

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

Case No. 2379/2023

Heard on : 30 November 2023

Date delivered: 13 February 2024

In the matter between:

KHANYA MDAKA

Applicant

And

**TOTAL ENERGIES MARKETING SOUTH
AFRICA (PTY) LIMITED**

First Respondent

**TOTAL ENERGIES BRITE STAR SERVICE
STATION (PTY) LIMITED**

Second Respondent

SETON SMITH ATTORNEYS

Third Respondent

**DEPARTMENT OF MINERAL RESOURCES
AND ENERGY**

Fourth Respondent

FUEL RETAILERS' ASSOCIATION

Fifth Respondent

JUDGMENT

MAJIKI J:

[1] There are two interlocutory applications to be determined in this matter. The applicant, an unrepresented adult male, in the main application filed a rule 30A of the uniform rules (the rules) application for the reason of the respondents' failure to comply with a directive issued. Subsequently, the first respondent filed rule 30(1) application objecting to the applicant's rule 30A application for the reason of his failure to afford it an opportunity to remove the cause of complaint. Further, it is sought that the supplementary affidavit filed by the applicant without the leave of the court be set aside. Both applications are opposed. The litigants will be referred to as in the main application.

BACKGROUND

[2] On 31 May 2023 the applicant approached court with a certificate of urgency seeking directives for an application he intended to launch. On 2 June 2023 he indeed filed and served his application papers. Following the applicant's replying affidavit, filed on 20 June 2023, on 16 June 2023, he filed a document with the heading:

"Supplementary affidavit to the applicant's founding papers."

Paragraph 2 reads:

TAKE NOTE FURTHER, if you intend to oppose this application:

- “(a) you must, by Tuesday, 20 June 2023, at 09h30, deliver an intention to do [sic] as well as any answering affidavit (s), if any, and
- (b) The applicant shall then apply for leave to amend with this honourable Court”
- (c) If no objection be so received, the corrections contained herein shall be deemed to be uncontested, and, thus, accepted by the parties and amended as such”.

[3] In the affidavit the applicant sought to correct what he said were errors and omissions in the founding affidavit. He said those arose because he had to file and serve the application papers within forty-eight (48) hours of the directive. What then followed were replacing phrases and words from paragraph (a) to (j), under the subheading “Amendments to the founding affidavit”. The paragraphs sought to be corrected are referred to in the content of the sentences.

[4] Thereafter, followed suggestions under the heading:

“OMISSIONS IN THE FOUNDING PAPERS”

The applicant therein introduces new paragraphs on new legal issues, some with argument.

[5] On 1 August the applicant filed Rule 30A application. He sought to compel that the first respondent adhere fully to the directive of Brooks J, dated 4 July 2023. Further it reads:

“TAKE NOTE FURTHER that the Applicant shall approach the Acting Deputy President on Wednesday, 2 August 2023 for their consideration of the Applicant’s unopposed Preferential Date application, dated 21 June 2023.

In this regard, the Applicant seeks the enrolment of this matter on the Opposed Court Roll on Thursday, 10 August 2023 or as soon thereafter as counsel may be heard by court.”

3.

FURTHERMORE, if you intend to oppose this application:

- (a) you must by Thursday 3, August 2023 at 14h00, deliver an intention to do (sic) as well as any answering affidavit(s), if any by Tuesday, 8 August 2023,
- (b) should the first Respondent fail to deliver a notice to object within the time stipulated above, then it will be assumed that they are not opposed to this application and the Respondents consent to the contents contained herein,
- (c) Should the First Respondent fail to fully comply with the court directive of the Honourable Judge Brooks, dated 4 July 2023, within ten (10) days hereof (or at the direction of the court at an earlier date), then the Applicant shall apply to have the First Respondent struck out from the matter, as per the rules of the court, and a default or summary judgment (sic) issued.”

[6] The directive issued by Brooks J read:

- “(a) The parties must file an[d] updated Joint Practice Note.
- (b) Either the applicant, if he has secured legal representation, or the First Respondents, must index and paginate the application papers.
- (c) The Registrar is directed to issue a notice of set down enrolling the matter in the unopposed court for 18 July 2023 indicating that this is a holding date,
- (d) The parties should approach the Deputy Judge President to obtain a preferential date, if possible, on the opposed motion court roll.
- (e) The parties must thereafter file heads of argument and a notice in terms of Rule 15A of the Rules of Practice in respect of the allocated opposed date.”

[7] The supporting affidavit itself also raised a number of complaints against a number of people including the court officials, acting Judge President and respondents’ legal representatives about a number of other matters in proceedings launched by the applicant.

[8] On 7 August 2023 the first respondent filed the rule 30(1) notices. The one related to an irregular step they say the applicant took by filing rule 30A application without affording the first respondent an opportunity to remove the cause of the applicant's complaint.

[9] The second rule 30(1) notice related to the irregular step by the applicant of filing supplementary affidavit other than the answering and replying affidavits without the leave of the court.

Rule 30A provides:

“(1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, or with an order or direction made by a court or in a judicial case management process referred to in rule 37A, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days from the date of delivery of such notification, to apply for an order —

- (a) that such rule, notice, request, order or direction be complied with; or
- (b) that the claim or defence be struck out.

(2) Where a party fails to comply within the period of 10 days contemplated in subrule (1), application may on notice be made to the court and the court may make such order thereon as it deems fit.

Rule 30 (1) provides:

“A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.

(2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if —

- (a) the applicant has not himself taken a further step in the cause with knowledge of the irregularity;
- (b) the applicant has, within ten days of becoming aware of the step, by written

notice afforded his opponent an opportunity of removing the cause of complaint within ten days;

(c) the application is delivered within fifteen days after the expiry of the second period mentioned in paragraph (b) of subrule (2).

(3) If at the hearing of such application the court is of opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems meet.”

[10] On 24 August 2023 the applicant filed a rule 30A (2) application dated 17 August 2023 seeking to strike out the respondent’s defence for failure to comply with the directive of 4 July 2023 and rule 30A (1) notice of 2 August 2023. The applicant gave notice that he would seek to have the application set down for 24 August 2023. He also complained of the letter filed on 28 July 2023 by the respondents served and on him on 31 July 2023, recording their concern for being directed to paginate the court file, whilst the practice manual requires the applicant as *dominis litis* to do so. According to the applicant the letter was out of time as in terms of rule 6(2)(4), the pagination and indexing of the file should have been done five (5) days prior the date of hearing; the 1 August 2023.

[11] On 18 September 2023 the first respondent filed the application seeking the setting aside of the applicant’s supplementary affidavit and other documentation filed together with his rule 30A application.

[12] On 3 October 2023 the applications were enrolled in the unopposed motion court. This court was of the view that the issues could be curtailed through case flow management process, so that the main application could be heard without undue delay. Indeed, the applicant was advised to seek legal

representation, with a view that he would seek leave to and file a supplementary affidavit, which process was unsuccessful. Instead, the applicant sought to file an affidavit seeking condonation of his supplementary affidavit. That affidavit was not without its own problems, which fortified the view that he needed to have a legal representative. When the applicant was no longer willing to wait for the process of appointment of a legal representative, the applications were re-enrolled to be heard before the same court.

[13] During the hearing, the applicant submitted that, in his application he had stated that if the cause of complaint (compliance with directive of 4 July 2023) was not attended to, within ten (10) days he would apply to have the first respondent struck out from the matter, in terms of the rules and obtain default or summary judgment. Furthermore, in the exercise of its discretion the court could condone the filing of supplementary affidavits, without the leave of the court. The applicant in the main stated that he had to prepare the application in two days from the time the directive was issued. Further, he was not legally represented.

[14] With regard to further affidavits filed, rule 6(5)(e) provides that the court, in its discretion may permit the filing of further affidavits.

[15] Rule 12 of the Eastern Cape rules of practice provides:

‘(a) In all applications brought other than in the ordinary course in terms of the Rules of Court, the legal practitioner who appears for the applicant must sign a certificate of urgency which is to be filed of record before the papers are placed before the Judge and in which the reasons for urgency are fully set out.

(b)

- (c) In matters contemplated in Rule 12(a) above, the registrar shall issue the papers and shall place the matter on the roll of cases as may be provided for in the notice of motion commencing the application.
- (d)
 - (i)
 - (ii)
 - (iii) Should he/she determine that is sufficiently urgent, he/she will
then give, directions as to the time and place when and where the application is to
be heard.

[16] From the reading of the above, there is no room for the applicant to seek directives by placing a certificate of urgency before a judge, however, later claim that the application papers were not ready. Once the judge directs that the matter is urgent, in terms of rule 12(a) above, and that the applicant should have the papers issued, that is the directive that must be carried through, as directed. The rule envisages that the application papers are already prepared when the judge is approached with the certificate of urgency.

[17] The applicant's supplementary affidavit is a miscellany as explained in paragraph 7 above. If allowed, there still would be difficult to discern whether the founding affidavit was amended; or it was prepared solely for the purposes of correcting errors or sought to introduce further new answers to aspects already raised in the affidavits.

[18] Another difficulty would be that rule 28(1) of the rules prohibits the amendment of affidavits, it provides:

‘Any party desiring to amend any 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’ (emphasis mine)

In my view, the supplementary affidavit ought to be set aside.

[19] The next issue relates to the rule 30A application. It is difficult to comprehend with the way the applicant has presented the said application, dated 1 August 2023. In the rule 30A (1) notice framed as an application, the respondents were given the timetable to file the answering affidavit by 8 August 2023, within four court days of the notice. Having stated that, he went on to say, if the cause of complaint was not rectified within ten (10) days, the applicant would move the application to strike out the respondents' defence. In this sense that would be done two (2) days after expiry of the period of filing of the answering affidavit. This approach flouts the provisions of the said rule and fails to properly give the respondents the opportunity to attend to the complaint. The application of 24 August 2023 seeking the striking out the defence followed an irregular procedure.

[20] Consequently, the first respondent's rule 30(1) application succeeds. In the light of the fact that the rule 30A application has been set aside on a procedural issue, despite my inclination that the very directive complained of had probably been overtaken by events, no determination is made in that regard.

[21] With regard to costs, this court is of the view that it should stand over for determination in the main application. Regardless of the fact that ordinarily the costs ought to follow the result, this court considers that the applicant made submissions that the principle in *Biowatch Trust v Registrar Genentic Resources and others* 2009 (6) SA 232 at par 56 should apply in his matters. I would reserve that aspect to be determined in the main application.

In the result the following order shall issue;

1. The applicant's rule 30A application is hereby set aside.
2. The applicant's supplementary affidavits and documentation in the main application after the filing of the replying affidavit are hereby set aside.
3. The applicant is hereby granted leave to file supplementary affidavit that complies with an affidavit intended for that purpose only within thirty (20) days of this order.
4. Costs of the applications are hereby reserved.

B MAJIKI
JUDGE OF THE HIGH COURT

Appearances:

Applicant	:	Mr Khanya Mdaka No. 1[...] C[...] Road NGCOBO
First Respondent's Counsel	:	Mr Botma
Instructed by	:	Messrs Messina Incorporated c/o JA LE ROUX ATTORNEYS 56 Leeds Road

MTHATHA