



IN THE GAUTENG DIVISION, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

20/2/2015

CASE NO: 61873/14

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED
20.2.15	
DATE	SIGNATURE

In the matter between:

ZIDLA NDAWONYE BOMAKE TRADING CC

1ST APPLICANT

RICHARD BAKITHI MLANGENI

2ND APPLICANT

And

HABANA TRADING (PTY) LTD

RESPONDENT

JUDGMENT

MSIMEKI J:

INTRODUCTION

[1] The applicant, in this matter, brought this application seeking an order as follows:

- "1. That Respondent be ordered to pay R10 200 658.78.
2. That Respondent be ordered to pay 15.5% interest of the debt above.
3. That Respondent be ordered to pay the costs of this application, only in the event of opposition.

4. That the above honourable court grants further and/or alternative relief which in the circumstances may deem fit.”
- [2] Mr M B Tshabangu and Mr J G W Basson, respectively, represented the applicants and the respondent when the matter was argued.
- [3] Mr Richard Bakithi Mlangeni deposed to the founding affidavit of the first applicant. He is a major director of the first applicant with members interest of 51%.
- [4] The application was issued on 20 August 2014 and served on the respondent on 30 September 2014.
- [5] The notice of intention to oppose was served and filed on 21 October 2014.
- [6] I need to mention that the respondent, in the definitions of the General Conditions of Contract is defined as “the company appointed by the Department of Public Works, Roads and Transport of the Mpumalanga Provincial Government, or a person designated by the Department to act on its behalf or any regional or local authority to which the Provincial Government of the Province of Mpumalanga has cede its rights and delegated its obligation.”
- [7] There was exchange of correspondence between the parties and their legal representatives. The Answering Affidavit, as a result, was not served and filed.

- [8] On 13 November 2014 the applicants served a Notice of Set Down on the unopposed motion roll. The Notice bears the registrar's stamp of 18 November 2014.
- [9] On 14 November 2014 the respondent served Notice in terms of Rule 35 (12) and Rule 35 (14) read with Rule 35 (13). The applicant's legal representative's date stamp, however, denotes the date of 14 September 2014. This appears to be an obvious mistake. The Notice called on the applicants to produce for inspection and to, if so required make copies of the documents referred to in the founding affidavit and its annexures within 5 (five) days from date of receipt of the Notice.
- [10] The applicants, on 1 December 2014, served on the respondent, their reply to respondent's notice in terms of Rule 35 (12), (13) and (14). The reply was filed on 2 December 2014.
- [11] The respondent, according to Mr Basson, after receipt of the Notice, had time to object, file an answering affidavit or bring an application to compel. Mr Basson held the view that the respondent, after receipt of the reply to the request, had up to 23 December to exercise its choice. If one calculates 15 days from 1 December 2014 one then ends up with 23 December 2014.
- [12] According to the notice of set down, the matter was to be heard on 15 December 2014, that being the date set aside for unopposed matters. If the respondent was late with its notice in terms of Rule (12), (13) and (14), then the problem was removed by the applicant's reply thereto. Assuming that that were so, the

respondent in that event was rescued by the applicant's reply. This then had the effect that the Notice of set down became premature.

[13] One can then appreciate Mr Basson's argument that the applicants ought to have removed the matter from the roll. This, the applicants did not do but, instead, Mr Tshabangu went on with his argument and submission that the matter was properly before the court.

[14] Rule 35 (12) provides:

“(12) 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.”

[15] Upon reference to a document or tape recording by one party in his/her pleadings or affidavits, the other party becomes entitled to see the document or the tape recording. A party cannot be expected to draft and file his/her own pleadings or affidavits before he/she is given an opportunity to inspect and copy, or transcribe, the document or tape recording referred to in his/her adversary's pleadings or affidavit. A party may exercise the rights under this subrule before he/she has disclosed his/her defence or even before he/she knows what his/her defence will be. The documents are needed to enable him/her to consider his/her position. The

party is not required to depose to or deliver opposing affidavits (or a plea) before he/she has inspected and copied the documents referred to in the subrule. Pending the production of the documents or recordings referred to in the subrule, the time period for the delivery of opposing affidavits (or plea) is suspended. (**Protea Auurance Co. Ltd v Waverley Agencies CC 1994 (3) SA 247 (C) at 249B; Unilever v Polagric (Pty) Ltd 2001 (2) SA 329 (C) at 336G-J; 336C and Erasmus: Superior Court Practice AT B1-261.**)

- [16] Mr Tshabangu for the applicants, held the view that there was nothing standing in the applicants' way preventing them from getting the relief that they seek in their Notice of motion. Having regard to what has been discussed above, the submission cannot be correct. The discussion above demonstrates that the application was set down prematurely. The application ought to have been removed from the unopposed roll of 15 December 2014. Mr Basson's submission has merit.
- [17] For proper ventilation of the issues in the application the application must be removed from the roll.
- [18] **The following order, in the result, is made**
1. **The matter is removed from the roll**
 2. **The costs will be costs in the application.**


M.W MSIMEKI
JUDGE OF THE GAUTENG DIVISION
PRETORIA

COUNSEL FOR THE APPLICANT:
INSTRUCTED BY:

MR M B TSHABANGU
M.B TSHABANGU INC.

COUNSEL FOR THE RESPONDENT:
INSTRUCTED BY:

ADV BASSON
VFV ATTORNEYS

DATE OF HEARING:
DATE OF JUDGMENT:

15 DECEMBER 2014