REPUBLIC OF SOUTH AFRICA

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

CASE NO: 142287/2017

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

Quigley 15/9/2020
SIGNATURE DATE

In the matter between:

KHUDUYANE QUIGLEY (PTY) LTD — Plaintiff (Respondent in rescission)

and

EKURHULENI METROPOLITAN MUNICIPALITY — Defendant (Applicant in rescission)

J U D G M E N T

Civil procedure-rescission under Rule 42(1)(a) - default judgment - procedure to be followed when defence struck under Rule 35(7) - in an action for judicial review and consequential damages flowing from alleged tender irregularities, plaintiff applied for defendant's defence to be struck under Rule 35(7) for failure to comply with order compelling discovery – application granted in unopposed motion court - in the same application plaintiff sought and was granted by default an order extending time period under section 9 of PAJA to institute judicial review; reviewing and setting aside tenders; and directing that defendant pay damages to plaintiff based on loss of profits in an amount to be proved - no evidence led - HELD: Rule 35(7) not a proper basis on its own to grant default judgment - Rule 31 applies once defence struck - if claim is not one for a debt or liquidated demand evidence must be led before default judgment may be granted under Rule 31(2)(a) - extension of time period under PAJA; review and setting aside of tenders and damages consequent thereon not claims for a debt or liquidated demand - not competent for court to grant default judgment without hearing evidence - order erroneously granted and rescinded.

KEIGHTLEY, J:

INTRODUCTION

1. The Ekurhuleni Metropolitan Municipality (the City), which is the defendant in the main action, applies for the rescission of an order granted by default in the unopposed motion court by Nkosi AJ in favour of the plaintiff in the action, Khuduyane Quigley (Pty) Ltd (Khuduyane). The latter opposes the application.

2. The litigation between the parties has some history. The dispute arises out of an invitation to tender issued by the City in 2013 for the supply of plant and equipment. Khuduyane was one of the companies that tendered for the contracts. It was successful in being awarded a contract in respect of certain of bid items, but not in respect of others. Dissatisfied with the outcome of the tender process, Khuduyane instituted judicial review proceedings under the Promotion of Administrative Justice Act (PAJA)[1] by way of an application in the High Court in 2015 (the review application). It sought to review and set aside the award of those bids in respect of which it had not been successful.

[1] 3 of 2000

3. The review application was heard in January 2017 by Wepener J. He dismissed the application. Although there is some dispute between the parties about the finer details of this outcome, it is common cause that that one of the reasons for the dismissal of the application was that the contracts that were the subjects of Khuduyane's challenge had expired by the time the matter was heard.

4. Undaunted, Khudyane then instituted the main action against the City. In this action, it again sought an order reviewing and setting aside the awards in respect of which it had not been successful. It also prayed for an order extending the period stipulated in s7(1) of PAJA for the institution of the review to 1 June 2017. Khuduyane claimed damages in the amount of some R8million from the City, alternatively, a statement and debatement of account. In addition, it sought a directive that the City provide it with various documents pertaining to the impugned bids. The damages claim was based on contract, alternatively delict, further alternatively s8 of PAJA.

5. The City filed an exception to the particulars of claim. This was dismissed by Mashile J. Thereafter the City filed a plea, and Khuduyane a replication. However, the City failed to respond to the discovery notice served by Khuduyane on 24 October 2018. A reminder letter was sent on 4 December to the City's attorneys, but this, too, met with no response. On 21 February 2019 Khuduyane was granted an order compelling discovery. This was hand-delivered to the City's attorneys on 4 March 2019, under cover of an explanatory letter. Once again, no response was forthcoming from the City's attorneys. They did not respond to, nor oppose, the next step in the litigation either. This was an application by Khuduyane to strike the City's defence, in view of its failure to comply with the order to compel discovery, and to have default judgment entered against it (the

application to strike). The application to strike was served on 5 May 2019, and a notice of set down was served on 21 May 2019.

6. According to Khuduyane, on the day before the scheduled set down of the application to strike there was telephonic communication between its attorney and the City's attorneys. The latter were aware of the set down the following day, asked for copies of the application, and told Khuduyane's attorneys that they would be present in court the following day. However, when the matter was called, there was no-one on record for the City. It is safe to say that the City was unable, in its affidavits in the rescission application, to properly explain how and why this came to pass.

7. It was on this basis that Nkosi AJ granted the order which is the subject matter of the rescission application. That order was in the following terms:

> "1. The Defendant/Respondent's defence is struck out, with costs.
>
> 2. Judgment is granted in favour of the Applicant as per the Plaintiff/Applicant's Particulars of Claim:-
>
> 2.1 The awards of the Defendant under tender contract number RS(R) 12/2003 are set aside in respect of:
>
> 2.1.1 bid item 12.3 in respect of the 12001-15000 litre capacity awarded to Productive Plant Hire and construction Trust as the primary contractor;
>
> 2.1.2 bid item 12.4 in respect of the 12001-1500 litre capacity awarded to Productive Plant Hire and Construction Trust as the primary contractor;
>
> 2.1.3 bid item 13.1 in respect of the 6001-9000 litre capacity awarded to Aqua Transport and Plant Hire (Pty) Ltd as the primary contractor;
>
> 2.1.4 bid item 13.2 in respect of the 9001-12000 litre capacity awarded to Bongani Tom Transport CC as the primary contractor;
>
> 2.1.5 bid item 13.3 In respect of the 12001-1500 litre capacity awarded to Bongani Tom Transport CC as the primary contractor;
>
> 2.1.6 bid item 13.4 In respect of the 12001-15000 litre. capacity awarded to Bongani Tom Transport CC as the primary contractor.
>
> 3. The period stipulated in Section 7(1) of the Promotion of Administrative Justice Act 3 of 2000, being 180 days is varied and extended until 1 June 2017.

4. The Defendant is ordered to provide the Plaintiff with all:

4.1 details of all plant and equipment hired from the primary, secondary or any contractors ranked above the Plaintiff in respect of bid items 12.3, 12.4, 13.1,13.2, 13.3 and 13,4;

4.2 all invoices rendered by primary and/or secondary and/or any contractors ranked above the Plaintiff in respect of such plant and machinery hired;

4.3 all orders in respect of plant and equipment required by the Defendant in respect of bid items 12.3, 12.4, 13.1, 13.2, 13.3 and 4.4 all appointing letters and all officially printed daily record books indicating the site and hours worked, including the one week sheet per machine in respect of all machines, plant and equipment.

5. The Defendant is ordered to:

5.1 render a full statement of account to the Plaintiff of all the orders, invoices and payments made by the Defendant to the entities which performed the works in respect of bid items 12.3, 12.4, 13.1, 13.2, 13.3.and 13.4 for the period 30 April 2014 to 30 June 2016;

5.2 debate the aforesaid account with the Plaintiff; and

5.3 pay an amount equivalent to the profit that the Plaintiff would have had the work been ordered from and done by the Plaintiff.

6. The Defendant is to pay the Plaintiff's costs of suit."

CONDONATION FOR LATE FILING OF REPLYING AFFIDAVIT

8. The City sought condonation for the late filing of the replying affidavit. This was vigorously opposed by Khuduyane, in light of, particularly, the City's woeful record of compliance to date. The replying affidavit was filed eight weeks out of time. The City sought an extension from Khuduyane, which was refused. The City filed its replying affidavit late without an application for condonation. It subsequently filed a condonation application approximately a month after it had filed its replying affidavit.

9. Khuduyane points out that although the City proffers some explanation for the delay, the explanation only covers a very short period. Substantial periods of the delay are not explained at all. It is difficult to avoid the conclusion that the City

and/or its attorneys simply failed to pay due regard to the time periods prescribed in the Rules.

10. It is trite that a party seeking condonation is asking the court for an indulgence. Condonation is not simply there for the asking. A sufficient explanation should be given for the full period of the delay in a case like this one. As far as the replying affidavit is concerned, Khuduyane is correct in its submission that the City failed fully to explain its delay. It seems simply to have decided to take its own time in preparing a reply. This is not the type of conduct that ought ordinarily to be overlooked by a court, particularly in circumstances where the party is already on the back foot as a result of its prior tardy conduct.

11. There will be no overwhelming prejudice to the City if the late filing of its replying affidavit is not condoned. The replying affidavit does not place many facts before the court that are of material assistance to the City. At most, the replying affidavit says that the relevant City officials were not told about the progress in the litigation, and therefore they were unaware that Khuduyane had filed the strike out application. This averment, if accepted, would not be of great assistance to the City. It implies that the City's attorneys were to blame for the City's failure to provide discovery and to oppose the strike out application. Even if this were so, it would not absolve the City. It is well established in our law that generally speaking a party cannot hide behind the dilatory conduct of its lawyers in seeking to explain a default judgment.

12. On balance, then, the City must suffer the consequences of its failure, without proper explanation, to heed the time limits provided for the filing of its reply. This is not one of those cases where a great injustice will be perpetrated by excluding

the replying affidavit. The City's condonation application in respect of the late filing of its replying affidavit falls to be dismissed with costs.

THE APPLICATION FOR RESCISSION

13. This brings me to the central point of the matter, viz. the rescission application. The City relies on Uniform rule 42(1)(a), alternatively rule 31(2)(b), alternatively the common law as the basis for rescission.

14. The City's reliance on rule 31(2)(b) and the common law faces an obvious obstacle. These bases of rescission require the applicant to show good cause for its default. This means it must give a reasonable explanation for its default. Default that is willful or grossly negligent will not invite sympathy from the court.[2] This is one of the factors the court will consider in granting rescission. In order to place the court in a proper position to evaluate this criterion, the applicant must set out the reasons for the default.[3] The explanation must be sufficiently full to enable the court to understand how the default came about, and to assess the applicant's conduct or motive.[4] An application that fails to set out these reasons is not proper.[5]

15. The explanation for the default set out in the City's founding affidavit leaves a lot to be desired. It attempts to explain that its attorneys did not know about the various notices and letters that had been delivered by Khuduyane's attorneys. The junior attorney looking after the matter was alleged to have been unaware of the notice to compel, and the application to strike. However, it is not explained how he could

2 *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476-7, as well as the long line of cases that have applied this principle
3 *Brown v Chapman* 1928 TPD 320 at 328
4 *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 353A
5 *Marais v Mdowen* 1919 OPD 34

have missed all of the notices and correspondence. In its answering affidavit, Khuduyane states that the same junior attorney was well aware of the application to strike, as he spoke to Khuduyane's attorney about the matter the day before the hearing. Khuduyane's attorney also emailed copies of the papers to him again. According to the filing sheets attached to Khuduyane's answering affidavit, it is clear that all the notices were served on the City's attorney's offices by hand and were signed for. Whatever vague attempt at an explanation is made in the founding affidavit is completely undone by the answer from Khuduyane.

16. If this application were to be determined solely on the basis of rule 31(2)(b) or the common law, the absence of a proper explanation for the default would in all likelihood present an insurmountable obstacle for the City. However, the City's primary ground for rescission is rule 42(1)(a). I turn to consider whether this is a viable option for the City.

17. Rule 42(1)(a) provides that:

> "The Court may, in addition to any powers it may have *mero motu* or upon the application of any party affected, rescind or vary … an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby."

The purpose of the rule is to correct expeditiously an obviously wrong judgment or order.[6] A court may in its discretion refuse to rescind or vary an order under this rule if an applicant does not apply for relief within a reasonable time.[7] What is a reasonable time depends on the facts of each case.[8]

[6] *Bakoven Ltd v GJ Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 471E-F; *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz* 1996 (4) SA 411(C) at 417B-I

[7] *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) at 306H

[8] *Promedia Drukkers*, above, at 421G

18. Khuduyane submitted, in the first place, that this rider to relief under rule 42(1)(a) should serve to non-suit the City in this case. It points out that the rescission application was launched some six months after Nkosi AJ's order was granted.

19. In my view, this delay is not so unreasonable that it ought to prevent the City from pursuing relief under rule 42(1)(a). The consequences for the City, and hence for the public, of permitting the order to stand, if indeed it was sought or granted erroneously, are substantial. In effect, the order binds the City to pay damages to Khuduyane based on the profit it is able to prove it would have made had the tenders been awarded to it. The amount of damages claimed is over R8 million. While this amount still needs to be proved, it is a significant sum of money that will have to be extracted from the public purse. Against this consideration, a delay of six months is not unreasonable. What is more, it should be borne in mind that Khuduyane itself only obtained the order years after the tenders were awarded. In the overall time frame of events, a six-month delay in instituting the rescission application is not significant.

20. What of the substance of the rule 42(1)(a) rescission application?

21. An order is erroneously granted if there is an irregularity in the proceedings or if it was not legally competent for a court to have made such an order.[9] Once a court holds that an order was erroneously granted, it should without further inquiry rescind the order,[10] and it is not necessary for the applicant to show good cause.[11]

22. The City advanced various grounds upon which it contended the Nkosi AJ order was erroneously granted. Among these was the contention that the order was

[9] *Promedia*, above, 417G-H
[10] *Tshabalala v Peer* 1979 (4) SA 27 (T) at 30D; *Bakoven Ltd*, above, at 471G
[11] *Topol v L S Group Management Services* (Pty) Ltd 1988 (1) SA 639 (W) at 650D-J

erroneously granted because Khuduyane was required to proceed under rule 53 in seeking judicial review. A further contention was that the order was erroneously granted because the learned Judge was not aware that Khuduyane's application for review was *res judicata*. I do not intend to deal with either of these grounds. In my view, the real nub of the issue lies with the City's primary contention to the effect that the order by default was not permissible in the absence of evidence being led to support the relief.

23. Khuduyane accepted in argument that its cause of action was judicial review under PAJA, coupled with a claim for damages under either contract, delict or s8 of PAJA. It accepted that without the review and setting aside of the tenders to the successful bidders, it would not have a lawful basis upon which to claim damages. Thus, it is essentially common cause that Nkosi AJ ordered the review and setting aside of tenders on a default basis. It is also common cause that no evidence was led before Nkosi AJ to support Khuduyane's claim. Counsel for Khuduyane submitted that the granting of the relief followed automatically and necessarily once the City's defence was struck out in terms of prayer 1 of the notice of the strike out application.

24. The City submits that this was erroneous and not in accordance with the requirements of rule 31(2)(a), as the relief sought was not a debt or liquidated demand. This rule provides that:

> "Whenever in an action the claim or, if there is more than one claim, any of the claims is not for a debt or a liquidated demand and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in subrule (4) for default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such order as to it seems meet."

25. Khuduyane counters the City's submission on the basis that it had not proceeded under rule 31(2)(a) in moving its application to strike before Nkosi AJ. Instead, says Khuduyane, it based its application on rule 35(7), which provides that:

> "If any party fails to give discovery as aforesaid … the party desiring discovery or inspection may apply to a court, which may order compliance with this rule and, failing such compliance, may dismiss the claim or strike out the defence."

On this basis, Khuduyane says that it was procedurally entitled to both strike the City's defence, and to obtain default judgment against the City at the same time. As it was procedurally entitled to its default judgment, so the argument continues, the order was not erroneously granted, and rule 42(1)(a) does not assist the City.[12]

26. It is not clear to me how Khuduyane's reliance on rule 35(7) advances its case. Under this rule it was permitted to apply to strike out the City's defence because of the failure of the City to make discovery. However, in order to obtain default judgment against the City, Khuduyane had to take a further step, viz. to seek and to obtain default judgment. This is not to say that this had to be done in separate proceedings. However, the striking out of a defence under rule 35(7) ought not to be conflated with obtaining an order by default against a defendant. In other words, the striking out of a defence, and obtaining judgment against the defendant involves an additional process for the plaintiff.

27. Having succeeded in striking out the defence, Khuduyane now had an opponent who had not filed a plea or notice of intention to defend. The Uniform rules provide for how default judgment may be obtained in this situation. If the claim is one for a debt or liquidated demand, then the procedure to follow is governed by rule 31(5)(a). If it is not for a debt or a liquidated demand, then the procedure is

[12] *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) at 94E

governed by rule 31(2)(a). Whichever of these rules is applicable, the point is that rule 35(7), on its own, does not provide a proper basis for granting default judgment.

28. As I have indicated, this does not mean that Khuduyane acted erroneously in seeking a strike out of the plea in prayer 1, and default judgment in prayer 2. Provided it makes out a case for both prayers, it could quite properly ask for the relief in one Notice. The real question is whether the granting of the relief was proper. This, in turn, involves a consideration of the question of whether rule 31(2)(a) applies to Khuduyane's claim. In other words, were any of Khuduyane's claims "not for a debt or liquidated demand". If so, then the court was not permitted under this rule to grant default judgment without hearing evidence.

29. Khuduyane's primary cause of action was the judicial review and setting aside under PAJA of the tenders that the City had awarded in 2014 to Khuduyane's competing bidders. Its claim for damages rested on this relief being granted. In addition, in order to proceed with its review, it required from the court relief in the form of an extension under s9 of PAJA of the 180-day period prescribed[13] for the institution of review proceedings. This is because the impugned tenders were awarded in about March or April 2014. Khuduyane's internal appeal against the decision was rejected on 4 December 2014. However, its action to review and set aside the impugned awards was only instituted on 24 April 2017. This was over two years later.

[13] Section 7(1) of PAJA requires that proceedings for judicial review must be be instituted without unreasonable delay and not later than 1809 days after the conclusion of any internal remedies, after the applicant was informed of the impugned decision.

30. Khuduyane says that the relief granted by default is declaratory in nature. This is because it must still compute the damages that the City is ordered to pay under the order. This being the case, says Khuduyane further, all it sought by way of default was an order akin to a declaration of rights, and that orders of this nature have been treated by our courts as falling within the category of a debt or liquidated demand for purposes of rule 31.[14]

31. It is difficult to comprehend how relief of the nature sought and granted to Khuduyane by default can properly be characterised as a simple declaration of rights which may be granted without any evidence being led. Considering, for one moment, the prayer for an extension of the 180-day time period prescribed in s7 of PAJA. This is relief that requires careful consideration by a court. Where the delay is longer than 180 days, a court is required to consider whether it is in the interests of justice for the time period to be extended.[15] This is expressly required under s9(2).[16] In the context of legality review, as opposed to PAJA review, where there is no explanation for the delay, it will be undue.[17] Specifically in the context of PAJA review, and the extension of the 180-day period, the Supreme Court of Appeal has explained what is required as follows:

> "And the question whether the interests of justice require the grant of such extension depends on the facts and circumstances of each case: the party seeking it must furnish a full and reasonable explanation for the delay which covers the entire duration thereof and relevant factors include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants the importance of the issue to be raised in the intended proceedings and the prospects of success."[18]

[14] See, for example, *Curlewis v Carlyle* 1980 TS 932

[15] *Buffalo City Metropolitan Municipality v Alsa Construction (Pty) Ltd* 2019 (4) SA 331 (CC).

[16] "The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require."

[17] *Buffalo City*, above at 78

[18] *Camps Bay Ratepayers' and Residents' Association and another v Harrison and another* [2010] 2 All SA 519 (SCA)

32. It is apparent from this dictum that an extension under s9 of PAJA is a form of condonation. Similar considerations apply. A party seeking condonation asks the court for an indulgence. It bears the onus of putting before the court the necessary facts to justify why the court should grant it the indulgence it seeks. It must make a focused application to demonstrate that it is in the interests of justice to grant the extension.[19] Where a party seeks an extension under s9 of PAJA in a case involving the setting aside of tenders, one of the factors a court is required to consider is the extent to which the performance under the contracts associated with the tenders has been proceeded with, and the resulting prejudice to the organ of state in setting the contract aside at the late stage in question.[20] These are facts critical to a proper determination of what the interests of justice require.

33. In my view, it is axiomatic that a proper exercise of the power accorded to courts to extend the 180-day period for review requires evidence to be placed before the court to justify the indulgence sought. Ordinarily, the evidence would be contained in affidavits placed before the court. These affidavits would also ordinarily contain evidence to support the claim for judicial review. In this case, however, and having failed in its original application for judicial review, Khuduyane elected to proceed by way of an action for the same relief, together with a claim for damages.

34. Although it filed an affidavit in support of its strike out application, that affidavit contained no evidence either in support of the application under s9 of PAJA or in support of the review. All that Nkosi AJ had in the court file in this regard was the particulars of claim. It is trite that averments in particulars of claim are not

[19] *Passenger Rail Agency of South Africa v Siyangena Technologies (Pty) Ltd* (Unreported; Gauteng Division, Pretoria, Case No 20 16/7839; 3 May 2017) at para 20

[20] *Alsa Construction (Pty) Ltd v Buffalo City Metropolitan Municipality* 2017 (6) SA 360 (SCA) at para 10(d)

evidence. In any event, the particulars of claim did not give a full explanation for the delay, nor did they deal with the critical issue of prejudice to the City in the event that the review period be extended to permit a review more than three years after the contracts had been awarded.

35. In my view, the court committed an irregularity in granting the relief under s9 of PAJA in the absence of any evidence before it to establish that the interests of justice required it.

36. If I am correct in this conclusion, then it follows that the court could not properly have proceeded to grant the substantive review relief. This is because, in the absence of an extension of the time period for review, the substantive review relief would fall away. So too, then, would the damages claim, which was dependent on the setting aside of the impugned tenders. In other words, the whole house of cards for Khuduyane is tainted by an irregularity warranting a rescission under rule 42(1)(a).

37. However, even if one goes beyond this fundamental problem with Khuduyane's opposition to rescission under rule 42(1)(a), I am in any event not persuaded that it was proper for the court to have granted the review and pronounced on the City's liability for damages in the absence of evidence.

38. A claim that is not for a debt or liquidated demand cannot be disposed of by default without evidence being led. A debt or liquidated demand in the context of default judgment can be equated with a claim for a fixed, certain or ascertained amount or thing.[21]

[21] *Supreme Diamonds (Pty) Ltd v Du Bois* 1979 (3) SA 444 (W)

39. A judicial review of the grant of a tender, and a consequent claim for damages for loss of profits does not logically fit the description of a fixed, certain or ascertained thing. A breach of the right to administrative justice ordinarily attracts public law remedies, such as a review under PAJA. The purpose of the remedy is to pre-empt or correct or reverse an improper administrative function.[22] Judicial review is inherently a complex legal issue. The default procedure for judicial review is that it is instituted by way of a notice of motion with supporting affidavits.[23] In the ordinary course, therefore, a court adjudicating a review matter will have the relevant facts and evidence before it when it makes its determination. The court will determine, on a balance of probabilities, and based on the evidence before it, whether or not the applicant has made out a case for review.

40. A party like Khuduyane, which seeks review by way of an action, should be in no different position. It must still prove its case on a balance of probabilities. This means it must place evidence before the court to sustain the relief it seeks. This point is particularly critical where, as in this case, the party takes the relatively unusual step of claiming damages consequent on the review and setting aside of the tender awards. While s8 of PAJA permits a court to make an award of damages, this is only in exceptional cases.[24] What is exceptional is left to the specific context of each case.[25] At the very least, then, before a court can make a ruling on whether such damages are justified, it would have to consider evidence of the alleged exceptional circumstances permitting the claim.

[22] *Steenkamp NO v Provincial Tender Board Eastern Cape* 2007 (3) SA 121 (CC)
[23] Uniform rule 53
[24] Section 8(1)(c)(ii)(bb) provides, in relevant part, that:
"The court or tribunal, in proceedings for judicial review in terms of section 6 (1), may grant any order that is just and equitable, including orders … in exceptional cases … directing the administrator or any other party to the proceedings to pay compensation".
[25] *Steenkamp*, above, para 30

41. As far as a delictual claim for damages flowing from unlawful administrative action is concerned, ultimately this is a question of wrongfulness. It involves a consideration of the *boni mores* of society, which is a value judgment that embraces all the relevant facts, the sense of justice of the community and considerations of legal policy.[26] The ultimate question is whether on a conspectus of all the relevant facts and considerations, public policy and public interest favour holding the conduct unlawful and susceptible to a remedy in damages.[27] It is difficult to conceive of how such considerations can properly be adjudicated upon if a court is permitted to grant default judgment in a matter involving such a claim without hearing any evidence. As the Constitutional Court has pointed out, imposing delictual liability on the negligent performance of functions of tender boards must be approached with caution, as it opens the door to a spiral of litigation:

> "That would be to the considerable detriment of the public at large. The resources of our state treasury, seen against the backdrop of vast public needs, are indeed meagre. The fiscus will ill-afford to recompense by way of damages disappointed or initially successful tenderers and still remain with the need to procure the same goods or service (sic)."[28]

42. In *Minnaar v Van Rooyen*, the Supreme Court of Appeal considered whether it was proper to grant an order under s424(1) of the Companies Act by way of default. It held:

> "It is inconceivable that an order would be made declaring a director liable for the debts of a company on the basis of reckless or fraudulent conduct where no evidence is led to support the allegations made."[29]

[26] *Steenkamp*, above para 41
[27] *Steenkamp*, above para 42
[28] *Steenkamp*, above, para 55
[29] *Minnaar v Van Rooyen NO* 2016 (1) SA 117 (SCA) at para 17

43. The Court noted that recklessness is not lightly found, and that a causal link must be established between the company's loss and the director's conduct. This must be proved on a balance of probabilities. The Court found that:

> "None of the allegations against Minnaar were supported by evidence. None was led. There was thus no proof at all, let alone prima facie proof, of whether his conduct had been fraudulent or reckless. Default judgment should, therefore, not have been granted."[30]

It concluded that the plaintiff was not entitled procedurally to default judgment against the defendant without leading evidence, and that the default declaratory order under s424(1) had been sought and granted erroneously within the meaning of rule 42(1)(a).[31]

44. In my view similar considerations apply where a party, like Khuduyane, applies for a default order reviewing and setting aside a tender award, and a declaration that the City is liable to it for its consequent loss of profits in such amount is it as subsequently able to prove. An order of this nature is not lightly granted. The claimant would have to establish its case on a balance of probabilities. It cannot do so in the absence of evidence to establish, first, the unlawfulness of the tender awards and, in addition, that the City's liability for damages should be ordered. Damages flowing from an unlawful award of a tender (assuming this is shown), as the courts have pointed out, are not simply granted on request. It is not a run-of-the-mill remedy in judicial review, and special policy considerations apply. In these circumstances, it was not proper, in my view, for Khuduyane to seek and for Nkosi AJ to grant the relief sought by way of default without evidence.

[30] At para 16
[31] At para 19

45. This constituted an irregularity in the proceedings. Khuduyane was not procedurally entitled to its order. It was granted erroneously and is liable to be rescinded under rule 42(1)(a).

CONCLUSION AND ORDER

46. For the above reasons, I make the following order:

1. The application for condonation for the late filing of the replying affidavit is dismissed with costs, such costs to include the costs of senior counsel.

2. The default judgment and order granted by the Court on 28 May 2019 is rescinded.

3. The applicant's defence in the main action is reinstated.

4. The respondent is directed to pay the costs of the rescission application (excluding the aforementioned condonation application), such costs to include the costs of senior counsel.

KEIGHTLEY J

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

Date Heard (by videolink):	28 AUGUTS 2020
Date of Judgment:	15 SEPTEMBER 2020
On behalf of the Applicant:	Mr. C Georgiades

Instructed by:	Tshidi Zebediela Attorneys.
On behalf of the First & Second Respondent:	Mr. Carstensen SC
Instructed by:	Hutcheon Attorneys