



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case no: 4343/2021

In the matter between:

INGEROP SOUTH AFRICA (PTY) LTD

Applicant

and

SEDIBENG WATER

First Respondent

THE MINISTER OF WATER AND

SANITATION

Second Respondent

BEFORE: **CHESIWE, J**

HEARD ON: **24 FEBRUARY 2022**

DELIVERED ON: **02 JUNE 2022**

- [1] The First Respondent (Sedibeng) brought an interlocutory application against the Applicant (Ingerop) in terms of rule 35(12)(b) of the Uniform Rules of Court, read together with Rule

30A. The application was opposed. The Parties will be cited as in the main application.

[2] The First Respondent seeks the following relief:

- “1. That the Applicant be ordered to comply with the First Respondent’s Rule 35 (12) Notice, dated 04 November 2021 (**‘the notice’**);
2. That should the Applicant fail to comply with the Court’s order in accordance with paragraph 1 above, within ten (10) days from the date of the service thereof, the Applicant shall be barred from utilizing the documents specified in the Notice in these proceedings;
3. That the Applicant pay the costs (sic) this application.”

THE PARTIES

[3] The Applicant (Ingerop) is a company duly incorporated in accordance with the company laws of the Republic of South Africa, with registration number 1995/002049/07, with registered business address at 2nd Floor, 138 West Street, Sandton, Johannesburg.

[4] The First Respondent (Sedibeng) is a state-owned entity under section 28 of the Water Services Act 108 of 1997 and it is a national government entity as listed in schedule 3 of the Public Finance Management Act 1 of 1999.

[5] The Second Respondent (the Minister of Water and Sanitation) cited in his official capacity as a member of the National Executive responsible for the Department of Water and Sanitation (**the DWS**) with its registered address at 185 Frances Baard Street, Pretoria.

BACKGROUND

[6] On 20 September 2021, the Applicant issued an application against the First Respondent (Sedibeng) for payment in the

amount of R35 102 773, 17 and interest thereon at the rate of 10,5% per annum *a tempore morae*.

- [7] On consideration of the claim and the averments made in the founding affidavit of the Applicant, the First Respondent issued a notice in terms of Rule 35(12) on 4 November 2021. The Applicant failed to comply with the notice, but instead filed a response to Rule 35(12) notice which contained a drop box link to all the documents sought by the First Respondent. According to the First Respondent, the drop box link did not reflect all the documents as stated in the Applicant's founding affidavit in the main application.
- [8] The First Respondent on receipt of the information that documents must be accessed in the drop box, wrote a letter to the Applicant, annexure "**SW3**" on its failure to comply with the notice and that the documents in the drop box link were incomplete. On 3 December 2021, the First Respondent proceeded with launching an application to compel.
- [9] The Applicant raised three points in *limine* namely, the application should have been prefaced with a Rule 30A notice, that the application to compel is an abuse of court processes and First Respondent is not entitled to the relief sought.

NON-COMPLIANCE WITH RULE 30A

- [10] Rule 30A provides as follows:

“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 discretion made in a judicial case management process... any other party may notify the

defaulting party that he/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 discretion 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 sub-rule (1), application may on notice be made to the court and the court may make such order thereon as it deems fit."

[11] The First Respondent's contention is that Rule 30A provides for general remedy for non-compliance with the rules and that it is not only confined to the relief provided in Rule 35(12), and that the First Respondent is entitled to invoke the provisions of Rule 35(12) or Rule 30A.

[12] The Applicant's contention is that Rule 30A was not complied with and that the First Respondent is delaying the main application in that the First Respondent did not file the replying affidavit on time nor is there a condonation application for the replying affidavit, nor for the late filing of the heads of argument. Counsel for the Applicant submitted that the application is flawed with irregularities and that the First Respondent has shown a pattern of delay to frustrate the claim of the Applicant to the extent that the Applicant had attended to the indexing and pagination of the court file, even though the First Respondent is *dominus litus*. Counsel submitted that the First Respondent's interlocutory application be dismissed with punitive costs.

[13] The question whether there has been compliance as contemplated in Rule 30A does not give rise to the exercise of a discretion by the court. The court has to determine the objective question of law or

fact, or whether there has been non-compliance. (**See Helen Susman Foundation v JSC** ¹)

[14] If the court grants the Applicant the relief sought, the consequence thereof would deny the First Respondent the opportunity to obtain the documents requested from the Applicant. The court has to take into consideration the reasons for non-compliance with the rules, whether the defaulting party's case appears to be hopeless and whether the defaulting party does not intend to proceed. (**Ford v South African Mine Workers Union**) ²

[15] It is clear that failure to comply with Rule 30A, a party is entitled to provoke the provisions of Rule 35(12)(b), which provides as follows:

“Any party to any proceedings may at any time before the hearing thereof deliver a notice as near as may be in accordance with form 15 in the First Schedule to any other party in whose pleadings or affidavit reference is made to any document or tape recording to produce such document or tape recording for inspection and to permit him to make a copy or transcription thereof. Any party failing to comply with such notice shall not save with the leave of the court, use such documents or tape recording in such proceeding provided that any other party may use such documents or tape recording.”

[16] Rule 30A is far less stringent and provide a general remedy for non-compliance with the rules. In **ABSA Bank Ltd v The Farm Klippan** ³, the court made it clear that:

¹ (CCT289/16) [2018] ZACC 8; 2018 (4) SA 1 (CC); 2018 (7) BCLR 763 (CC) (24 April 2018) at para 31

² 1925 TPD 405 at 406

³ 490 (CC) 2000 (2) SA 211 (W) at 215 A-B

"If a provision in the rules provide a specific remedy for non-compliance with the rule, a party may only follow the specific rule and need not give notice in terms of or follow Rule 30A."

- [17] Harms Civil Procedure in the Superior Courts: LexisNexis provides that:

"Under Rule 30A, a party making a request, or giving a notice, to which there is no respondent by the other party, may through a further notice to the other party warn that after 10 days, application will be made for an order that the notice or request be complied with, or that the claim or defence be struck out, as the case may be. Failing compliance within 10 days mentioned, application may then be made to court and the court may make an appropriate order."

- [18] The First Respondent requested the documents from the Applicant via its legal representative on 26 November 2021. According to the First Respondent, the drop box link sent by the Applicant did not reflect all the documents and this resulted in the application to compel the Applicant to furnish the requested documents. The Applicant in the founding affidavit makes mention of these documents. As correctly stated by the First Respondent, the Applicant in its opposing papers did not mention whether the documents are not relevant, privileged or not in its possession.
- [19] The averment by the Applicant that the application to compel is an abuse of court processes, cannot stand. The Applicant was employed by the First Respondent. There is nothing wrong to request documents from a party who listed such documents in its founding affidavit. The First Respondent being a state entity that appointed the Applicant, is entitled to request documents for work done and claimed for, by requesting the said documents from the Applicant. For obvious reasons if Applicant failed to provide the

documents, the First Respondent has no other remedy or alternative other than to approach the court. That cannot be regarded as an abuse of court process

- [20] The Applicant's contention that it has not failed to comply with the notice cannot stand. The Applicant listed the documents in its founding affidavit in the main action and the First Respondent is requesting those listed documents. During oral arguments in court, Counsel for the First Respondent took me through these documents as listed in the founding affidavit of the Applicant and showed that the same documents are reflected in the application to compel. The First Respondent having informed the Applicant that the drop box link has incomplete documents, would not approached the court unnecessarily if the documents were reflected in the drop box link and were complete. The First Respondent seemingly needs these documents to properly answer and consider the main application.
- [21] Rule 35(12) clearly states that if reference is made to a document, it must be produced. (**Penta Communication Service (Pty) Ltd v King and Another**)⁴
- [22] In **Gorfinkel v Gross, Hendler and Frank** ⁵, the Court found that the sub-rule should be interpreted as providing *prima facie obligation* (my emphasis) on a party who refers to a document in a pleading or an affidavit to produce it for inspection if called upon to do so in terms of Rule 35(12).
- [23] Though the obligation is subject to limitation of whether the document is not in a party's possession, cannot be produced, or

⁴ 2007 (3) SA 471 (C)

⁵ 1987 (3) SA 766 (C)

privilege or irrelevant. The Applicant did not plead any of the above. The documents requested are clearly listed in the founding affidavit of this application, as well as in the founding affidavit of the main application, annexures “C1” to “C12” on pages 58 to 70. The First Respondent informed the Applicant that the link did not show all the required documents. The Applicant in its own papers, having listed the documents, has no reason to refuse to hand these over. In any event, the Applicant through a Service Level Agreement (SLA), is obliged to provide the First Respondent with reports, invoices of the various months’ minutes of meetings and other documents.

- [24] The Applicant’s founding affidavit clearly sets out the invoices and documents as annexures to the affidavit. The amounts on the invoices are quite substantial as well as the total amount of R35 102 773, 17. It is in the interests of fairness that the Applicant provide proof of the job done. The First Respondent is indeed dealing with public funds and to make payment to a service provider, proof of invoices, reports and any work done in terms of the SAL should be provided. The First Respondent would not request these documents if these were available on the drop box link. As already stated above, the Applicant was in a contractual agreement with the First Respondent and thus is expected to provide the necessary documents for work done. None of these documents were pleaded as confidential, irrelevant or not in the Applicant’s possession. The Applicant has indeed failed to produce the documents as requested by the First Respondent. I see no reason not to grant the First Respondent the relief sought.

- [25] In my view the points *in limine* raised by the Applicant ought to be dismissed and the relief sought by the First Respondent ought to be granted.

COSTS

- [26] The general rule is that costs follow the successful party. In my view, the First Respondent did not approach the court unnecessarily or vexatiously. Had the Applicant provided the First Respondent with the documents, this matter would not have been before court. It was therefore unnecessary for the Applicant to even oppose the matter

- [27] In this instance, costs will follow the successful party.

- [28] I accordingly order as follows:

1. The Applicant (in the main action) is ordered to comply with the First Respondent's Rule 35(12) Notice dated 04 November 2021;
2. Should the Applicant fail to comply with the court's order in accordance with paragraph 1 above, within 10 days from date of service therefore, the Applicant shall be barred from utilizing the documents specified in the Notice in these proceedings;
3. The Applicant to pay the costs of this application.
4. The Applicant's point *in limine* are dismissed with no order as to costs.

A handwritten signature in black ink, appearing to be 'Chesuwe, J.', written over a horizontal line.

CHESIWE, J

On behalf of the Applicant: Adv. MC Makgato
Instructed by: Honey Attorneys
Bloemfontein

On behalf of the First Respondent: Adv. W Pocock
Instructed by: Symington & De Kok Attorneys
Bloemfontein