

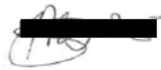
REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: N

01/04/2026_
DATE


SIGNATURE

Case Number: 14/43099

In the matter between:

THE CITY OF JOHANNESBURG

Applicant

and

CAPENSIS INVESTMENTS 352 (PTY) LTD
CAPENSIS INVESTMENTS 322 (PTY) LTD

1st Respondent
2nd Respondent

In re:

CAPENSIS INVESTMENTS 352 (PTY) LTD

First Plaintiff

CAPENSIS INVESTMENTS 322 (PTY) LTD

Second Plaintiff

and

THE CITY OF JOHANNESBURG

Defendant

JUDGMENT

MOGOTSI, AJ

Introduction

- [1] This is an interlocutory application brought by the Applicant seeking an order compelling the Respondents to furnish security in the amount of R2 000 000.00 (Two Million Rands) for its costs in the main action.

Background

- [2] The matter has a protracted and complex history. The history of the litigation between these parties stretches back to the initial Sale Agreements in 2001. In November 2014, the Respondent, who are the Plaintiffs in the main action, launched an action for damages in excess of R27 000 000.00 (Twenty-Seven Million Rands) against the Respondent, the Defendant in the main action, arising from the alleged unlawful sale of two properties in Alexandra Township. Those agreements were declared null and void by a Court Order dated 14 November 2003, which also ordered that Erf 2981 be transferred back to the Applicant.
- [3] More than eight years later, on 23 August 2012, the Respondents launched an application seeking to vary that 2003 court order. That application was dismissed in April 2014, as was a subsequent application for leave to appeal. A petition to the Supreme Court of Appeal was later abandoned.

- [4] The Respondents' sole director and shareholder, Mr K.P. Matsheke, passed away in September 2021. In October 2021, the Applicant sought to bring the matter to finality. Correspondence with the Respondents' erstwhile attorneys, Fluxmans, revealed that the Respondent companies were in the process of deregistration due to failure to file annual returns. The Applicant's attorney took steps to stay the deregistration process with the Companies and Intellectual Property Commission ("CIPC") to allow the matter to be finalised. Windeed Company Reports dated June 2022 confirmed that both Respondent companies were in "ANNUAL RETURN DEREGISTRATION PROCESS" and that the late Mr Matsheke was still reflected as the active sole director. Despite these steps, the Respondent companies were finally deregistered on 30 March 2023.
- [5] In February 2022, Mr Mthenjwa ka Mamthenjwa, later identified as Advocate Ephraim Sepheka, entered the fray, purporting to represent the interests of the surviving spouse and executrix of the late Mr Matsheke's estate. Fluxman's Attorneys withdrew, and Braimoh Attorneys came on record.
- [6] A pre-trial conference was held on 25 May 2022. Despite the Applicant's challenges, Adv Sepheka confirmed that he drafts all documents and prefers all communication to be sent directly to him.
- [7] The Applicant's concerns about the bona fides of the litigation, the authority of the representatives, and the Respondents' ability to pay costs were set out in a detailed letter to Adv Sepheka dated 8 June 2022 (FA20) to no avail.
- [8] On 22 July 2022, the Applicant filed an interlocutory application challenging the authority of Braimoh Attorneys and Adv Sepheka. In response, Adv Sepheka deposed to an answering affidavit personally, in which he made various assertions about the executor's authority to represent the companies and claimed that the Plaintiffs' deregistration had been put on hold. This assertion was, with the benefit of hindsight, incorrect.
- [9] Braimoh Attorneys purported to withdraw in July 2023, and Mahlakoane Attorneys came on record. The Applicant issued a fresh Rule 7 notice to Mahlakoane Attorneys, which remained unanswered.

- [10] The previous interlocutory application was heard by Livesage AJ on 16 August 2023. Judgment was handed down on 7 September 2023. The court dismissed the Rule 30 challenge on the basis that the pre-trial conference constituted a further step and found that the Rule 7 challenge to Mahlakoane Attorneys was not properly before it.
- [11] The Applicant decided not to appeal this decision, citing the futility of pursuing costs against companies that are empty shells and, as we now know, non-existent.
- [12] Applicant launched the present security for costs application in August 2024, after it became apparent that Adv Sepheka was determined to proceed to trial. The supplementary affidavit, filed later, revealed the final deregistration of the companies in March 2023.
- [13] After the launching of the security for costs application, the Applicant filed an amended notice of motion on 4 March 2026, seeking substantially expanded relief, including a declaratory order regarding the deregistration and costs *de bonis propriis* against the Respondents' legal representatives.

The issues

- [14] The issues are crisp, and this court is called upon to determine the procedural validity of the 4 March 2026 amendment, the significance of the companies' deregistration, and the Applicant's prayer for a *de bonis popriis* costs order.

The application for amendment

- [15] On 4 March 2026, the Applicant filed an "As Amended Notice of Motion." The amendment seeks to introduce the following three new categories of relief:

A declaration that the Respondents have been deregistered and their names removed from the register within the meaning of Section 83(1) of the Companies Act.¹;

¹ Act 71 of 2008.

A declaration that all steps taken and appearances entered purportedly on behalf of the Respondents are null and void and are set aside; and

An order that Mahlakoane Attorneys and Adv Ephraim Sepheka alternatively Mthenjwa be ordered, jointly and severally, to pay the Applicant's costs *de bonis propriis* on the attorney-and-own-client scale, including the costs of two counsel.

[16] The original prayers for security for costs are retained as alternative relief.

[17] The Respondent's counsel submitted that the proposed amendment was inconsistent with the provisions of Rule 28² (1) of the Uniform Rules of the Court, which reads as follows:

“(1) Any party desiring to amend a pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment.

(2) The notice referred to in sub-rule (1) shall state that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice, the amendment will be effected.”

[18] In *Shoprite Checkers (Pty) Ltd v Trustees for The Time Being of The 3 Broten Trust*³, the position regarding the amendment of pleadings is summarised as follows:

“The amendment of pleadings and documents is done in terms of Rule 28(1) of the Uniform Rules of Court. The rule permits the amendment of any other pleading and document other than the sworn statements and sets out a process that should unfold to enable the court to consider the amendment application.

² Rule 28 (1) of the Uniform Rules of the Court.

³ [2023] ZAGPJHC 130 (6 February) para 10 -13.

It is permissible for the court exercising its discretion and notwithstanding anything to the contrary in the rule, at any stage before the judgment, to grant leave to amend any pleading and document.

It is trite that the onus is on the party seeking the amendment in this case, the plaintiff, to establish that the other party, namely, the defendant, will not be prejudiced by it.

The principles governing the granting of an amendment have been summarised by White J in *Commercial Union Assurance Co Ltd v Waymark NO*. These are the following:

- (a) The court has a discretion whether to grant or refuse an amendment;
- (b) An amendment cannot be granted for the mere asking; some explanation must be offered, therefore.
- (c) The applicant must show that *prima facie* the amendment 'has something deserving of consideration, a triable issue';
- (d) The modern tendency lies in favour of an amendment if such facilitates the proper ventilation of the dispute between the parties;
- (e) The party seeking the amendment must not be *mala fides*.
- (f) The amendment must not cause an injustice to the other side which cannot be compensated by costs;
- (g) The amendment should not be refused simply to punish the applicant for neglect.
- (h) A mere loss of opportunity of gaining time is no reason, in itself, for refusing the application;

(i) The amendment is not sought timeously; some reason must be given for the delay.”

[19] In court and upon realising that the proposed amendment was not in compliance with Rule 28 (1) of the Uniform Rules of the Court, the Applicant’s counsel interjected whilst the Respondent’s counsel was addressing the issue of the proposed amendment, placing it on record that the proposed amendment was done by virtue of Rule 28 (10)⁴ of the Uniform Rules of the Court, which provides as follows:

“(10) The court may, notwithstanding anything to the contrary in this rule, at any stage before judgment grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit.”

[20] The conduct of the Applicant’s counsel implies that he tacitly conceded that the amendment is not in compliance with Rule 28 (1). However, to compound the Applicant’s problems, it did not apply for leave to effect the amendment as envisaged in Rule 28 (10). Therefore, I can safely find that the amended notice of motion filed on 4 March 2026 is an irregular step and falls to be struck out.

[21] Having found that the amendment is an irregular step, I shall determine this application based on the original notice of motion for security for costs. However, before turning to the merits of the security of costs application, it is necessary to consider the effect of the final deregistration of the Respondent companies.

[22] Section 83 (4) of the Companies Act⁵ provides that upon deregistration, the company ceases to exist as a legal entity. The legal position is clear and well-established⁶, and it became clear to me during the court proceedings that both sets of counsel are in agreement that a deregistered company is a legal nullity.

⁴ Rule 28 (10)⁴ of the Uniform Rules of the Court

⁵ Act 71 of 2008

⁶ *Barclays National Bank Ltd v Traub; Barclays National Bank Ltd v Kalk* (1981 (4) SA 291 (W))

[23] The Respondent companies were finally deregistered on 30 March 2023 and became nullities, meaning that they cannot take any steps in legal proceedings, and no legal proceedings can be launched against them. It follows that it cannot furnish a bank guarantee, comply with a court order, or pay costs.

[24] Critically, throughout its founding, replying affidavits, and in court, the applicant has been highly critical of Adv Sepheka and Mahlakoane Attorneys for purporting to represent deregistered companies. The Applicant has argued, correctly in my view, that a deregistered company cannot litigate, that steps taken on its behalf are a nullity, and that the legal representatives are acting without authority. Yet, in the very same application, the Applicant itself has taken a direct legal step against these same deregistered companies. The Applicant, in my view, cannot have it both ways. It cannot, on the one hand, condemn the Respondents' legal representatives for dealing with non-existent entities, while on the other hand, itself seek relief from those same non-existent entities. If the companies do not exist for the purpose of being represented, they equally do not exist for the purpose of being sued or being ordered to furnish security.

[25] Consequently, I am of the view that the application is brought against non-existent entities, and this court cannot order it to pay security for costs. It follows that the application falls to be dismissed.

[26] Regarding the prayer for costs *de bonis propriis*, I mentioned earlier in this judgment that this prayer was introduced via an irregular amended notice of motion dated 4 March 2026. In the circumstances, it suffices to mention that it would not be appropriate to grant this relief. This brings me to the question of costs.

Costs

[27] On the question of costs, the ordinary rule that costs follow the result should apply. The Applicant has been unsuccessful in its primary application for security for costs. The Respondent's attorneys were not on record to protect the interests

of the Respondents only. They were compelled to come on record to argue, *inter alia*, the application for a *de bonis propriis* costs relief sought by the Applicant.

Order

[28] For these reasons, I make the following order.

1. The "As Amended Notice of Motion" filed on 4 March 2026 is struck out as an irregular step.
2. The Applicant's application for security for costs is dismissed.
3. The Applicant is ordered to pay the respondents' costs of this application on a party and party basis, scale "B".



MOGOTSI
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances

For the Applicants	: Adv CHJ Badenhorst SC
	Adv J Malherbe
Instructed by	: Pinsent Masons South Africa Incorporated
For the Respondents	: Adv E Sepheka
Instructed by	: Mahlakoane Attorneys
Date of Hearing	: 10 March 2026

Date of Judgment : 01 April 2026

