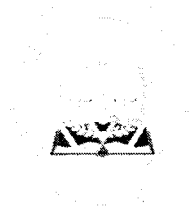


IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

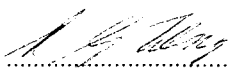


Case number: 84119/2014

Date: 30/3/17

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHERS JUDGES: YES/NO
- (3) REVISED

30-3-17 
DATE SIGNATURE

In the matter between:

BUSHBUCKRIDGE MUNICIPALITY

APPLICANT

AND

HWALI BUSINESS ENTERPRISE CC

RESPONDENT

(REG NO: 2002/099632/23)

JUDGMENT

TOLMAY, J:

- [1] The Applicant in this application applies for the striking out of Respondent's particulars of claim. The Applicant alleges that Respondent failed to comply with its notice in terms of rule 35(12) and (14) in which it *inter alia* requested a copy of:

"The written agreement entered into during June 2011 or thereafter between the Defendant and the Plaintiff extending the agreement of August 2010 referred to in paragraph 3.2 of the particulars of claim."

- [2] The application is brought in terms of Rule 30A of the Uniform Rule of Court which provides *inter alia* that:

"(1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, any party may notify the defaulting party he or she intends to, after the lapse of 10 days, to apply for an order that such rule, notice or request be complied with within 10days or that the claim or defence be struck out."

- [3] The Rule 30A notice was delivered on 03 March 2016 calling upon the respondent to comply with the applicant's request made pursuant to Rule 35(12) and (14), to make available, the written agreement between the parties entered into during June 2011 or thereafter, upon which the respondent's claim is based.

- [4] The crux of the Applicant's case is set out in paragraph 11 of its founding affidavit, which reads as follows:

[9] The respondent alleges that on 29 June 2011, the MOA was extended for two (2) years on same terms. In this regard, the respondent annexes a letter signed by the acting Municipal Manager at the time as annexure "C".

[10] The relevant portion of annexure "C" reads:

"It is with pleasure that we inform you that the municipality has decided to extend your contract with two years for implementation of the above programme. The contract will be administered as per the original contract that has been signed between yourselves and the municipality.

Please note that the contract will be effective upon signing a contract document and the acceptance of this appointment by the contractor..." [My emphasis]

[11] In paragraph 3.2 of the Particulars of Claim, the Respondent initially pleaded that:

"The parties extended the abovementioned agreement on the same terms and conditions in June 2011 for two years and the extension of the contract was confirmed in writing on behalf of the Defendant, by Mr Mnisi, the acting Municipal Manager on 29 June 2011. A copy of the written confirmation of the extension is attached hereto, marked annexure "C"."

- [12] The Respondent after the delivery of the Rule 30A notice amended par 3.2 of its particulars of claim, after the amendment it reads as follows:

"The parties orally extended the abovementioned agreement on the same terms and conditions in June 2011 for two years and the extension of the contract was confirmed in writing on behalf of the defendant, by Mr Mnisi, the acting Municipal Manager on 29 June 2011. A copy of the written confirmation of the extension is attached hereto, marked as annexure "C".

- [13] Rule 35(12) of the Rules provides as follows:

"Any party to any proceeding 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 affidavits reference is made to any document or tape recording to produce such document or tape recording for his 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 document or tape recording in such proceeding provided that any other party may use such document or tape recording."

- [14] Rule 35(14) provides as follows:

"After appearance to defend has been entered, any party to any action may, for purposes of pleading, require any other party to make available for inspection within five days a clearly specified document or

tape recording in his possession which is relevant to a reasonably anticipated issue in the action and to allow a copy or transcription to be made thereof.”

[15] It is clear from a perusal of both the original particulars of claim and the subsequent amendment that the Respondent does not rely on a written agreement of the extension of the agreement. Respondent clearly states that the written agreement was entered into during June 2011. That agreement was then orally extended and the extension was according to Respondent confirmed in a letter dated 29 June 2011 which was attached to the papers as Annexure “C”. Consequently the Respondent did not rely on a written agreement and it was not possible to comply with the rule 35(12) and (14) notices as no such document exists.

[16] It is therefore abundantly clear that the Respondent can’t discover a document that does not exist. Consequently there is no merit in the application.

[17] The Applicant, only in the heads of argument, raised some further issues and made the submission that annexure “C” is not a contract and submitted that the Respondent’s claim ought to be struck out because there was not compliance with the contents of annexure “C” and that the Respondent’s claim is therefore without any legal foundation. The aforesaid was never part of the Applicant’s case and is

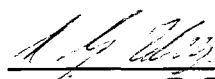
not raised anywhere on the papers. This argument maybe raised by way of an exception, but this is not the Applicant's case before this Court and can't be raised or argued on the papers before me.

[18] The Respondent proceeded to ask for attorney and client costs if the application is dismissed. This is primarily based on the fact that Applicant was aware of the fact that there is no written agreement to discover. I am of the view that in the light of all the circumstances such an order is appropriate. The particulars of claim after the amendment at the very least, was abundantly clear that no written agreement existed to discover. Despite the fact the Applicant persisted with this application.

[19] Consequently I make the following order:

19.1 The application is dismissed.

19.2 The Applicant to pay the costs of the application on an attorney and client scale.


R G TOLMAY
JUDGE OF THE HIGH COURT