO Rule 46A(9)(A)&(B) upon Mrs G Mtshali / Legal Department...”*

- [11] It is stated on behalf of the Municipality that it was under the impression that the attorney acting for the Municipality would attend to the documents served. Furthermore, the return of service reflected an application for a reserve price and as such it did not deem it necessary to act upon.
- [12] On 8 June 2023 a default judgment was granted by Khan AJ in the amount of R14,008,650.00, together with interest at 7% from the date of summons to date of payment (the default judgment).
- [13] On 26 July 2023 the Municipality instituted an urgent application in terms of which an order to stay the writ of execution (Part A) was sought, pending the institution and finalisation of a rescission application against the default judgment (Part B).
- [14] On 2 August 2023 Carewell Holdings filed a Notice in terms of Rule 7 of the Uniform Rules of Court, requesting specific documents to prove, amongst other issues, that the deponent to the urgent application, as well as the attorneys acting for the Municipality, has the authority to act on behalf of the Municipality. The Municipality answered to the Rule 7 notice and attached (a) the letter of instruction from the Municipality to the attorney dated 20 July 2023, and (b) the extract from the Minutes of a Special Municipal Council and Resolution from the Municipality dated 8 June 2023.
- [15] The urgent application was set down for hearing on 27 July 2023 and the following order was made by Dewrance AJ:

*“The matter be and is hereby struck off the roll due to non-appearance from the applicant and defective Notice of Motion, with costs on an attorney and client scale.”*

- [16] Instead of addressing the urgent application that was struck from the roll by Dewrance AJ, the Municipality elected to institute a “new” urgent application, seeking an order suspending the execution of the

writs of attachment. Save for addressing the Rule 7 notice, no new information is placed before Court in the new application.

In the notice of motion, the Municipality requests interim relief “pending the final determination of the rescission application which has been instituted by the applicant...”

[17] On 31 July 2023 the attorneys acting for Carewell Holdings, confirmed that the total monetary amount under attachment is R15,219,246.80, which is made up of the capital amount of R14,008,650.00 plus interest in the amount of R1,210,596.83, despite the fact that a total amount of R75,812,891 has been attached by the Sherriff.

[18] On 31 July 2023 the rescission application has been served on Carewell Holding's attorneys. This is reflected in electronic mail (e-mail) correspondence in which the attorneys for the Municipality wrote:

*"Further to the above, we confirm that since you are now in possession of our client's rescission application (Part B thereof) and the attached funds will not be transferred or paid over to the ... Carewell Holdings' attorneys pending the rescission*

*application."*

[19] Carewell Holdings has not filed an opposing affidavit to either one of the two (2) urgent applications.

[20] The notice in terms of Rule 30 objecting to irregular proceedings, was filed by Carewell Holdings in response to the new urgent application.

[21] On 4 August 2023 only the points in limine as raised in the second urgent application, were argued in court.

Striking off of a matter

[22] When a matter is struck from the roll, it can only be re-enrolled on the filing of an affidavit addressing the reasons for which it was struck. This was not done. The Municipality instead elected to bring a new application on exactly the same facts.

[23] It was argued on behalf of the Municipality that the new application is not a new application, but a supplementary affidavit attached to the notice of motion. It was also argued that the application before court only dealt with relief sought in terms of the original application Part A and it was not necessary to refer to Part B of the original application.

[24] This argument is not viable, due to the fact that the e-mail correspondence dated 1 August 2023 from the Municipality's attorneys to Carewell Holding's attorneys, reads as follows:

*"See attached our new application for your records thereof, which is scheduled for the 04 August 2023." (own emphasis)*

[25] In addition, the founding affidavit of the new application reads as follows in paragraph 7 thereof:

*"7. This application is launched for the second time following a Court Order that was granted on 27 July 2023, whereat the application was struck off the roll due to non-appearance and defective notice of motion. A copy of the order is attached and marked as "SNN". (own emphasis)*

- [26] The above quotations clearly reflect the Municipality's intention to proceed with a second urgent application without addressing the application that was struck from the roll. In my view this is a classic example of having a second bite at the proverbial cherry.
- [27] On the basis of the above, I find that the second urgent application is procedurally and substantively erroneous. The Rule 30 should be upheld and the second application, which is the only application before court, should be dismissed with costs.
- [28] Having found that the Rule 30 notice is upheld and the filing of a second urgent application is an irregular proceeding, there is no need to venture into the issues raised in the Rule 7 notice of authority.

## Analysis

- [29] The second urgent application should not have been launched. The correct procedure is to address the shortcomings of the first application, ie the reason that the matter was struck, and request that the court re-instate the application. The applicant in a matter that was struck from the roll, has an opportunity to correct the errors made in the application that was struck, should it wish to proceed with the application.
- [30] A matter that is struck from the roll does not magically disappear, but remains very much alive. It is for the Municipality to elect whether it intends proceeding with the first application.
- [31] To issue a "new" application on the same facts, is nothing other than lis pendens on the basis that the same parties are already before court on the same facts. It is argued on behalf of Carewell Holdings that the applications (both the first and second applications) should be dismissed with cost on a punitive scale.
- [32] The interest of justice requires me to take cognisance of the application holistically. The Municipality seeks to have writs of execution to the amount of R75,812,891 stayed pending the finalisation of the rescission application against the default order granted by Khan AJ. It is glaring that the amount that has been attached, is overwhelming more than the amount that Carewell Holdings is entitled to.
- [33] It is stated on behalf of the Municipality that the Municipality is not able to proceed with its day to day business which includes payments to Eskom, salaries of employees, etc while the sums of money in the 5 bank accounts is attached under a writ of execution.
- [34] On the basis that the attached amount exceeds the amount claimed by Carewell Holdings by no less than five (5) times, I am of the view that it would be in the interest of justice to not shut the door to the Municipality.
- [35] In the premise, I find that it would be just and fair to grant the Municipality an opportunity to address the striking of the first application, should the Municipality wish to proceed with the first application.

## Conclusion

[36] I find that the second urgent application constitutes an irregular step and should be dismissed with costs.

[37] I further find that the Municipality should be granted an opportunity to pursue the first application, and that corrective actions to be taken within a period of ten (10) days after this court order, should the Municipality wish to proceed with the first application.

## Order

[38] In the premise I make the following order:

- i) The second urgent application dated 3 August 2023, is dismissed with costs.
- ii) The applicant is granted an opportunity to rectify the first urgent application within a period of ten (10) days from the date of this order.

FMM REID

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION MAHIKENG

DATE OF HEARING: 4 AUGUST 2023

DATE OF JUDGMENT: 10 AUGUST 2023

## APPEARANCES:

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Prepared on 10 October 2026 · Esheria