

IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE LOCAL DIVISION, MTHATHA]

CASE NO: 2654/16

Heard on: 08/03/18

Delivered on: 20/03/18

In the matter between:

SIKHOKHELE MAPHUKATHA

Applicant

and

ALFRED NDZO DISTRICT MUNICIPALITY

Respondent

JUDGMENT

NHLANGULELA DJP

[1] These are interlocutory proceedings in which the Applicant (the Plaintiff in the action proceedings) issued a document titled: “Notice In Terms Of Rule 35 (3)” calling upon the Respondent (the Defendant) to make available within 10 days certain documents, namely:

- (i) the application form that was submitted by the Plaintiff for the position as per the advertised post;
- (ii) the defendant’s staff establishment; and
- (iii) the defendant’s recruitment and selection policy.

[2] The Applicant states in his founding affidavit that the purpose of the Rule 35 (3) notice is to enable him to file a plea to the Respondent's counterclaim.

[3] In response to the Rule 35 (3) notice the Respondent filed a further discovery affidavit, believing the Rule 35 (3) notice to be requiring of it to furnish further and better discovery of documents over and above those that it had discovered pursuant to the Applicant's earlier Rule 35 (1) notice.

[4] In the initial discovery affidavit the Respondent had discovered the following documents: (i) the pleadings; (ii) internal advert of vacant positions; and (iii) recruitment and selection policy. In the further discovery affidavit the following documents were discovered: (i) originals of all process filed in the action; (ii) originals of all correspondence posted and/or delivered; and (iii) copies of all documents discovered as such where the original has been mislaid or can no longer [be found] for whatever other reason. Notwithstanding such discovery the Applicant brought the present application seeking a relief in the following terms:

“1. The respondent be required to discover the documents as requested by the Applicant (**Plaintiff in the Main Action**) in terms of Rule 35 (3) of the uniform rules of this Honourable Court within ten (10) days of service of this order upon it, failing which the Applicant be authorised to approach this Court on the same papers, duly supplemented, for

an Order Striking out the Respondent's defence
(Defendant in the Main Action) in the action and
 for judgment by default.

2. that the respondent be ordered to pay costs of the application.
3. Further and/or alternative relief.”

[5] The Respondent objects to the relief sought on the ground that both the notice of motion and founding affidavit on which the application is predicated were not signed by the legal representatives of the Applicant and the Applicant respectively. Although these objections were raised pertinently in the answering affidavit, they were not explained adequately in the replying affidavit. The Applicant only made a bare denial that the papers before the Court are now signed, but without giving full explanation on how it came to be that papers not signed on the date of launching of the application on 23 May 2017 have now been signed. The copies of the founding papers that were served upon the Respondent remain unsigned. The irresistible conclusion to be drawn is that the Applicant and/or those legally representing him quickly signed the papers that had been filed on 23 May 2017 sometime after notification was given in the answering affidavit that the founding papers were unsigned. In the final analysis the affidavit of the Applicant offends the provisions of Regulation 3 (1) of the Regulations governing the Administration of an Oath or Affirmation, GN R1258 in GG 3619 of 21 July 1972 as amended to the extent that the copy that was

served shows that the Commissioner of Oaths signed the affidavit without the deponent being present in front of him. On those basis I accept the submission advanced on behalf of the Respondent that the application falls to be dismissed on the authority of the cases of *Nkondo v Minister of Police and Another* 1980 (2) SA 362 (0) at 364A-B; and *Goodwood Municipality v Rabie* 1954 (2) SA 404 (C) at 406C, that an affidavit not attested to on oath or affirmed in terms of regulations cannot be treated as the evidence.

[6] On the merits of the application I am in agreement with the legal representative of the Respondent that the Rule 35 (3) notice, a pre-trial step, is an incorrect process to be used in calling for discovery of documents for the purpose of pleading to the Respondents' counter-claim. The provisions of Rule 35 (12) or, alternatively, Rule 35 (14) must have been used instead. The reason for the Rule 35 (3) notice is borne out of the allegations made by the Applicant in paragraph 9 of the founding affidavit which read:

“It is respectfully submitted that the required documents are very crucial to the main action more particularly for purposes of pleading to the counterclaim raised by the Respondent.”

[7] On the Applicant's own showing the relief that he seeks cannot be granted. On the face of a clearly incorrect procedure having been adopted, it was submitted on behalf of the Applicant that, in essence, it matters not whether Rule 35 (3) or Rule 35 (6) (and by implication Rule 35 (12) or Rule 35 (14) was used

because the documents are sought to be used towards preparation for trial in due course. These submissions cannot be sustained because they undermine the function that each of the sub-rules serves in action proceedings; and especially that the prejudice suffered by the Respondent due to non-compliance will be undermined. The orderly management of trials by the Courts will also be undermined.

[8] The difficulty experienced by the Applicant in this matter lies in the unfortunate misconstruction, and the consequent misapplication, of the provisions of Rule 35 (3).

[9] Therefore the costs of the application must be paid by the Applicant.

[10] In the result the following order shall issue:

The application is dismissed with costs.

Z. M. NHLANGULELA

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

MTHATHA

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