



Reportable:	Yes/No
Circulate to Judges:	Yes/No
Circulate to Magistrates:	Yes/No

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

CASE NO.: 1199/2023
Date heard: 21-02-2025
Date delivered: 14-03-2025

In the matter between:

SOL PLAATJE LOCAL MUNICIPALITY

Applicant

And

MAKONE CONSULTING ENGINEERS (PTY) LTD
(Registration number: 2004/112475/23)

1st Respondent

THE SHERIFF OF KIMBERLEY AND GALESHEWE

2nd Respondent

In re:

MAKONE CONSULTING ENGINEERS (PTY) LTD

Plaintiff

And

SOL PLAATJE LOCAL MUNICIPALITY

Defendant

CORAM: WILLIAMS J:

JUDGMENT

WILLIAMS J:

1. On 10 December 2024 the applicant, the Sol Plaatje Local Municipality (the Municipality) obtained an urgent interim order pending the return day that *inter alia*: the second respondent, the Sheriff of Kimberley and Galeshewe, be interdicted and restrained from removing the vehicles attached in terms of a writ of execution issued on 18 June 2024; and that the execution and

operation of the default judgement order dated 5 April 2024 be suspended pending the finalisation of the rescission application in Part B of the applicant's Notice of Motion.

2. The background to this application can be summarized as follows:
 - 2.1 The first respondent, Makone Consulting Engineers (Pty) Ltd (Makone), instituted an action against the Municipality for payment for services rendered on 29 June 2023.
 - 2.2 The Municipality did not defend the matter and on 5 April 2024 default judgment was granted against the Municipality for payment of the amount of R806 500, 57 plus interest thereon.
 - 2.3 On 18 June 2024 a writ of execution was issued.
 - 2.4 On 30 September 2024 the sheriff attached two motor vehicles belonging to the Municipality.
 - 2.5 On 3 December 2024 Makone's attorneys instructed the Sheriff to remove the vehicles. The Municipality indicated that it would settle the debt by 6 December 2024.
 - 2.6 Instead of payment, the Municipality provided an undertaking in terms of Rule 45(5) to the Sheriff on 5 December 2024.
 - 2.7 On 10 December 2024 the Sheriff attended the offices of the Municipality to remove the assets, which action led to the bringing of the urgent application.
3. The application was brought on a couple of hours notice to Makone, who managed to instruct its attorney and counsel to oppose the application, albeit without opposing papers. The Sheriff was only served with the application on 11 December 2024 and has to date not opposed the application.
4. When the matter served before me on the extended return date of 21 February 2025 a complete set of affidavits had been filed as well as heads of argument.

5. Makone opposed the application on the basis that it was not urgent, that the Rule 45(5) security was defective and that the Municipality has not shown that it would suffer irreparable harm should the vehicles be removed and sold. It also contended that it would suffer severe financial prejudice should the operation and execution of the default judgment be suspended. Lastly that the Municipality does not have good prospects of success with the rescission application.

Urgency

6. The attack on the lack of urgency is made on the basis that it was self-created and that the R 45(5) security was a ruse to create urgency where none existed with regard to the suspension of the writ of execution. The Sheriff attached the motor vehicles on 30 September 2024 and only after an attempt to remove the vehicles on 3 December 2024 did the Municipality provide the sheriff with the R 45 (5) security on 5 December 2024 which was in any event defective and prompted another attempt at removal on 10 December 2024.
7. On behalf of the Municipality it was argued that the application for the interdict could not have been brought before 10 December 2024 because until that date the Municipality was not informed by the Sheriff that the R 45(5) security was defective, which is in any event denied by the Municipality. Had the application not been brought on that day the Municipality would not have been afforded substantial redress if the matter were to enrolled in the normal course. The vehicles would by then have been sold and would render normal proceedings superfluous. It was also argued by Mr Groenewaldt for the Municipality that this matter did not involve normal private litigants but is one which involves taxpayers' monies and that the court should not allow the potential abuse of tax payers' funds because of non-compliance with technical requirements. So that even if I find that the urgency was self-created, the interests of justice dictate that any potential misuse of public funds trump any form of self-created urgency.

8. R 45(5) reads as follows:

"The court may, on application, suspend the operation and execution of any order for such period as it may deem fit: Provided that in the case of an appeal, such suspension is in compliance with section 18 of the Act".

9. Nowhere in his Rule does it appear that the security can only be given on the day of removal by the Sheriff of the attached assets. Neither the Municipality, or its attorneys could in any event have laboured under such an impression given the fact that the Municipality had provided the Sheriff with the challenged security on 5 December after the first attempt at removal on 3 December and before the attempt on 10 December. This argument does not hold any water.
10. However, given the fact that the sheriff had not informed the Municipality of the alleged defects in the security, before 10 December, when she returned to remove the vehicles, thus denying the Municipality an opportunity to consider and attend to such alleged defects, in my view, rendered the application urgent.

The interdict

11. The interdict sought is premised on the R 45 (5) undertaking given to the Sheriff. The argument is that there can be no prejudice to Makone should the vehicles remain in the possession of the Municipality until the date of a sale in execution. On the other hand, the Municipality will suffer irreparable harm if the vehicles are removed in that the particular vehicles are used by the Mayor and Speaker and without these vehicles service delivery will be impaired. Furthermore the tax payers will have to cough up for the storage fees of the vehicles before the sale thereof. It is argued further that I have a discretion to make such an order even if it is found that the R 45 (5) security is not valid.
12. I do however not have to deal with the validity or not of the security. The problem which I have with the interdict sought and granted on 10 December

2024 is that it is a final interdict and not at all what is envisaged with the undertaking in terms of R 45 (5).

13. No case has been made out for final relief and it is in any event unsustainable. No court would permanently restrain a party from performing its legitimate functions.

The suspension of the order by default

14. In *Gois t/a Shakespeare's Pub v Van Zyl and Others* 2011(1) SA 148 (CLC), Waglay J, as he then was, summed up the principles for the granting of a stay of execution as follows at paragraph 37 thereof:
 - "(a) A court will grant a stay of execution where real and substantial justice requires it or where injustice would otherwise result.*
 - (b) The court will be guided by considering the factors usually applicable to interim interdicts, except where the applicant is not asserting a right, but attempting to avert injustice.*
 - (c) The court must be satisfied that:*
 - (i) the applicant has a well-grounded apprehension that the execution is taking place at the instance of the respondent(s); and*
 - (ii) irreparable harm will result if execution is not stayed and the applicant ultimately succeeds in establishing a clear right.*
 - (a) Irreparable harm will invariably result if there is a possibility that the underlying causa may ultimately be removed, ie where the underlying causa is the subject-matter of an ongoing dispute between the parties.*
 - (b) The court is not concerned with the merits of the underlying dispute – the sole enquiry is simply whether the causa is in dispute."*
15. In *BP Southern Africa (Pty) Ltd v Mega Burst Oils and Fuels (Pty) Ltd* 2022(1) SA 162 (GJ), the court however held that the principles laid down in the *Gois* matter are guidelines and that the court seized with such an application, could, in its discretion consider the merits of the dispute to determine whether an injustice will be done. I align myself with this view, especially in circumstances where the default was wilful.
16. *In casu*, Mr Groenewaldt has in any event invited me to look at the defence raised by the Municipality in the application for rescission. I must however

at this state mention, that there is no proper rescission application in this matter.

17. Although there is reference in the Notice of Motion to the rescission application being part B of the application, there is no clearly demarcated Part B in the body of the founding affidavit. The averments made in support of the suspension application appear to be the same as those relating to the application for rescission. It is understandable that the Municipality, in the haste with which the papers were prepared, did not have time to fully deal with the rescission application (and therefore also the relief sought that it be granted leave to supplement its papers). The problem is that supplementation of the founding affidavit is sought only after the confirmation of the *rule nisi* and within 60 days from such confirmation. I am left in the dark as to whether the rescission application is or will be brought in terms of R 31 (2)(b), R 42(1) or the common law. More with regard to this later herein.
18. The Municipality explains in its founding affidavit that it had been informed by a Mr O Moagi, its technician of Water and Sanitation, that it had no defence against the action brought by Makone. On the basis of this advice it did not defend the action. Default judgment was subsequently granted on 5 April 2024.
19. During middle October 2024, the Municipality's City Engineer, Water and Sanitation, a Mr P Mukosi became aware of the claim and expressed the view that the professional fees of Makone were excessive and not in line with the Engineering Council of South Africa's (ECSA) guidelines. In terms of these guidelines the fees of Makone, who was appointed by the Municipality as a consulting engineer for the reconstruction of toilet top structures in certain areas of Kimberley, are calculated at 10% of the value of the entire project. The value of the project being R11 991 130, 17, Makone was thus only entitled to a fee of R1 199 130, 00.

20. The Municipality alleges that to date it had paid Makone R2 446 305, 68 in respect of professional fees which amounts to an overpayment of R1 247 192, 68. It is therefore submitted that the Municipality not only has a *bona fide* defence to Makone's action but that it also has a counterclaim for the amount it was overpaid.
21. On the basis thereof Mr Groenewaldt submitted that the Municipality has a triable defence and that the Court should exercise its discretion in favour of the suspension of the warrant of execution pending the rescission application which is brought in order to remedy the misappropriation of tax payers money.
22. Makone in its answering affidavit, denies that the entire project value was R11 991 130,17 and states that this value only applied to the construction amount for implementation of Phase 2.1 of the project. In addition it states that the fees charged by itself not only constituted the normal professional fees (of 10%) but also included costs for additional services and disbursements which it was entitled to charge in terms of the Service Level Agreement entered into with the Municipality.
23. I need not say much about the defence raised by the Municipality, that is left for the court hearing the rescission application, which can be brought whether or not the relief in terms of R 45 (A) is granted. However, I do need to mention that if the amount owed to Makone for services rendered merely comprised the professional fee of 10% of the project value, it would have been most irresponsible for the Municipality, entrusted with tax payers money, to have made payment way above what was due. In its replying affidavit the Municipality states that it had made total payments to Makone in the amount of R3 292 641, 17, of which R2 446 305, 68 represented professional fees, which on my calculations, based on the Municipality's version of only being liable for 10% of the project, means an overpayment of R2 093 511, 17, which is contradictory to what is stated in the founding affidavit.

24. There are other aspects of the rescission application which are also unsatisfactory. So for instance the Municipality does not explain why the rescission application was not brought within a reasonable time after it had been informed of its alleged overpayments to Makone during October 2024. On 15 November 2024 the attorneys for the Municipality sent an e-mail to the attorneys for Makone seeking an undertaking that they withdraw the attachment and removal of the vehicles, pending a rescission application which would be brought by the Municipality before 1 December 2024. Such application did not materialise before 1 December 2024 and I dare to say that it is yet to materialise.
25. Rule 31(2)(b) requires of a defendant to apply for the rescission of a judgment within 20 days of acquiring knowledge of such judgment. The Municipality, at best for it, would have had knowledge of the judgment at the latest on 30 September 2024 when the warrant of execution was served on it.
26. Rule 42(1) requires certain jurisdictional facts to exist before a court can exercise its discretion to set aside an order in terms of the Rule. This is however not an order or judgment in which there is an ambiguity, or a patent error or an omission in terms of R 42 (1)(b), nor is it an order or judgment granted as a result of a mistake common to the parties in terms of R 42 (1)(c).
27. In *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd* 2007(6) SA 87 (SCA) the SCA held at paragraph 27 thereof, in regard to R 42 (1)(a) that:

“[27] Similarly, in a case where a plaintiff is procedurally entitled to judgment in the absence of the defendant the judgment if granted cannot be said to have been granted erroneously in the light of a subsequently disclosed defence. A court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff's claim as required by the rules, that the

defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the rules entitled to the order sought. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment".

(own underlining)

28. Based on the *Lodhi* judgment, the Municipality would also not be able to rely on Rule 42(1)(a).
29. In terms of the common law a judgment can be set aside where it was granted by default if good cause is shown. "*Good cause*" entails that a reasonable explanation must be given for the default, the applicant must show that his application is made *bone fide* and he has to show on the merits that he has a *bona fide* defence which *prima facie* carries some prospect of success. The court however still retains its discretion which must be exercised after a proper consideration of the relevant circumstances. In these circumstances the Municipality would in my view have a major obstacle to overcome, merely by providing an acceptable reason for its default.
30. That being said, if one applies the requisites for an interim interdict to the application to suspend the execution of the default judgment, as stated in the *Gois* matter *supra* and other similar matters, the Municipality has to show *inter alia* that irreparable harm will result if the execution is not stayed and the applicant ultimately succeeds in establishing a clear right. In its founding affidavit the Municipality states that it will suffer irreparable harm in the form of paying unnecessary storage and the impact on service delivery if the vehicles are removed. As mentioned the vehicles are those used by the Mayor and Speaker in their official capacities. No explanation is given as to the impact the execution of the writ would have on service delivery. It cannot be that there are no other municipal vehicles which these

officials can use in performing their duties. Likewise no information has been given as to the costs of storage. The applicant has furthermore failed to show that Makone is "*man of straw*" and that it would not be able to recoup such losses in the event a rescission of the default judgment is granted. Meanwhile Makone, who has done everything according to the Rules, is expected to wait for payment of the judgment debt until the rescission application is finalised.

31. In my view the Municipality has failed to show that it would be in the interest of justice to have the execution suspended and as a result the *rule nisi* should not be confirmed.

Costs

32. There is no reason why costs should not follow the event. Mr De Heus who appeared for Makone submitted that costs on scale B be allowed should the *rule nisi* be discharged. Such a cost order would, in my view be appropriate.

The following order is made.

The rule nisi issued on 10 December 2024 is discharged with costs on the party and party scale, scale B.



CC WILLIAMS
JUDGE

For Applicant: Mr S Groenewaldt
Towell & Groenewaldt Attorneys

For Defendant: Adv C De Heus
R Masilo Attorneys
c/o Mosikare Attorneys