IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case number: 3147/2017

In the matter between:

MALUTI PLANT HIRE CC Applicant

and

ORECRUSHERS SA (PTY) LTD Respondent
(REG: 2004/033083/07)

In *re*:

ORECRUSHERS SA (PTY) LTD Plaintiff

and

MALUTI PLANT HIRE CC Defendant
(REG: 2001/061749/23)

CORAM: DAFFUE, J

HEARD ON: 28 MARCH 2019

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 28 MARCH 2019

REASONS

I INTRODUCTION

[1] On 28 March 2019 I heard argument pertaining to an application for rescission of judgment. I dismissed the application with costs and indicated that my reasons would follow. These are my reasons.

II THE PARTIES

[2] Applicant is Maluti Plant Hire CC, it being the defendant against whom judgment by default was granted. It was represented by Adv A Sander, instructed by Noordmans Attorneys.

[3] Respondent is Orecrushers SA (Pty) Ltd, the plaintiff in the main action. It was represented by Adv LC Leysath. The local attorneys are Symington & De Kok.

III THE RELIEF SOUGHT

[4] The applicant sought rescission of the default judgment granted against it on 21 September 2018, the setting aside of the warrant of execution issued, that the bar for filing its plea be lifted and leave be granted to file its plea and counterclaim within 20 days.

[5] No application for condonation for non-compliance with any of the Uniform Rules of Court or this Division's Practice Direction has been filed. This aspect will be dealt with next.

IV NON-COMPLIANCE WITH RULES AND PRACTICE DIRECTION 1/2015

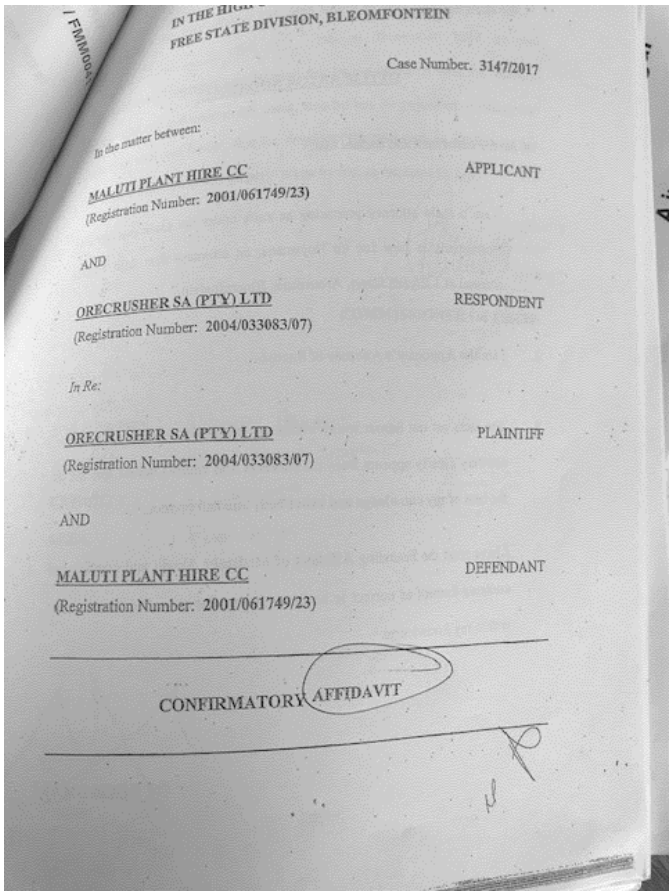
[6] The bundle of application papers prepared for the court does not comply with the Uniform Rules of Court ("the Rules") and this

court's Practice Direction 1/2015. I shall deal with the Rules first. Rule 62(4) stipulates *inter alia* that all pages of the documents delivered shall be suitably secured (bound). The responsibility is that of the applicant (plaintiff) who must collate, number and index all documents filed by all the parties. The sub-rule is not merely for the convenience of the parties, but more particularly for the presiding judge(s) who is (are) called upon to deliver judgment. Courts insist on compliance with the rule. See: *Manna v Lotter* 2007(4) SA 315 (C) at 325H – 326A and *Erasmus, Superior Court Practice*, D1-740.

[7] Neither the original notice of motion, founding affidavit and accompanying affidavit of Mr Noordman, nor the original replying affidavit and the confirmatory affidavit of Mr Bronner (who belatedly confirmed the founding affidavit and not the replying affidavit) are in the court file. This is in direct transgression of the Rules. "Deliver" is defined in Rule 1 as follows: "'deliver' shall mean serve copies on all parties and file the <u>original</u> with the registrar." (emphasis added)

[8] The original application papers should have been bound in one bundle. Instead copies – and poor copies of the replying affidavit and annexures in particular - were bound in an unsatisfactory manner as I shall elaborate *infra*. When I informed Mr Sander of this at the start of proceedings, he stated that according to the instructions from his attorney, Mr Noordman who was present in court, the original documents must be in the court file. I perused the file again in court and found the original answering affidavit together with its annexures. Inexplicably these documents, which were apparently stapled together at some stage, were not so fastened anymore and were found loose in the file. There was not

a sign of the original notice of motion and founding and replying affidavits that applicant was supposed to file in compliance with the Rules. The Notice of Motion was signed by Mr Noordman at Port Alfred on 20 December 2018. He signed his affidavit at the same place on 21 December 2018. Apparently these documents were electronically sent to Bloemfontein. The application was issued in Bloemfontein on 21 December 2018. Mr Noordman's original affidavit with the heading "founding affidavit" was found on its own at the bottom of the file. Apparently, someone changed the heading to "confirmatory affidavit" after the document was deposed to under oath and this amended document was attached to the founding affidavit. A picture thereof is shown *infra*.



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Case Number. 3147/2017

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MALUTI PLANT HIRE CC — APPLICANT
(Registration Number: 2001/061749/23)

AND

ORECRUSHER SA (PTY) LTD — RESPONDENT
(Registration Number: 2004/033083/07)

In Re:

ORECRUSHER SA (PTY) LTD — PLAINTIFF
(Registration Number: 2004/033083/07)

AND

MALUTI PLANT HIRE CC — DEFENDANT
(Registration Number: 2001/061749/23)

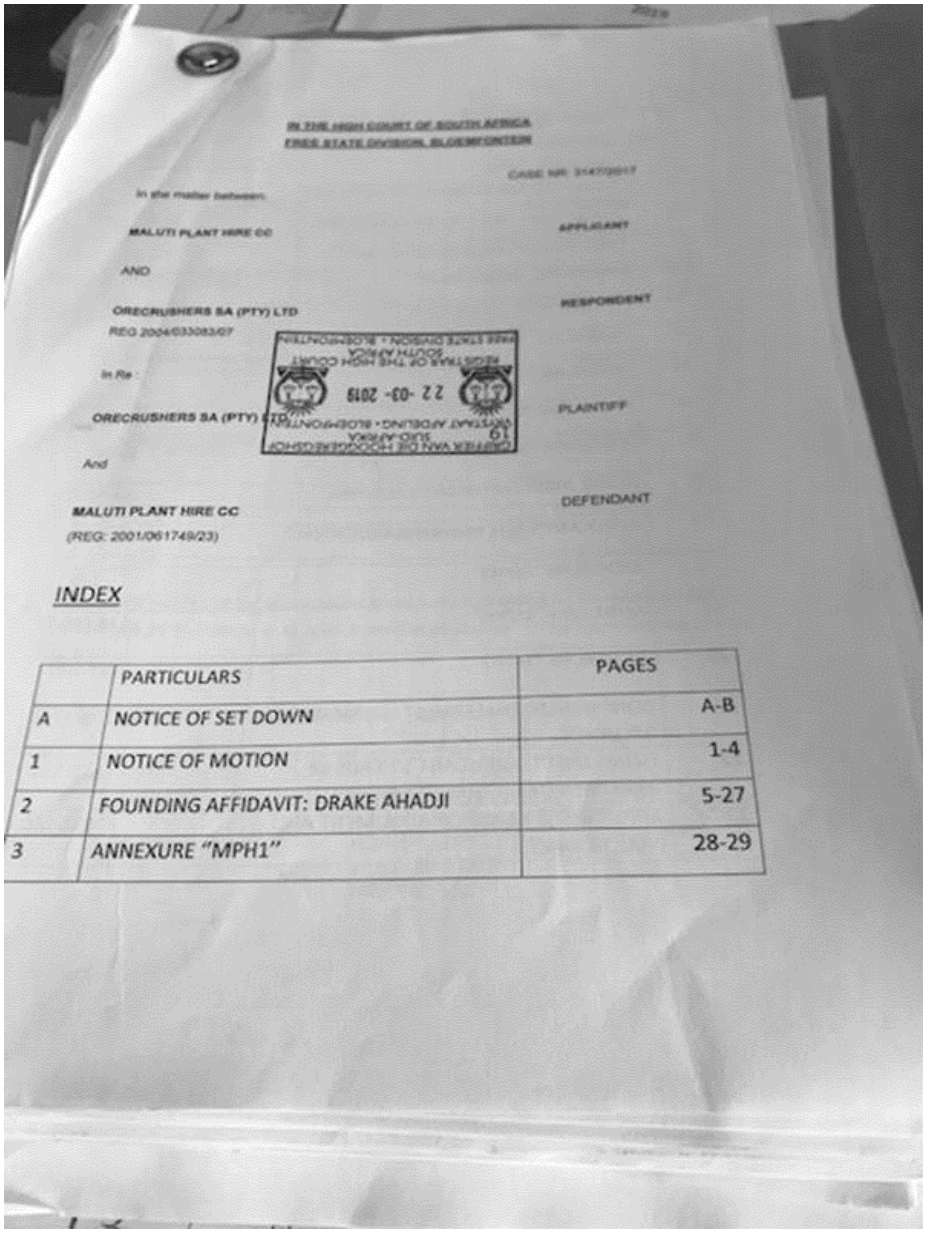
CONFIRMATORY AFFIDAVIT

[9] This court's Practice Direction 1/2015 enforced from 20 May 2015 deals with double-sided printing. Documents in excess of 10 pages filed with the registrar "must, in spite of the wording of court rule 62(2) ordinarily be printed on both sides of the page." However "records containing double-sided printing must be bound in a way that permits both sides of each page to be fully legible." (emphasis added)

[10] I pointed out on numerous occasions to practitioners in the past that the above Practice Direction must be complied with in a proper fashion to allow the presiding judge to read both sides of the pages with ease. Often, when I had time and opportunity, I arranged with my secretary to call upon the applicants' (and plaintiffs') legal representatives to rectify matters by placing the documents in a lever-arch file or plastic ring binder before I have to study the papers. These legal practitioners, to their credit, promptly complied with my requests. I do not understand why legal practitioners – four years down the line - still fail to comply with the Practice Direction. In this instance, due to time constraints and a heavy workload, I had an opportunity to study the papers in this application the night before the application was to be heard and no arrangement could be made for applicant's attorney to remedy the defects.

[11] *In casu* the documents – copies and not originals – are fastened with a pin pushed through the left hand side of the bundle as is evident from the first picture *infra*. Two problems were experienced in studying the papers. First, it is not possible to read the left hand pages without, either turning one's head and neck

clockwise by about 45 degrees, or by turning the bundle anti-clockwise. I refer to the next two pictures *infra*. *In casu* the bundle contains 130 pages only, which meant that I had to act as stated a mere 65 times whilst still being able to concentrate at the task at hand, *i.e* to study the papers. Secondly, legal practitioners do not appreciate that, as is the case here, it is often not possible to read text contained close to the top right of the pages on the left and in particular to find the exhibits referred to in the text which are customarily marked at the top right hand corner which are concealed by the pin in these instances. The middle picture *infra* is an example. I marked the exhibit in court during argument, as identified by Mr Sander, on the left hand side.



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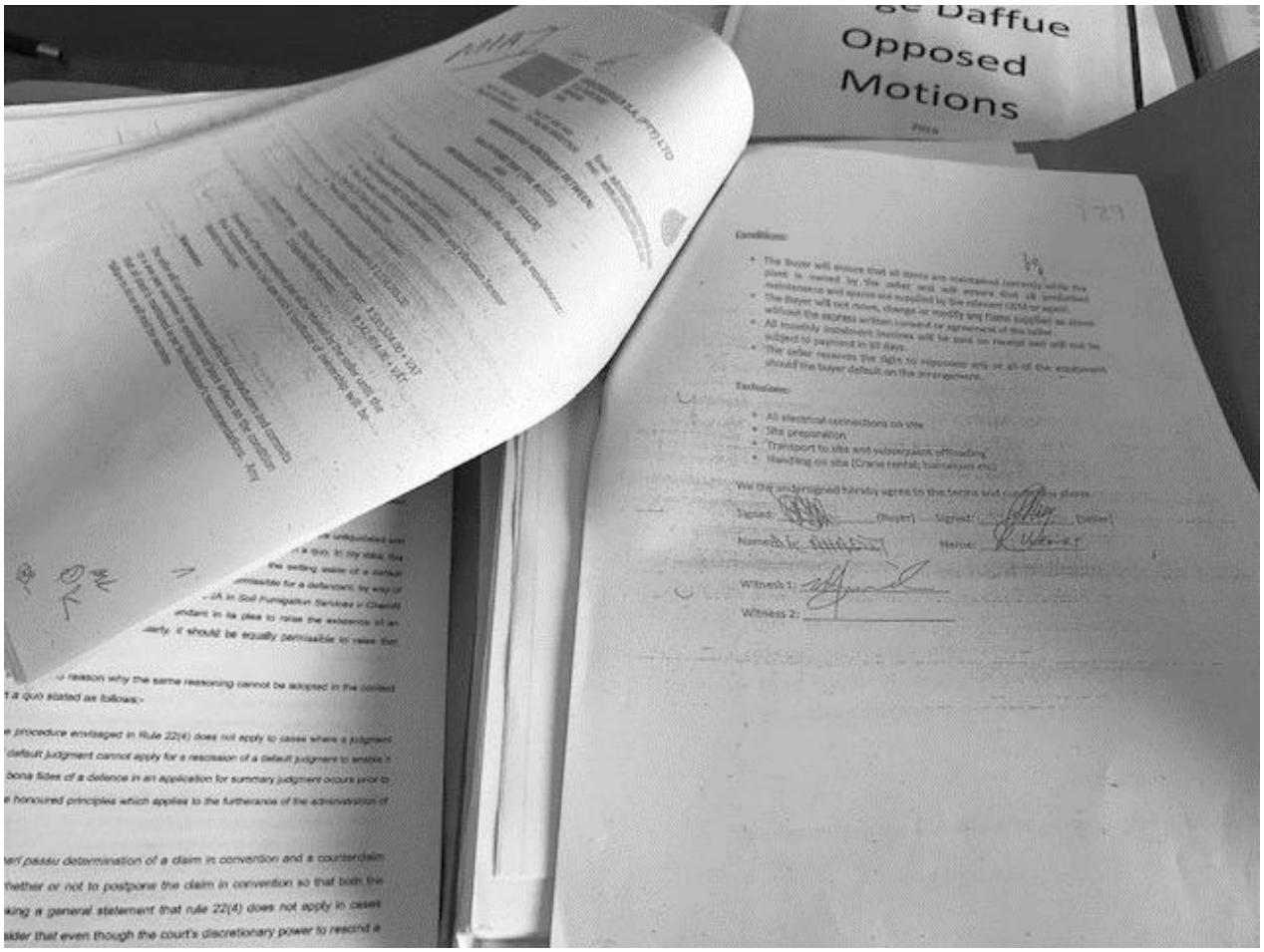
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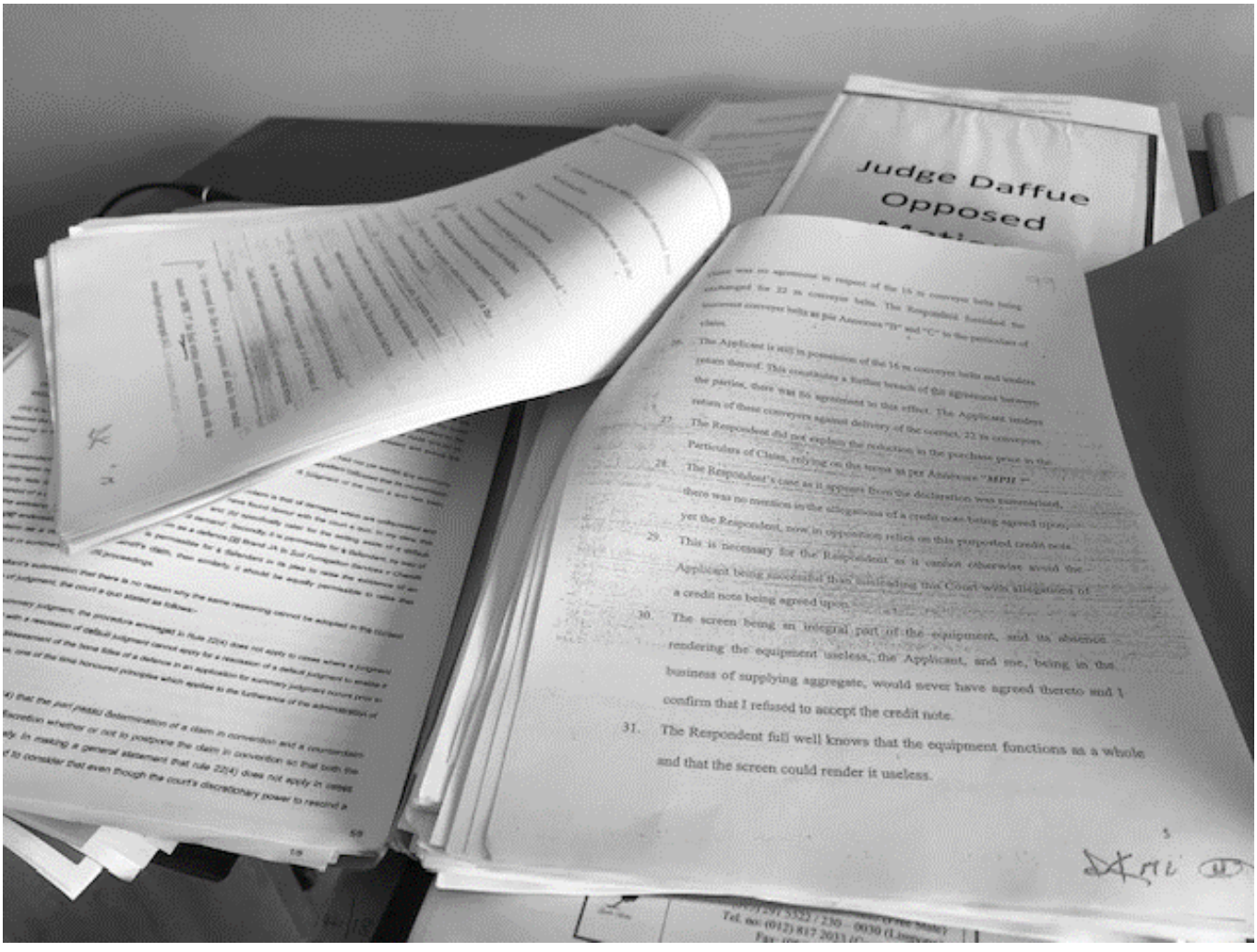
Judge Daffue
Opposed
27. The Respondent did not explain the reduction in the purchase price in the Particulars of Claim, relying on the terms as per Annexure "MPH –
28. The Respondent's case as it appears from the declaration was summarised, there was no mention in the allegations of a credit note being agreed upon, yet the Respondent, now in opposition relies on this purported credit note.
29. This is necessary for the Respondent as it cannot otherwise avoid the Applicant being successful thus unloading this Court with allegations of a credit note being agreed upon.
30. The screen being an integral part of the equipment, and its absence rendering the equipment useless, the Applicant, and me, being in the business of supplying aggregate, would never have agreed thereto and I confirm that I refused to accept the credit note.
31. The Respondent full well knows that the equipment functions as a whole and that the screen could render it useless.

[12] I have reason to believe that the judges of the Supreme Court of Appeal and the Constitutional Court will not be prepared to entertain applications and appeals that are for all practical purposes not fully legible. In fact, bundles prepared as *in casu* will not even find their way past the Registrars' offices. When I looked down on Mr Sander's brief, I noticed that his papers were neatly placed in a lever arch file – which he admitted was on his initiative – and which would make reading and studying thereof comfortable. There is no reason why the court's file could not be secured in the same or similar manner such as with plastic ring binders.

[13] I perused some of the other Divisions' and courts' Practice Directions contained in *Erasmus, Superior Court Practice*, vol 3. Johannesburg's Practice Direction 6.2.5 stipulates that the bundle of documents in civil trials must be bound in a manner "that does not hinder the turning of pages and which enables it to remain open without being held open." Pretoria's requirement is the same. As strange as it may sound, both in Johannesburg and Pretoria it is merely required in the case of applications that documents be bound in such a way that it does not hinder the turning of pages and not also that the bundle must be able to remain open without being held open. The SCA's Practice Direction reads as that of this Division. Apparently double-sided printing is still not allowed in the Constitutional Court as is the case in the Western Cape.

[14] Applicant did not seek condonation for any non-compliance with the Rules or the Practice Direction based on alleged urgency or any other ground. No urgency existed, save insofar as applicant's

legal team tried to make the 20 day deadline in Rule 31(2)(b) referred to *infra*. Strictly speaking, the application should have been struck from the roll or postponed to show the court's dismay, but that would not be fair towards both parties.

[15] I considered postponing the application and to order applicant's attorney to pay the wasted costs *de bonis propriis.* However, upon an apology being tendered by Mr Sander on behalf of his attorney and bearing in mind that I had time to struggle through the documents, I decided to proceed hearing argument in order to prevent delay which would eventually be to the prejudice of the respondent in particular.

V THE TEST IN MOTION PROCEDURE FOR FINAL RELIEF

[16] Bearing in mind the requisites for rescission of judgment applications dealt with *infra* and the manner in which I considered the factual disputes, it is appropriate to refer to some authorities in motion proceedings. In such proceedings the affidavits constitute both the pleadings and the evidence and the issues and averments in support of the parties' cases should appear clearly therefrom. See *Minister of Land Affairs and Agriculture v D & F Wevell Trust* 2008 (2) SA 184 (SCA) at 200D. It is trite that the applicant in application proceedings must make out his case in the founding affidavit. A litigant should not be allowed to try and make out a case in the replying affidavit. The founding affidavit must contain sufficient facts in itself upon which a court may find in the

applicant's favour. An applicant must stand or fall by his founding affidavit. See *Director of Hospital Services v Mistry* 1979 (1) SA 626 (AD) at 635H – 636D.

[17] A court should adjudicate factual disputes in application procedure for final relief having regard to the well-known *Plascon-Evans Paints dicta* recently approved and considered in more depth in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA). I quote from para [12]:

> "[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion, must in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers: Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E-635C.

VI A BRIEF HISTORY OF THE FACTUAL MATRIX

[18] There are several factual disputes and many vague averments which I shall mention as I deal with the facts. In fact, it is well-nigh impossible to set out a factual matrix from applicant's perspective due to evasiveness and glaringly vague allegations unless I resort to speculation. I shall deal with the explanation relating to litigation in the main action first and then with the merits of the claim. The material allegations are the following:

1) Mr Noordman, applicant's attorney, was previously employed by Matsepes Attorneys in which capacity he received

instructions from applicant pertaining to *inter alia* the defence of respondent's claim. On 4 July 2017 Mr Noordman served and filed a notice of intention to defend in the main action. In paragraph 14 of the founding affidavit applicant's deponent states under oath that "Respondent, having issued a Simple Summons, was required by this Court's rules to file its declaration." The deponent either knew it then as informed by the attorney, or he was informed accordingly afterwards. We don't know what transpired between the deponent and the attorney, but I am of the view that any reasonable attorney would, upon receipt of instructions to defend a matter, outline the future litigation and the way forward until the matter eventually gets finalised in a court of law, unless settled earlier. In any event, the reasonable attorney would have obtained detailed instructions as to the defence at the onset in order to communicate with the opposite side in the hope of achieving a suitable result as early as possible.

2) There is no allegation, not to speak of proof, of any communication between the parties prior to litigation or after receipt of the summons in support of applicant's defence raised in the founding affidavit mentioned *infra*.

3) It is averred that Mr Noordman left Matsepes' employ "during or about the end of 2017". What precisely does this mean? Then it is averred as follows in paragraph 26: "Subsequent to this the Applicant requested that all its files (including this matter's file) be transferred from Matsepes to Mr Noordman…." The use of the word "subsequent" is indicative of applicant's evasiveness. The failure to present a proper timeline appears to be

deliberate, bearing in mind the duty of attorneys towards their clients as explained *infra.* What is evident from the quoted passage is that Matsepes' mandate must have been terminated at a stage and that applicant's deponent was fully aware of Mr Noordman's whereabouts, to wit that he was still practising as an attorney in Bloemfontein. I accept that Mr Noordman knew about applicant's intention to make use of his services. The court was not told who – Applicant's deponent or Mr Noordman - communicated with Matsepes and when and how often communication took place, bearing in mind the alleged problems experienced in receiving the applicant's files. Apparently no progress reports pertaining to the litigation were sought. Again, there is a dearth of information in this regard.

4) It is alleged that Matsepes had sought payment for the work done on the files and that the files had been sent to a cost consultant for drafting bills of costs and taxation purposes. However, the cost consultant refused to hand back the files to Matsepes as this firm failed to pay his account. This is not only inadmissible hearsay evidence, but the level of vagueness is unacceptable. We do not know when all this occurred and how long was the delay. Even so, Matsepes whose mandate has been terminated, which must be accepted as there was no reason to draw bills of costs otherwise, probably accepted that they had no responsibility to act on behalf of applicant anymore. Mr Noordman and his client should have known and/or appreciated that.

5) Mr Noordman and his client knew that a declaration, which was admittedly filed on 19 March 2018 only and later than

could have been expected, was due. There is no indication that they could have believed that the claim was abandoned. Even accepting a delay with the handing over of files, the reasonable attorney in the shoes of Mr Noordman would have made enquiries from time to time as to developments on the files. He should have recognised that Matsepes were under no obligation to protect the interests of their former client and that default judgment might be obtained in the absence of future responses.

6) The applicant's deponent refers to telephonic communication between him and the cost consultant. No details are provided as to when the call was made and what steps were taken to avoid prejudicial action based on the hearsay evidence obtained from this person.

7) Apparently nobody in Matsepes' employ regarded it necessary to keep applicant or Mr Noordman abreast with developments on the file. The confirmatory affidavit of Mr Bronner, an employee of Matsepes, attached to the replying affidavit and not as could be expected to the founding affidavit, is as meaningless as the unhelpful affidavit of Mr Noordman. If the particular file of applicant was sent to a cost consultant, Mr Bronner could not be in control thereof anymore. All pleadings, documents and correspondence relating to the file could not have been inserted in the file by the attorney as the file was not with him anymore. Matsepes had no mandate to act on behalf of the client at such stage. As a matter of law, Matsepes should have refused to accept any documents relating to their former client's litigation. However, the declaration and notice of bar

have been received and could not merely be ignored. I shall deal with this again *infra*.

8) The proposition in paragraph 30 of the founding affidavit that applicant was content that its matter would be properly dealt with by Matsepes until transfer of the file is improbable, if not blatantly false, in light of the information tendered by applicant. It is incredulous that applicant did not have any knowledge of what transpired in the litigation for about a year. Now it seeks to blame Matsepes for alleged improper conduct.

9) Obviously, if applicant terminated Matsepes' mandate much later in the year 2018 and instructed Matsepes then only to hand the file to Mr Noordman, Matsepes would still be the responsible attorneys until termination of their mandate and they should have explained why did they not inform applicant of the filing of the declaration and subsequent filing of the notice of bar. Applicant and its attorney elected to remain as vague as possible in order to keep the court in the dark, having to rely on speculation. I shall consider the relevant Rules and the effect thereof when I discuss substitution of attorneys *infra*.

10) I emphasise the following in conclusion pertaining to the explanation for the default. In contrast with applicant and its attorney's vague explanation of what transpired with reference to a definite timeline since Mr Noordman left the employ of Matsepes until November 2018, applicant provided a detailed and comprehensive version of his counsel's whereabouts since counsel had obtained instructions to prepare the founding affidavit in order to

show why the application was issued on 21 December 2018 only. Applicant might not have been expected to provide such a detailed version, but I would have expected much more detail than provided. Surely, Mr Noordman either opened a temporary file for applicant and/or kept notes and/or kept copies of correspondence with Matsepes. Reference thereto under oath could enlighten the court of the efforts made to obtain applicant's file and/or to request progress reports from Matsepes.

11) I have duly considered the factual disputes in respect of the transactions between the parties and came to the conclusion that the disputes should be adjudicated based on the principles enunciated in Plascon Evans. Respondent's version cannot be held to be far-fetched or clearly untenable in order to be rejected. The further factual matrix is based on an acceptance of respondent's version.

12) On 10 September 2014 applicant purchased certain plant and equipment from respondent for an amount in excess of R3m. These were delivered to and utilised by applicant in Lesotho. On 22 July 2015 the parties varied the agreement by *inter alia* excluding the double deck screen, causing the purchase price to be reduced to R2 158 095.00 which was later further reduced to R2 106 870.00. A deposit of R615 057.36 was paid. The balance of R1 786 724.44 was to be paid in monthly instalments of R100 000.00 plus VAT. Only one instalment was paid on 13 August 2015. The parties agreed that respondent would retain ownership of the goods until payment of the full purchase price. All this is common cause between the parties as the applicant failed

to deny the averments contained in the declaration and annexures thereto.

13) Applicant utilised the plant and equipment at a mining site in Maseru, Lesotho for several months since December 2014. During January 2016 it brought the goods to South Africa. Since then – on respondent's version - applicant started to raise concerns pertaining to the alleged defective triple deck screen, not to be confused with the double deck screen that was sold in terms of the first agreement, but returned to respondent earlier.

14) On respondent's version in the declaration, read with the annexures thereto, confirmed under oath in the answering affidavit, the parties agreed that credit be given in the amount of R570 000.00 to applicant in respect of the triple deck screen to accommodate it after having raised queries and this amount was deducted from the outstanding amount, leaving an amount of R1 176 744.44 due and payable. Although Mr Sander tried to show during argument that there was no agreement pertaining to the return of the triple deck screen and the credit given, based on the fact that the document relied upon – annexure D to the declaration - was not signed, his client did not deal at all in the founding affidavit with the express and damning allegations contained in the respondent's declaration and annexures thereto.

15) It is applicant's case on the merits that respondent did not deliver the goods as alleged and therefore it is in breach of the agreement. On applicant's version in paragraph 67 of the founding affidavit, the respondent's conduct constitutes

repudiation, "which repudiation the Applicant accepts and cancels the Agreement herewith." The emphasis is on the present tense, meaning that applicant averred in December 2018 that it elected to cancel the agreement notwithstanding an alleged repudiation occurring about three years earlier. However, it is common cause that respondent delivered as agreed, but applicant wants to rely on the fact that the triple deck screen, which it utilised for a long time, was eventually sold by respondent to a third party, such action constituting so-called repudiation. Respondent's explanation in this regard is sound and acceptable and there is no reason to reject same. It was prepared to accommodate applicant after it had used the triple deck screen for a long time where after it started to raise queries. Applicant's account was credited in respect of the value of the triple deck screen. Hereafter – as late as August 2016 - applicant simply dropped the triple deck screen at respondent's suppliers in Pretoria whereupon respondent refurbished and sold it to a third party. Mr Sander argued with some conviction, based on the version in reply, that the triple deck screen, "the soul and heart" of the plant – "the whole set-up" – was sold and that respondent therefore rendered an incomplete performance. I mentioned earlier that I accepted respondent's version in respect of all factual disputes. Counsel failed to convince me. Mr Sander also pointed out that the credit of R570 000.00 advanced by respondent was not pleaded as such in the declaration. That may be so, but the document attached to the declaration – annexure D thereto – and the reduction of the outstanding balance makes this quite clear.

16) A strange allegation is made in paragraph 68 of the founding affidavit that applicant "tenders return of all equipment that formed part of the sale agreement and which had not been delivered to respondent and which are in the possession of the Applicant." The vagueness is obvious. Applicant failed to inform the court what is still in its possession. Again, applicant used the goods sold for several months since December 2014 and only now tenders delivery of unspecified goods. The same vagueness is indicative from paragraph 88 where applicant states that it tendered return of unspecified goods against payment of the aforesaid deposit and R100 000.00 instalment previously paid by it to respondent.

VII THE LAW RELATING TO RESCISSION OF JUDGMENT APPLICATIONS

[19] It is applicant's case that it is entitled to relief in accordance with Rule 31(2)(b). There is no suggestion that the judgment was obtained under circumstances provided for in Rule 42 or that fraud or *iustus error* played a role in obtaining judgment.

[20] The requirements for rescission of judgment under Rule 31(2)(b) are well-known. An applicant must show good cause and this encapsulates that

(a) the applicant must proffer a reasonable explanation for the default;
(b) the application must be *bona fide*;
(c) the defence on the merits of the case must *prima facie* carry some prospect of success.

See *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at para [11].

[21] In *Colyn supra* the court stated further as follows in para [12]: "Even if one takes a benign view, the inadequacy of this explanation may well justify a refusal of rescission on that account unless, perhaps, the weak explanation is cancelled out by the defendant being able to put up a *bona fide* defence which has not merely some prospect, but a good prospect of success." (emphasis added)

[22] Contrary to the possible escape route afforded an applicant mentioned in *Colyn supra*, a unanimous full bench of the former Appeal Court consisting of five judges made the following quite clear in *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (AD) at 765D – E: "It is not sufficient if only one of these two requirements (a reasonable and acceptable explanation and a *bona fide* defence which carries some prospect of success) is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits."

[23] Mr Sander referred to *Hassim Hardware v Fab Tanks* (1120/2016) [2017] ZASCA 145 (13 October 2017), an unreported judgment of the Supreme Court of Appeal, to bolster his argument and therefore I need to refer thereto. He emphasised, based *inter alia* on the *dictum* in para [12] of this judgment, that an applicant for

rescission does not have to "illustrate a probability of success, but rather the existence of an issue fit for trial." It must be mentioned that the court accepted in the same paragraph the requirements set out in *Colyn supra* referred to herein above. The judgment must be considered in context and I shall do that when I evaluate the evidence.

[24] Although courts are slow to penalise a litigant for his attorney's inept or negligent conduct during litigation, "there comes a point where there is no alternative but to make the client bear the consequences of the negligence of his attorneys." See *Colyn supra* at para [12], relying with approval on *Saloojee and another NNO v Minister of Community Development* 1965 (2) SA 135 (A). Where a litigant relies on the ineptitude or negligence of his attorney, he should show that such action or inaction should not be imputed to him.

VIII AN EVALUATION OF THE APPLICATION

[25] Applicant's founding affidavit is vague in the extreme as shown *supra*. A reading thereof leaves one with the impression that applicant believed that rescission of the default judgment was there for the taking. No reasonable and acceptable explanation for the default was presented. It was left to the court to speculate as to what occurred over a period of nearly a year and I formed a distinct impression that the two attorneys who deposed to confirmatory affidavits, apparently in support of the application, tried their utmost to conceal the true facts to the court in an attempt to avoid an inference of negligence to be drawn. I shall explain shortly.

[26] In *Hassim Hardware supra* the Supreme Court of Appeal had little difficulty to accept that a reasonable and acceptable explanation for the default had been provided. During protracted pre-litigation communication between the attorneys for the parties, appellant's new attorney informed his opponent, without appellant having been aware thereof, that service of the summons would be accepted at the attorney's office. The attorney fell seriously ill suddenly and was even hospitalised for a short while. During his absence from office the summons was served and his staff failed to adhere to his instructions, causing default judgment to be obtained. The SCA was satisfied that the attorney "put enough measures in place to look after appellant's interests in his absence" and his firm's failure to file a notice of intention to defend and the shortcomings of his staff in this regard did "not warrant that appellant be penalised." A short period of delay occurred and the SCA was not prepared to find, as submitted on behalf of respondent, that appellant showed disinterest in how his attorney was conducting his case. See: para [15].

[27] In adjudicating the first requirement, I need to emphasise the fiduciary duties of attorneys and say something about Rule 16. The Code of Conduct for Legal Practitioners published in Government Gazette 38022 of 22 September 2014 came into force on 1 November 2018 only, the date when the Legal Practice Act came into operation; however the ethical rules set out in the Code are nothing new and these have been accepted as the norms applicable to attorneys over decades. It is stated in rule 3.3 that attorneys must treat the interests of their clients as paramount, provided that their conduct shall always be subject to their duty to the court, the interests of justice and observation of the law. I am

of the view that this did not occur *in casu*. Applicant was neglected by either Mr Noordman, or whoever has taken over his files when he left Matsepes – apparently Mr Bronner – or both attorneys. Mr Bronner, if he was the responsible attorney, failed to explain why Matsepes accepted pleadings and documents in the applicant's matter which it should have refused to accept once the firm's mandate had been terminated. See in this regard *Erasmus, Superior Court Practice*, D1 – 162 and *Barclays Bank DCO v Van Niekerk* 1965 (2) SA 78 (O). If Matsepes' mandate was terminated, they should have withdrawn as attorneys of record in which event service of any pleadings and notices on it after such termination of mandate and withdrawal would have been invalid. However, Matsepes did apparently not withdraw as applicant's attorneys. They were more concerned about payment of their fees than applicant's interests. This is further reason why applicant and Mr Noordman should have acted responsibly and forthwith to prevent any default as could have been predicted *in casu*.

[28] Rule 16 deals with representation of parties during litigation. Rule 16(2) is clear authority that a party represented by an attorney in any proceedings may at any time terminate such attorney's mandate and thereafter the party may act in person or appoint another attorney to act for him. In such a case notice must be given to the registrar and all parties to the litigation. The new attorney's name and address must be provided if one has been appointed. This is contrary to Mr Sander's submission that Mr Noordman could not get on record unless Matsepes withdrew as attorneys. A former attorney can never hold a client ransom during litigation as Mr Sander wanted the court to accept. Obviously, the former attorney may decline to hand over the relevant file pending

payment of the account. If Mr Noordman and his client acted in terms of this rule immediately after he had left Matsepes' employ, all further pleadings and notices would have been served on Mr Noordman's new firm. The vagueness of applicant and the two attorneys makes it difficult to blame anyone to the exclusion of the other.

[29] It must be accepted that Matsepes did not withdraw as attorneys of record in terms of Rule 16(4). Respondent's attorneys would not know that Matsepes did not act for applicant anymore. Applicant had a duty to ensure that its appointed attorney carry out its mandate in a proper fashion to defend the claim until finality is obtained. It had to continuously enquire how the litigation was developing. It should have become apparent that neither Matsepes, nor Mr Noordman treated its interests as paramount. It did not get feed-back from Matsepes and Mr Noordman did not inform it, *ex facie* the application papers, of any developments. The first firm wanted payment of their fees, but did not settle the account of the cost consultant and could not obtain taxed bills of costs to claim payment from applicant. Applicant and Mr Noordman should have been aware that Matsepes would not act in the interests of applicant. Matsepes had a conflict of interest in that they were still officially representing the applicant, but failed to act in the interests of applicant *ex facie* the documents presented to the court. Mr Bronner, if he was really entrusted with applicant's file which cannot be determined with certainty, acted negligently, if not recklessly, in that he not only received a declaration from the opposite side, but a notice of bar as well. He should have appreciated that judgment by default would follow. On the basis that he received instructions soon after leaving the employ of

Matsepes, Mr Noordman failed to carry out his mandate immediately by assisting applicant to terminate Matsepes' mandate and give notice in terms of Rule 16(2). Red lights should have drawn both attorneys' attention to the seriousness of the matter, but they apparently elected to ignore this.

[30] The applicant, improperly assisted by two attorneys, failed to give a reasonable and adequate explanation for its default. There is also no reason why the ineptitude or negligence of the attorneys should not be imputed to it. Consequently, the first requirement for rescission was not met and this should really be the end of the enquiry, based on the *dicta* in *inter alia Colyn* and *Chetty supra.*

[31] I am satisfied that the application is not *bona fide*. Unlike as what transpired in *Hassim Hardware supra*, there is no indication of any dispute on the merits in the papers before the court prior to the filing of the notice of motion. Out of the blue, mention is made in the founding affidavit of certain defences, *inter alia* that respondent repudiated the agreement between the parties, which allegedly occurred three years ago, which was accepted in December 2018 only. This has a bearing on the defence and the third requirement of rescission of judgment applications and will be dealt with again *infra*. For purposes of considering the *bona fides* in launching the application, it needs to be explained that neither applicant, nor its attorney, Mr Noordman who received the initial instruction to defend the main action and who surfaced again in December 2018 after a warrant of execution had been served on applicant, makes reference to any communication relating to a dispute between the parties prior to institution of this application. Applicant probably hoped that it would be the better option to let sleeping dogs lie and

that the problem would evaporate without the necessity of keeping abreast with possible future action by respondent.

[32] No *bona fide* defence has been shown. I refer to the factual matrix *supra*. Applicant paid its first and only instalment of R100 000.00 on 13 August 2015 after having experienced endless problems with defective goods on its version. This is extremely improbable conduct. The triple deck screen was handed back in August 2016, a year later and long after applicant had ceased working in Lesotho. There is a dispute on precisely what led to this, but it was on all probabilities triggered by the credit advanced to applicant in respect of the triple deck screen. I am satisfied that this dispute and other factual disputes should be adjudicated on respondent's version based on the principles enunciated in Plascon Evans. I have no reason to reject respondent's version as far-fetched or false. As indicated earlier, applicant has provided a vague and improbable version. It is guilty of causing smokes and mirrors in respect of not only the reasons for the default, but also the failure to settle its dues in respect of the contract with respondent. I am satisfied that the acceptable version put forward by respondent makes it quite clear that respondent complied with all its contractual obligations and that applicant used the goods for several months since December 2014 in furtherance of its obligations at the mining site in Lesotho. No breach of contract by respondent or any repudiation has taken place. Applicant failed to pay the reduced balance purchase price.

[33] There is another reason why applicant's alleged defence has no prospects of success. It cannot now rely on acceptance of the alleged repudiation and cancellation of the agreement three years after repudiation had occurred. It had to make an election several

years ago which it failed to do. See *Christie's The Law of Contract in South Africa*, 6th ed at 563 and further, together with authorities quoted. Enforcement of a contract and cancellation are inconsistent remedies and mutually exclusive. Applicant was duty-bound to make its election to accept the alleged repudiation and to cancel the contract within a reasonable time as stated in *Christie* at 564. It failed to act accordingly.

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J P DAFFUE, J

On behalf of Applicant	:	Adv A Sander
Instructed by	:	Noordmans Attorneys Bloemfontein

On behalf of Respondent	:	Adv LC Leysath
Instructed by	:	c/o Symington & de Kok Bloemfontein