

**IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)**

CASE NO: EL 495/2016

ECD 1195/2016

In the matter between:

MZUVUKILE SIBONGILE MTSHIXA

APPLICANT

And

UKWEZA HOLDINGS (PTY) LTD

RESPONDENT

IN RE:

UKWEZA HOLDINGS (PTY) LTD

PLAINTIFF

And

MZUVUKILE SIBONGILE MTSHIXA

DEFENDANT

JUDGMENT ON INTERLOCUTORY APPLICATION

MBENENGE J:

[1] On 19 April 2016 the respondent instituted action proceedings before this court seeking payment by the applicant of the sum of R454 065. 75

“due, owing and payable by the Department of Education of the Province of the Eastern Cape [the [D]epartment] to the [respondent] in respect of catering services the (respondent) had rendered to the [D]epartment at the Mthatha Commercial High School but which amount was paid by the [D]epartment to the [applicant] on account thereof that the [applicant] on account thereof that the [applicant] had misrepresented to the [D]epartment that the said amount was due and payable to him whereas, in truth and in fact it was, to the [applicant’s] knowledge, due and payable to the [respondent]” (the main action).

[2] It was, in the alternative, alleged that R454 065. 75 was, on the basis set out in paragraph 1 above, the extent to which the applicant had been unjustifiably enriched at the expense of the respondent.

[3] After the applicant had entered appearance to defend the main action, the respondent duly notified the applicant of its intention to apply for summary judgment. Despite such notice, the applicant did not oppose the application, resulting in summary judgment, by default, being granted against the applicant for payment of R454 065. 75, together with interest thereon calculated at the prescribed legal-rate *a temporae morae*, on 24 May 2016.

[4] The grant of summary judgment attracted the launch, by the applicant, of an application for an order rescinding and setting aside the summary judgment and granting the applicant leave to defend the main action. The essence of the applicant’s alleged *bona fide* defense to the main action is captured in the relevant supporting affidavit in the following terms:

“19. The respondent owes me and [my] corporation [Thathile Trading 110 CC] the difference between the said sum of R454 065. 75 and a sum of R12 042 000. 00 plus interest and penalties due by the corporation to SARS as a result of the failure by the respondent to pay the said income tax and vat for claiming vat and not paying it. Due to the fact that the corporation has never been a vat vendor, the respondent is not entitled to any deductions for vat output. In the premises I submit that the respondent has failed to join the corporation in these proceedings to whom the sum claimed was paid. Therefore, the judgment granted by the above Honourable Court was granted by error and it is void.”

[5] The applicant has also proffered a lengthy explanation regarding how it came about for him to be oblivious to 24 May 2016 as having been the summary judgment application hearing date. Nothing, for present purposes, hinges on that explanation and why the rescission application was not launched timeously.

[6] The respondent is opposing the rescission application principally on the ground that the applicant has not shown that it has a *bona fide* defense which *prima facie* enjoys prospects of success. The mainstay of the opposition is set out in the relevant opposing affidavit as follows:

“4.6 ...the suggestion that the applicant, personally, is liable to SARS is manifestly without merit. Apparent from the applicant’s own affidavit is that the transactions which attracted the tax were conducted by the respondent on behalf of the CC. In the circumstances it is quite inconceivable that the applicant can be personally held liable for such tax.

4.7 The applicant’s allegations, if proved in due course, will not constitute a defense to the respondent’s action. In the premises, the applicant’s contention that he has a *bona fide* defense to the plaintiff’s action is manifestly without any factual or legal basis.”

[7] Elsewhere in the opposing affidavit, the respondent contends:

“8.3. The applicant’s unsubstantiated allegation that the respondent owes him, personally, significant amounts in respect of income tax and value-added tax is, for the reasons set out above, clearly incorrect. Apparent from the paragraph under reply is that the applicant accepts that the transactions which attracted the tax [were] performed by the respondent on behalf of the CC and not on his behalf.

8.4. To the extent that it may be relevant, which is not conceded, I record that the respondent has paid all taxes it was obliged to pay arising from the income it earned in respect of the services it rendered on behalf of the CC.”

[8] The applicant’s replying affidavit ought to have been delivered within 10 days from 1 August 2016. This did not happen, culminating in the respondent taking the initiative and setting down the rescission application for hearing as an opposed application on 27 October 2016. The relevant notice of set down was delivered on 12 September 2016.

[9] On 13 September 2016 the applicant delivered a notice in terms of rule 35(12) of the Uniform Rules of Superior Court Practice (the Rules) calling upon the respondent to produce for his inspection-

“1 All income tax returns for all taxes the respondent was obliged to pay arising from the income it earned in respect of the services it rendered on behalf of the CC for the period from November 2006 to June 2015, which the respondent [refers] to in paragraph 8.4 of its answering affidavit.

2. All fresh invoices issued to the CC by respondent for the period from November 2006 to June 2015.

3. Proof of credits passed in favour of the CC in respect of value Added Tax the respondent previously charged for the period from November 2006 to June 2015.”

[10] The respondent replied to the applicant’s rule 35 (12) notice registering its refusal to produce the income tax returns referred to in paragraph 8.4 of its answering affidavit, first, on the ground that the income tax returns are not relevant to the triable issues in the rescission application and, second, because the respondent’s answering affidavit makes no reference to income tax returns in respect of the period from November 2006 to June 2015 (the period referred to in paragraph 1 of the notice under reply). The respondent pledged to avail, on request by the applicant, “*a tax clearance certificate evidencing that the respondent has complied with all its income tax obligations*”. Copies of the fresh invoices are annexed to the respondent’s reply, and so are copies of the credit notes.

[11] Thereafter, on 24 October 2016, the applicant resorted to the instant interlocutory application and is seeking an order making the provisions of rule 35 relating to discovery applicable to the rescission application so as “*to secure the discovery of outstanding documents [a]pplicant seeks in order to prepare properly for his case.*”

[12] The affidavit in opposition to the interlocutory application was delivered out of time, on 18 November 2016. Condonation for the late delivery of the replying affidavit was sought by way of notice delivered on 24 November 2016, the date set for hearing of both the rescission application and the related interlocutory application. The respondent once again took the initiative to set these matters down for hearing. The application for condonation of the late delivery of the replying affidavit was not opposed.¹

[13] At the hearing before me, I informed the parties that, whilst both the rescission and interlocutory applications were serving before me, it would be prudent and convenient to first hear the interlocutory application and make a ruling thereon. In that way, the future conduct of the rescission application wherein the replying affidavit has yet to be delivered would be determined.²

1 The respondent took umbrage to certain allegations made in the relevant supporting affidavit which sought to introduce *via* the backdoor fresh causes of action. The impugned allegations were, however, not persisted in by the applicant.

² On the authority of *Waltloo Meat and Chicken SA (Pty) Ltd v Silvy Luis (Pty)Ltd* others 2008 (5) SA 461 (T) a court is entitled to disregard an affidavit delivered out of time without condonation for such late delivery having been applied for.

[14] Mr Poswa who, at the hearing appeared for the applicant, disavowed reliance on rule 35 (12) of the Rules³ and contented himself with seeking a directive in terms of rule 35 (13) rendering the provisions of rule 35 relating to discovery applicable to the rescission application. From a reading of the affidavit in support of the interlocutory application, it is not the applicant's case that he is unable to deliver his replying affidavit in the rescission application because, for instance, there is a document referred to in the answering affidavit which he seeks to inspect and copy or transcribe before delivering the replying affidavit. The interlocutory application also does not purport to compel the respondent to reply to the applicant's rule 35 (12) notice, as that notice has attracted a reply.

[15] As far as I could have ascertained, the applicant's quest is for "[securing] the discovery of outstanding documents [the] [a]pplicant seeks in order to prepare for his case." The case that the applicant contemplates appears to be "*an application to compel the [r]espondent to produce the income tax returns in relation to all income the [r]espondent received from the Department...which was due to the [a]pplicant's corporation for the period November 2006 to August 2015.*"

[16] The applicant has, in my view, called in aid rule 35 (13) in a situation for which it was not designed. The employment of discovery is generally resorted to where the battle lines between the parties have been drawn and legal issues established.⁴ The purported contemplated application to compel production of certain outstanding documents has yet to be launched. It hardly lies with the applicant to contend that battle lines have been drawn and legal issues established in respect of a "*contemplated application*". Even in the rescission application battle lines will be drawn and legal issues established once the applicant shall have delivered his replying affidavit.⁵

[17] Even though rule 35 relating to discovery applies to applications as far as the court may direct,⁶ discovery is rare and unusual in application proceedings and should

³ Rule 35 (12) provides:

"Any party to any proceeding may at any time before the hearing hereof deliver a notice as near as may be in accordance with Form 15 in Schedule to any other party in whose pleadings or affidavits reference is made to any document or tape recording to produce such document or tape recording for his inspection and to permit him to make a copy or transcription thereof. Any party failing to comply with such notice shall not, save with the leave of the court, use such document or tape recording in such proceeding provided that any other party may use such document or tape recording."

⁴ *SST Sales (Pty) Ltd v Fourie* 2010 (6) SA 272 (GSJ) at 276

⁵ In the *SST* case (*supra*) it was held that an order in terms of rule 35 (13) will, as a general rule, only be made after the legal issues have been established once all the affidavits have been filed.

⁶ *Machingawuta v Mogale Alloys (Pty) Ltd* 2012 (4) SA 113 (GSJ) at 115 f – 116A

be ordered by the court only in exceptional circumstances.⁷ The applicant has not established the existence of exceptional circumstances.

[18] It follows that no case for relief has been made out in the notice commencing the interlocutory application.

[19] The respondent's efforts to bring the rescission application closer to a finish have been thwarted by the applicant's tardiness. The main application ought to be brought closer to finality, sooner than later. This may be achieved once the applicant is placed on terms to deliver his replying affidavit in the rescission application.

[20] I accordingly make the following order:

- (a) *The applicant's interlocutory application for an order in terms of rule 35 is dismissed with costs, such costs to include the reserved costs of 27 October 2016.*
- (b) *The main application is postponed to a date to be arranged with the Registrar of this Court.*
- (c) *The applicant is directed to deliver his replying affidavit in the rescission application by 20 January 2017.*
- (d) *Any costs occasioned by the –*
 - (i) *postponement of the main application; and*
 - (ii) *applicant's application for condonation of the late delivery of the replying affidavit in the interlocutory application,**shall be borne by the applicant.*

S M MBENENGE

JUDGE OF THE HIGH COURT

⁷

Firststrand Bank LTD t/a Wesbank v Manhattan Operations (PTY) LTD 2013 (5) SA 238 (GSJ) at 242 F-H

Counsel for the applicant:

S G Poswa

Instructed by Makhanya Attorneys
East London

Counsel for the respondent:

D J Taljaard

Instructed by Gordon McCune Attorneys
King William's Town
C/o Mark Fredericks & Associates
East London

Date heard

24 November 2016

Date Delivered

20 December 2016