

Case: Body Corporate of Valleyview v Queen New York Cosmetic (Pty) Ltd

By **Ondwela Masikhwa** (Candidate Attorney), checked by **Michelle Venter** (Associate) and released by **Chantelle Gladwin-Wood** (Partner)

03 February 2025

(2023/070664) [2024] ZAGPJHC 1300 (20 December 2024)

INTRODUCTION

The case of Body Corporate of Valleyview V Queen New York Cosmetic (Pty) Ltd (2023/070664) [2024] ZAGPJHC 1300 (20 December 2024) deals with the question of whether the filing of a Rule 35(12) Notice ("Discovery Notice") allows the Respondent to bypass the timeframes in terms of Rule 6(5)(d)(ii) or 6(5)(e) in filing its Answering Affidavit.

BACKGROUND

An Application was instituted by the Body Corporate of Valleyview ("the Applicant") for the winding-up of the Respondent. The Application was served on the Respondent ("Queen New York Cosmetic") on 28 August 2023. The matter was set down on 12 September 2023 on the Unopposed Motions Roll. The Respondent filed its Notice of Intention to Oppose, just before the set down date, on 07 September 2023. The Respondent failed to serve its Answering Affidavit, which was due for service on 28 September 2023, in terms of Rule 6(5)(d)(ii). On 28 October 2023, the Respondent filed a Discovery Notice in terms of Rule 35(12)(a). The Applicant elected not to respond thereto, and the Respondent likewise did not take any further action. The Applicant instead elected to set the matter down again, on the Unopposed Motions Roll for hearing on 04 March 2024. Shortly before the set down date, the Respondent filed a Notice in terms of Rule 30A (Notice to Remove Cause of Complaint).

PARTIES' ARGUMENTS

During the hearing on 04 March 2024, the Respondent sought an Order that the Application be removed from the roll and the Applicant be ordered to pay the costs on attorney and own client scale. The basis of the Respondent's argument was that the Respondent had served a Discovery Notice (despite the fact that the dies for serving its Answering Affidavit had long since lapsed), and since the Applicant had thereafter proceeded to set the matter down on the Unopposed Motions Roll, without having first complied with the terms of

the Discovery Notice, this constituted an irregular step. On the Respondent's version, its filing of the Discovery Notice meant that it was not necessary for the Respondent to file an Answering Affidavit before the Discovery Notice was complied with.

The Applicant submitted that the filing of the Discovery Notice by the Respondent did not suspend the requirement for, or time period for, the Respondent to file its Answering Affidavit. The Applicant submitted further that having the matter set down on the Unopposed Motions Roll did not amount to an irregular step, in light of the Respondent's failure to file an Answering Affidavit or seek relief in terms of Rule 27 (condonation). On the Applicant's version, it was therefore competent for the Court to grant an Order for the winding up of the Respondent (whether provisionally or finally).

COURT'S INTERPRETATION

The Court relied on the judgment of Potpale Investments (Pty) Ltd 2016 (5) SA 96 (KZP) wherein it was held that the filing of a Notice in terms of Rule 35(12) does not suspend the time limit in which a party is to file further pleadings. This principle has also been endorsed by the SCA in the judgments of Democratic Alliance v Mkhwebane 2021 (3) SA 403 (SCA) as well as Caxton and CTP Publishers and Printers Limited v Novus Holdings Limited [2022] 2 All SA 299 (SCA) (9 March 2022).

The court in casu noted that the Respondent's argument that it was not obliged to file an Answering Affidavit in these circumstances was a completely incorrect interpretation of trite legal principles.

Moreover, the Respondent took no steps whatsoever to seek condonation for its failure to file its Answering Affidavit timeously, nor did it seek and extension of the time limits to enable it to do so. In the premises, it was clear that the Applicant should be awarded the costs occasioned by the postponement on 04 March 2024, in order to, inter alia, partly cure the prejudice to the Applicant that Respondent's actions had caused.

CONCLUSION

The Court held that, in light of the trite principles of in our law, the filing of the Respondent's Rule 35(12) Notice did not suspend the time limits in relation to the filing by the Respondent of an Answering Affidavit. Accordingly, the Application for the winding up of the Respondent was postponed sine die, and in the interests of justice (given that the matter was clearly opposed) the Respondent was afforded 15 (fifteen) days from the date of the Order within which to file its Answering Affidavit. The Respondent was further ordered to pay the Applicant's costs occasioned by the postponement on 04 March 2024.

Please note: this article is for general public information and use. It is not to be considered or construed as legal advice. Each matter must be dealt with on a case-by-case basis, and you should consult an attorney before taking any action contemplated herein.



Chantelle Gladwin-Wood
(Partner)



Michelle Venter
(Associate)



Ondwela Masikhwa
(Candidate Attorney)