

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

CASE NO. 2301/2009

In the matter between

MINISTER OF SAFETY AND SECURITY

Applicant

and

MZUKISI TYALI

First Respondent

KING SABATA DALINDYEBO

MUNICIPALITY

Second Respondent

JUDGMENT

HARTLE J:

1. In this interlocutory application, the applicant seeks an order striking out an answering affidavit deposed to by the first respondent on 1 September 2010.
2. The application is ostensibly made in terms of the provisions of Rule 30A(1) of the Rules of this court.
3. The main application is one pursuant to the provisions of the Prevention of Illegal Eviction from Unlawful Occupation of Land Act, No 19 of 1988 (*“the PIE Act”*). An order was granted on 18 February 2010 authorising the applicant to serve the application pursuant to the provisions of section 42 of the PIE Act. On the same date a rule *nisi* was issued calling upon the first respondent to show cause by 18 March 2010 why she should not be evicted from premises owned by the applicant.
4. On 18 March 2010 the application was removed from the roll.
5. On 17 June 2010 the application was again removed.
6. On 1 July 2010 the matter served before this court again when it was postponed to 8 July 2010. It appears from the order granted on the latter date that the first respondent appeared personally on this occasion. The rule

(which I assume was revived) was extended to 30 July 2010, and the first respondent was directed to file her answering affidavit by 23 July 2010.

7. Albeit not timeously, she did so on 26 July 2010. Well at least this is the indication given in the court file which includes the original affidavit deposed to by her bearing only the Registrar's official stamp of this date on the face of it. It does not appear from the filed affidavit, however, that it was served on either the applicant's representative or the second respondent (whose interest in the matter both parties have incidentally simply overlooked throughout), but I was advised from the bar by Mr *Sishuba* who appeared for the applicant that the affidavit was indeed served on the latter on 4 August 2011¹. The affidavit, when it was filed, was seemingly not accompanied or preceded by a notice to oppose which is a peremptory requirement pursuant to the provisions of Rule 6(5)(d)(i). Although the first respondent may have been assisted by an attorney in preparing the affidavit, the provisions of the rule were not complied with and nobody went on record on her behalf. Mr *Sishuba* submitted however, quite correctly in my view, that the applicant had on 8 July 2010 been advised of the first respondent's intention to oppose the application when she appeared personally; therefore the absence of a formal notice in this regard was not an issue in the matter. The filing of the original answering affidavit by the first respondent was therefore not an abortive step for want of either a notice to oppose or proper "*delivery*" thereof.²

1 Mr Sishuba produced a copy of the affidavit which bore the date stamp 4 August 2010 and the signature of a representative from the applicant's firm in proof of service on them.

2 A pleading is delivered, according to the definition in Rule 1, by filing the original with the registrar and serving a copy on the interested parties.

8. On 14 September 2010 a formal notice to oppose was delivered by the first respondent's current attorneys of record, followed two days later by the filing of yet another answering affidavit deposed to on 1 September 2010. The applicant at first informally sought to complain about this by way of a letter addressed to the first respondent's attorneys dated 21 September 2010 in which she was invited to "*regularize*" the fact that he had already, on 4 August 2010, been served with an answering affidavit.
9. On 22 September 2010 the first respondent's attorneys explained that they were unaware of a prior affidavit, had not found anything on the court file when they perused it and were informed by the first respondent that no service of such affidavit had taken place. They apologized and invited the applicant to ignore "*any affidavits not served by (their) office*".
10. This precipitated the applicant's filing of a Rule 30A(1) notice on 6 October 2010 calling upon the first respondent to formally remove the "*cause of the complaint*" - which I set out below - failing which he would seek an order striking out her second answering affidavit. The body of the notice reads as follows :
 - "1. The respondent in reply to the applicant's application delivered on applicant's attorneys of record (her) answering affidavit on 4 August 2010. The same affidavit was earlier filed with the registrar of this Honourable Court on 26 July

2010 (first answering affidavit).

2. The respondent again on 16 September 2010 delivered to applicant's attorneys of record another answering affidavit (which is different to the one filed on 26 July 2010) dated 1 September 2010 (second answering affidavit).
3. The second answering affidavit was filed in violation of Rule 6 of the Uniform Rules of Superior Court Practice (the Rules) in that it was filed without an application being made first and leave having been granted for filing of same by this Honourable Court.
4. The respondent's non compliance with the Rules as set out above, renders the delivery of the respondent's second affidavit to be in violation of the Rules of this Honourable Court."

11. A further letter was addressed to the applicant's attorneys dated 15 October 2010 reminding them of the earlier correspondence in which the first respondent's attorneys explained that the first affidavit, which the applicant alleged had been served on him, should be ignored. The applicant was again requested to "*consider any affidavits not served by (their) office as pro non scripto and ... expunged*", as well as to reply to the last affidavit. The hope was further expressed that the applicant would not pursue the Rule 30A(1) notice.

12. The applicant's attorneys responded, however, that they could not accept the first respondent's view that the earlier affidavit was a nullity. As far as they were concerned it was a "*legitimate court document*" and could not simply just be "*wished away*". In the result – so they concluded - the notice in terms of Rule 30A(1) stood.

13. On 26 October 2010 the first respondent filed a notice withdrawing the earlier affidavit.

14. This notwithstanding, and without filing a fresh notice in terms of rule 30A (1), the applicant persisted with its application in terms of Rule 30A(2) which was delivered on 8 December 2010. Evident from the notice filed in this regard is that the applicant's grievance was not with the first affidavit, or its withdrawal for that matter, but with the filing of the second affidavit which had - so it was contended - been delivered without the leave of this court being sought and granted. The applicant alleged in this regard that the delivery of it "*violates the provisions of Rule 6*". No further detail concerning the applicant's alleged non-compliance with the particular rule was outlined. The remedy which the applicant sought was for the striking out of the first respondent's last affidavit.

15. The first respondent opposed the application, raising a preliminary argument that the applicant had failed to comply with the provisions of Rule 30A(2) in

that there was no “*notice*” to the court for the application.³ Further – so she explained by way of affidavit- the second affidavit was delivered without knowledge of the first one,⁴ which the applicant had informally been requested to ignore. She added that after receipt of the formal notice to remove the cause of the complaint (and before the issue of the present application) she had acted promptly to “*cure the situation*”, not only by again requesting the applicant to ignore the prior affidavit, but also thereafter by formally withdrawing the first answering affidavit. As far as she was concerned that left only the last affidavit to be replied to, in respect of which the applicant was tardy in replying to. She denied any non-compliance with the provisions of Rule 6. Indeed it was argued at the hearing on her behalf that the applicant’s complaint that she had violated Rule 6 was not specific to any sub-rule, leaving her in the dark as to what the real issue was. As far as she was concerned she had not filed a “*further*” affidavit and no leave from the court was therefore necessary. Such leave might in the future prove necessary, but such a situation had not as yet arisen, most notably because the applicant had not yet filed a replying affidavit, whether in response to the now withdrawn first affidavit, or the second.⁵

16. She submitted further that since the applicant had at all material times known he should ignore the first affidavit – which was properly withdrawn – there could in the result be no prejudice to him.

3 In argument the first respondent further relied on the absence of any supporting affidavit.

4 Seemingly the explanation given in the affidavit was that of her attorney, which was consistent with the correspondence addressed to the applicant’s attorneys in this regard. The first respondent could hardly have disavowed knowledge of the first affidavit.

5 Mr *Sishuba* suggested at the hearing that the applicant had not done so for fear that this would amount to a “*further step in the proceedings*” which would compromise his right to pursue the present remedy.

17. When the matter was argued before me the first respondent added a further string to her bow of legal arguments by submitting that, since the application purported to be one striking out an affidavit – which category of application is required to be heard when the matter is before the court on its merits – it was premature.

18. The latter argument is in my view without merit however since it is premised on a misunderstanding that the applicant's present application is one in terms of the provisions of Rule 6(15), which it clearly is not. On the contrary, the application purports peculiarly to be one within the contemplation of Rule 30A which has its own machinery and remedy to enforce compliance with the rules of court generally where the particular rule offended against does not have its own inbuilt procedure providing for an enforcement procedure.⁶

19. In this regard 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, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days, to apply for an order that such rule, notice or request be complied with or that the claim or defence be struck out.

(2) Failing compliance within 10 days, application may on notice be made to the court and the court may make such order thereon as to it seems meet.”

⁶ *Norman & Co (Pty) Ltd v Hansella Construction Co (Pty) Ltd* 1968 (1) SA 503 (T); *Houtlands Investments (Pty) Ltd v Traverso Construction (Pty) Ltd* 1976 (2) SA 261 (C).

20. Before dealing with the merits of the application, first a brief word about the first respondent's original preliminary objection.

21. Rule 30A (2) provides that an application in terms of this sub-rule may "*on notice*" be made to the court. The same concept of "*on notice*" is referred to in rule 6 (11) which deals with interlocutory and other applications incidental to pending proceedings and is to be distinguished from applications which are required to be launched "*on notice of motion*". The former category of applications is required to be "*supported (only) by such affidavits as the case may require,*" in other words where there are specific provisions in the rules which provide for a particular form of application. But interlocutory applications generally do not require a supporting affidavit, neither does "*notice*" in this rule mean notice of motion.⁷

22. There was therefore no need on the part of the applicant to preface its application with a formal notice of motion or file a supporting affidavit. Neither were the provisions of Rule 6 (5) (f) of application. The *Concise Oxford Dictionary* defines the putting of a person on notice as meaning to "*warn someone of something about or likely to occur.*" "*Notice*", as a noun, is also described as "*advance notification or warning*". Given that the concept of notice is an essential element of due process, it suffices if a

⁷ *Yorkshire Insurance Co Ltd v Reuben* 1967 (2) SA 263 (E) at 265E – H; *Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O) at 755A – 756C; *Hendricks v Santam Insurance Co Ltd* 1973 (1) SA 45 (C) at 46D – 47C; *Muller v Paulsen* 1977 (3) SA 206 (E) at 208E – G; *SA Metropolitan Lewensversekeringsmaatskappy Bpk v Louw* NO 1981 (4) SA 329 (O) at 332G.

respondent in such an application, having already been alerted to his stated non-compliance with a rule (or with a request made or notice given pursuant thereto), and the consequences thereof by his continued failure after a lapse of 10 days, is advised in an acceptable format that the applicant's complaint will be elevated to the court for the remedy provided for to be enforced. It is clear from the face of the Rule 30A (2) notice at page 65 of the indexed record that this purports to be the "*application for the striking out of the (the first) respondent's further affidavit in terms of (the rule)*" following its precursor which was the Rule 30A (1) notice and that the remedy sought is for "*the striking out of the respondent's further affidavit.*" Therefore, leaving aside for the moment the merits of the application it in my view constitutes adequate and appropriate notice and is in compliance with the provisions of Rule 30A(2) concerning the manner in which such applications are required to be made. I was therefore satisfied that the matter was properly before me.

23. Returning now to the merits of the application, there was some confusion about what was really troubling the applicant especially since, after the first respondent had withdrawn her first affidavit, the Rule 30A(2) notice continued to allude to the conundrum posed by a "*further*" affidavit, which it now no longer was. Mr *Sishuba* argued at the hearing of the matter that the first respondent was precluded by the provisions of Rule 28, which provides for amendments to pleadings and documents, from filing any affidavit "*whose intention and consequence would have the effect of amending any earlier affidavit filed*". This submission is supported the provisions of Rule 28 (1), so he argued, which allows for amendments to pleadings and

documents “*other than a sworn statement.*”

24. I am not aware of any provision which precludes a party from withdrawing an affidavit, or a requirement that such withdrawal should be accompanied by a prior application for the leave of the court *per se*, neither did counsel refer me to any authority in this regard. I assume though from his reference to Rule 28 that Mr *Sishuba*’s concern is for a situation where the new affidavit purports to withdraw admissions previously made or which involve a “*change of front*” within the meaning referred to in *President Versekeringsmaatskappy v Moodley*⁸

25. *Hiemstra J* held in the latter matter that amendments involving a withdrawal of an admission should be treated on the same basis as all other amendments. He noted that “*the withdrawal of an admission is usually more difficult to achieve because (i) it involves a change of front which requires a full explanation to convince the court of the bona fides thereof, and (ii) it is more likely to prejudice the other party, who had by the admission been led to believe that he need not prove the relevant fact and might, for that reason, have omitted to gather the necessary evidence*”.⁹

26. In the original Rule 30A (1) notice the applicant hinted at the fact that the second affidavit was different from the first, but it was not suggested in it, the follow up Rule 30A (2) notice or at the hearing, that the last affidavit

⁸ 1964 (4) SA 109 (T).

⁹ At pages 110 – 111.

involved the withdrawing of any admissions previously made or required any explanation beyond what the first respondent had given. The applicant further appeared to accept, certainly by the time the matter was argued, that the first affidavit was no longer in contention. By its withdrawal it was no longer relevant to the proceedings.

27. But to return to the applicant's complaint - as it was foreshadowed in the rule 30A (1) notice and continues to be the theme in the present application - this has at all times being focused on the second affidavit and not the first, without specifying in an intelligible manner, however, how the first respondent has failed to comply with any specific rule of court in this regard so as to affect the proceedings. Neither has the applicant changed tack since the first affidavit was withdrawn. If he meant to complain that the first respondent should be seeking leave to withdraw admissions previously made by her (and that until such leave had been granted the second affidavit could have no standing), he did not say so nor what specific rule was not being complied with in this regard. Or perhaps he considered that since the first affidavit was now no longer in contention once it was withdrawn, the first respondent was required to seek the court's condonation for the late filing of the last affidavit - which was indeed filed out of time and not in conformance with this court's order dated 8 July 2010 – but this too he did not say nor warn the first respondent of by way of a fresh notice in terms of Rule 30A (1) drawing attention to a new problem laid bare by the withdrawal of the first answering affidavit. The applicant could also not have intended to mean, certainly not once the first affidavit was withdrawn, that the last affidavit continued to constitute a "*further*" affidavit in the sense

of being supplementary to the first one, because the latter had by now been substituted.

28. There was in my view therefore an absence of any explicit complaint of a failure to comply with rule 6 as contended for by the applicant as providing the necessary jurisdictional basis for his application in terms of Rule 30A(2). In the result the application must fail.

29. Notwithstanding the view I take in this matter, I am not inclined to mulct the applicant with the attorney and client order of costs prayed for by the first respondent. The situation in which the applicant found himself was somewhat unusual and confusing and a properly specified complaint, foreshadowed by an appropriate notice drawing attention to the issues causing concern, may well have warranted this court's intervention. In my view the normal costs result should therefore pertain.

30. As an aside, I queried from Mr *Sishuba* whether the applicant had not misconceived its remedy and the relevant rule applicable to the situation. I entertained this notion since the applicant had alluded in the informal correspondence to a need for the first respondent to *regularize* the situation. The Rule 30A (1) notice had also invited the first respondent to *remove the cause of his complaint* rather than urging him to comply with the rules in a given manner. It had further been suggested in argument that the applicant, by not filing a replying affidavit, was being careful not to take a further *step*

in the proceedings which would compromise its remedy. I was also struck by the relief sought, being to strike out the affidavit rather than the defence itself which is the appropriate order where the alleged failure to comply affects the whole of the proceedings. I reflected that the applicant's interests might have been better served by the machinery provided for by Rule 30 which deals with the situation where an "*irregular step*" has been taken (or by simply raising his objections in a replying affidavit), but Mr *Sishuba* was clear that the applicant was deliberate in his choice of remedy in this regard. Indeed he persisted that the applicant (despite not having prayed for this more austere relief in his notice of application) was entitled to an order striking out the defence because the last affidavit was not properly before me in the absence of the leave of this court to permit it. For the reasons indicated above, however, the applicant has not made out a case for such relief.

31. Finally I reflected that I ought in the interests of the proper administration of justice to give consideration to condoning the late filing of the first respondent's last answering affidavit to promote finality, but she has not explained adequately in my view in the affidavit filed in opposition to the present application how it came to pass that two affidavits were deposed to by her in the first place (I couldn't help but notice from the correspondence exchanged between the parties' attorneys that there were two other related matters in which the same situation pertained); has not accounted for why the last affidavit is different from the first (I interpolate to mention that I did not apply my mind to any meaningful comparison between the two); has not explained why she failed to comply with the order of this court dated 8 July

2010; nor bothered herself with explaining why, ostensibly out of the blue on 16 September 2010 – a considerable while after the last affidavit was deposed to, she ultimately delivered her last affidavit purporting to be the real McCoy. It struck me further that to entertain such relief (without any request from her) would be undeserving. In any event, the matter requires a proper consideration of what might be fair in the circumstances.

32.I issue the following order:

- i) The applicant's interlocutory application to strike out the answering affidavit of the first respondent dated 1 September 2010 is dismissed with costs.

BC HARTLE

JUDGE OF THE HIGH COURT

Date of hearing : 8 June 2012

Date of judgment : 14 June 2012

Appearance for the Applicant:	Adv M H Sishuba
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