REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED.

Signature ……..

Date……..

CASE NO: 3352/2016

In the matter between:

SHELLA WILLIAM KEKANA **APPLICANT**

and

MOGALAKWENA LOCAL MUNICIPALITY **RESPONDENT**

JUDGMENT

MAKGOBA JP

[1] The Applicant in this matter, Shella William Kekana, applies for rescission of a default judgment granted against him by this Court on 21 February 2017. The Court declared him a vexatious litigant and prohibited him from launching any further actions and proceedings until all pending legal actions / proceedings launched by him are either withdrawn or finalised and all costs orders obtained against him have been paid in full. The Court further ordered that all pending matters launched by him be finalised and that he be only allowed to launch any legal proceedings with leave of the Court or a Judge.

[2] The application to have the Applicant declared a vexatious litigant was launched after a litany of litigation by him against the Respondent, Mogalakwena Local Municipality ("the Municipality"). The application was aimed at preventing his abuse of the legal process and the Courts in waging unmeritorious litigation against the Municipality.

[3] The Court order of the 21 February 2017 was obtained by default after the Applicant had failed to file a notice to oppose. The essence of the Court order is that the Applicant is barred from launching any new proceedings against

the Municipality until all pending legal proceedings that he instituted against the Municipality are finalised.

[4] The present application was launched by the Applicant on 19 June 2017. The Respondent (Municipality) gave notice to oppose this application, served and filed its answering affidavit at the end of July 2017. After the Municipality filed its answering affidavit the Applicant took no further steps to prosecute his application. The Applicant neither filed any replying affidavit nor set the matter down for hearing. It would appear that the Applicant had abandoned the application for rescission. This prompted the Municipality to, on its own accord, have the matter set down and finalised.

[5] This application is therefore before me for hearing at the instance of the Respondent / Municipality. The Applicant served and filed his replying affidavit on 11 May 2018. No heads of argument were filed as at 11 May 2018. In my view the Applicant had abandoned his application for a period of nine months until the Respondent took the initiative to have the matter heard and fiinalised.

[6] It is trite that in an application for rescission of judgment the Applicant must demonstrate, amongst others, that the order he seeks to set aside was granted in his absence without proper notice. The Applicant is generally expected to show good cause for the rescission by:

(a) Giving a reasonable explanation for his default;

(b) Showing that his application was made *bona fide*; and

(c) Showing that he had a *bona fide* defence to the Respondent's claim which *prima facie* has some prospects of success.

See: **Colyn v. Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA)**.

[7] The Applicant avers that the Court order was granted in his absence and without any proper notice to him. According to the return of service of the Sheriff the notice of motion was served on 20 August 2016 by affixing a copy thereof to the principal gate at […] G. Street, […], Polokwane, Polokwane, being the Applicant's residence. The Sheriff went on to make the following note on his return:

"NO ONE WAS WILLING TO ACCEPT THE DOCUMENT"

One gets the impression that there were people at the Applicant's residence but none of them was willing to accept service of the Court papers.

[8] In paragraph 6 of the founding affidavit the Applicant states:

"My residence at […] G. Street, […], Polokwane is guarded by guards supplied by a security company 24 hours per day, 7 days a week. It is highly improbable that the Sheriff could not find anybody present at the premises to serve the application on."

It can safely be accepted that the security guards were present at the Applicant's residence when the Sheriff affixed a copy of the Court document to the principal gate. I find it improbable that the security guards who are protecting the Applicant's life and property could fail or neglect to bring to the attention of their "master" the Court document left by the Sheriff at the gate. In my view there was a proper service of the notice of motion. The Sheriff was left with no option but to affix a copy of the application to the principal gate at the Applicant's place of residence as there was no one willing to accept service of the application.

[9] The service of the application by the Sheriff in the manner he did is in my view proper, sufficient and in compliance with Rule 4 of the Uniform Rules of Court. This is not a case where the premises of the Applicant were unoccupied but an instance where person(s) at the Applicant's residence refused to accept service. It is highly unlikely that the security guards at his house would not have brought the application to his attention.

[10] After obtaining the Court order on 21 February 2017 the Municipality's attorneys of record made efforts to bring the order to the Applicant's attention. The Sheriff made attempts to serve the Court order on the Applicant on 10 March 2017, 13 March 2017 and 31 March 2017. In all the three occasions

the Sheriff found the gate locked. On the 4 April 2017 the Sheriff served the Court order at the Applicant's residence by "handing a copy thereof to a male person who refused to disclose his name". This was a proper service of the Court order. However, the Applicant is not candid with the Court to concede that the Court order did come to his knowledge. This is a further demonstration of the Applicant's willful conduct.

[11] On 2 March 2017 the Municipality's attorneys of record addressed letters to both Mohale Incorporated Attorneys and Mapotene Mangena Attorneys bringing the Court order to their attention. The two firms of attorneys acted for the Applicant in many of the previous Court proceedings involving the Municipality. Mohale Incorporated are still acting for the Applicant in two pending matters in the Constitutional Court and Mapotene Mangena Attorneys are the Applicant's attorneys of record in this matter. It is highly unlikely that these attorneys could not have brought the Court order to the attention of the Applicant.

[12] I make a finding that the Applicant's default was willful as he had knowledge of the application and its legal consequences but took a conscious decision freely and voluntarily and refrained from opposing the application. I agree with the submission made by the Municipality's Counsel that the explanation

proffered by the Applicant why he was not in willful default is not only insufficient but it is also deliberately misleading to the Court.

The application for rescission falls to be dismissed on this basis alone.

[13] Is this application for rescission *bona fide*? I am inclined to make a finding that the Applicant is not *bona fide* in launching and proceeding with this application. He abandoned the application after receipt of the Municipality's answering affidavit only to emerge at the last minutes on 11 May 2018 (after nine months) to file his replying affidavit. He failed to set down the application for hearing prompting the Municipality to obtain a date for hearing and setting the matter down for hearing. He ignored the Municipality attorneys' request for his replying affidavit or to set the matter down for hearing. His willful default continues.

[14] The Applicant's conduct is inconsistent with a *bona fide* intention to defend the matter. It is trite that the conduct and motives of the Applicant for a rescission of judgment are relevant factors to be considered by the Court.

In **Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (AD)** it was held that in order to show good cause the Defendant must at least furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about, and to assess his conduct and motives.

[15] Upon perusal and consideration of the Applicant's founding affidavit I come to the conclusion that no *bona fide* defence has been disclosed by the Applicant. At paragraph 15 of his founding affidavit the Applicant states:

"....In order to avoid burdening this application with unnecessary detail full details of the reasons and grounds for each application cannot be dealt with herein. I will however in my answering affidavit in the main application set out the detail of circumstances under which each application were launched and the grounds for it with specific reference to the papers of each application"

With respect, the Applicant seems to have arrogantly granted himself the rescission order. This is wrong. He is obliged to disclose the basis of his defence, if any, at this stage and not assume that the judgment would obviously be rescinded whereafter he would put up his defence.

[16] I come to the conclusion that no case has been made out in the Applicant's founding affidavit to allow this Court to determine whether to grant the rescission application. This is so when taking into consideration the following aspects:

16.1. Willfulness in the Applicant's conduct;

16.2. Lack of sufficient cause for failure to oppose the main application;

16.3. The Applicant is not *bona fide* in bringing the rescission application; and

16.4. The fact that the Applicant did not disclose a *bona fide* defence.

[17] In the result the application is dismissed with costs.

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E M MAKGOBA
JUDGE PRESIDENT OF THE HIGH COURT, LIMPOPO DIVISION, POLOKWANE

APPEARANCES

Heard on	**:**	**14 MAY 2018**
For Applicant	**:**	**Adv. J A L Pretorius**
Instructed by	**:**	**Mapotene Mangena Inc** **Polokwane**
For Respondent	**:**	**Adv. K T Mokhatla**
Instructed by	**:**	**Hogan Lovells Attorneys** **c/o Maboku Mangena Attorneys** **Polokwane**