

SOUTH AFRICA / JUDGMENT

Are Direng Transport and Labour Hire and Another v Rustenburg Local Municipality and Others (UM190/2020) [2022] ZANWHC 24 (21 June 2022)

[2022] ZANWHC 24

COURT

North West High Court, Mafikeng

BEFORE

A H Petersen

CASE / FILE NUMBER

UM190/2020

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IN

THE HIGH COURT HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION, MAFIKENG

CASE

NO: UM190/2020

Reportable:

NO

Circulate

to Judges: NO

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to Magistrates: NO

Circulate

to Regional Magistrates: NO

In

the matter between: ARE
 DIRENG TRANSPORT AND LABOUR
 HIRE
 First Applicant
 RAMBAIT
 TRADING ENTERPRISE (PTY)
 LTD
 Second Applicant
 and
 RUSTENBURG
 LOCAL MUNICIPALITY
 First Respondent
 KATLEGO
 BAPHIRING TRADING ENTERPRISE CC
 Second Respondent
 PROVINCIAL
 TREASURY: NORTH WEST PROVINCE
 Third Respondent

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by way of e-mail. The date and time of the handing down of judgment is deemed to be 14h00 p.m. on 21 JUNE 2022.

ORDER

1.
The Review Application by the applicants launched in terms of Uniform Rule 53 is dismissed.

2.
The applicants are to pay the costs of the application on an attorney client scale.

JUDGMENT

PETERSEN J

Introduction

- [1] This application came before me on 27 May 2022 for adjudication of Parts B and C of the applicant's Rule 53 Review Application brought against the respondents. The application was enrolled by the first respondent.
- [2] The applicants, notwithstanding the delivery of the Notice of Set Down on 2 February 2022, failed to file heads of argument. On the

date of hearing, Counsel had been belatedly briefed by the applicants with a sole mandate to seek a postponement of the application. The application for postponement fell gravely shy of being a substantial application and after hearing Counsel for the applicants and the first respondent, the application for postponement was dismissed. The application accordingly proceeded on the existing papers filed of record, which include the founding affidavit and an answering affidavit of the first respondent.

[3] The relief sought on review by the applicants, relevant to Parts B and C is formulated in the Notice of Motion as follows:

"PARTS

10. The First Respondent's decision to appoint any service provider on Tender No: RLMIDCDC/0067I2018/19 for the provision of wet refuse collection service for various areas in Rustenburg is unlawful and is hereby reviewed and set aside;
11. The First Respondent's decision to vary and/or extend the tender of the Second Respondent for the provision of wet refuse collection service for various areas in Rustenburg is unlawful and is hereby reviewed and set aside;
12. The First Respondent's failure to take a decision to consider, evaluate and adjudicate the Tender and appoint the successive bidder is reviewed and set aside;
13. The First Respondent be ordered to pay the costs of this application;

...

PARTC

17. Further that (sic) court orders that this application constitutes a complaint and in terms of Item 2 of the Misconduct regulation, as the respondent ... "

Background

[4] A brief background of the history of the litigation in this matter is apposite, to appreciate the status of the application as it

presently stands. The applicants launched a review application in terms of Uniform Rule 53 (Rule 53) on 23 September 2020, to have a decision taken by the first respondent, with which it is aggrieved, reviewed and set aside. The application was launched in three parts. PART A being an urgent application on an extremely urgent basis in terms of which the applicant sought to compel the first respondent to appoint a successful bidder for a tender for the provision of wet refuse collection service for various areas in Rustenburg under tender reference RLM/DCD/0067/2018/19, to be heard two days after being launched on 23 September 2020. PARTS Band C as set out supra.

[5] The first respondent opposed the relief sought in PART A and delivered its answering affidavit within the two (2) day period set

by the applicants. The applicants at the hearing of the urgent application on 26 September 2020 withdrew PART A of the application.

The matter followed its normal course thereafter, with the first respondent delivering the record and reasons as required by Rule 53 on 13 October 2020. On 3 December 2020, the applicants delivered a so- called "Notice of Discovery". In my judgment of 26 August 2021, I stated as follows in this regard:

"... the respondents' (applicants) was then entitled to "...amend, add to or vary ... "the notice of motion and "... supplement the supporting affidavit ... ". Upon receipt of the record and reasons, the respondents' failed to invoke the right to request additional documents, which may be relevant to the record in accordance with the prescripts of rule 53. The respondents' instead, on 3 December 2020, delivered a notice for "discovery" in the main review application. The discovery notice called on the applicant to make discovery of documents identified in the notice, in terms of rule 35, so as to enable the respondent's to amend the founding papers. The discovery notice was predicated on the contents of the applicants' answering affidavit delivered in answer to Part A of the notice of motion."

This procedural step was set aside on 26 August 2021.

[6] As the applicants took no further steps after 26 August 2021, the first respondent delivered its answering affidavit in respect of PARTS B AND C of the application. The applicants failed to file a replying affidavit. The applicants seemingly unperturbed by this Court's order of 26 August 2021, engaged the first respondent by way of letter demanding that it supplement its record and reasons which was provided on 13 October 2020. The first respondent's attorneys were not prepared to engage with the applicants by way of letter and made this known to the applicants' attorneys in writing.

[7] The applicants, in turn, on 26 November 2021 served a "notice of motion Rule 30 application - irregular proceedings" on the first respondent. The first respondent being of the opinion that this step on the part of the applicants constituted an irregular

step, once again invoked Rule 30, alternatively 30A on 1 December

2021. When the applicants failed to remove the cause of complaint by the first respondent, the first respondent on 6 January 2022 launched an application in terms of Rule 30, alternatively Rule 30A, which the applicants did not oppose. The first respondent accordingly enrolled the said application for hearing on the unopposed roll of 10 February 2022, which order was granted, on an unopposed basis. The present application was accordingly enrolled for 27 May 2022.

Discussion

[8] The application as it presently stands must be adjudicated in accordance with the principle or rule set out in *Plascon-Evans Paints (TVL) Ltd v Van Riebeeck Paints (Pty) Ltd*[1], where the following was stated:

"Secondly, the affidavits reveal certain disputes of fact. The appellant nevertheless sought a final interdict, together with ancillary relief, on the papers and without resort to oral evidence. In such a case the general rule was stated by VANWYK J (with whom DE VILLIERS JP and ROSENOW J concurred) in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (CJ at 235E - G, to be:

"... where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order... Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted."

This rule has been referred to several times by this Court (see *Burnkloof Caterers (Pty) Ltd v Horseshoe Caterers (Green Point) (Pty) Ltd* 1976 (2) SA 930 (A) at 938A - B; *Tamarillo (Pty) Ltd v B N Aitkin (Pty) Ltd* 1982 (1) SA 398 (A) at 430 - 1; *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Backereien (Pty) Ltd en Andere* 1982 (3) SA 893 (A) at 923G - 924D). It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163- 5; *Da Mata v Otto* NO 1972 (3) SA 858 (A) at 882O-H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6

(5) (g) of the Uniform Rules of Court (cf *Petersen v Cuthbert & Co Ltd* 1945 AD 420 at 428; *Room Hire* case supra at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg *Rikhoto v East Rand Administration Board and Another* 1983 (4) SA 278 (w,) at 283E - H). Moreover, there may be exceptions to this general rule. as. for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers (see the remarks of BOTHA AJA in the *Associated South African Bakeries* case, supra at 924A)."

(my emphasis)

- [9] The essence of the first respondents answer to prayers 10 to 13, which remains undisputed is succinctly captured in the heads of argument of Adv Laubscher for the first respondent. In respect of prayer 10, the first respondent did not appoint a service provider under "... Tender No.: RLM/DCD/0067/2018/19 for the provision of wet refuse collection for various areas in Rustenburg ..." and there is thus no "decision" which stands to be reviewed.
- [10] In respect of prayer 11, the first respondent resolved to extend the validity period of the second respondent's appointment by means of a deviation executed in terms of the provisions of regulation 36 of the Municipal Supply Chain Management Regulations, 2005 promulgated in terms of the provision of section 168(1) of the Local Government: Municipal Finance Management Act, Act 56 of 2003.
- [11] In respect of prayer 12, the first respondent undertook processes and procedures to "...consider, evaluate and adjudicate the Tender ..." but resolved not to appoint a service provider subsequent to the conducting of those processes for the reasons set out in paragraph 23.1 supra.

(At paragraph [9] of this judgment)

Conclusion

- [12] The applicants review application in terms of Rule 53 accordingly stands to be dismissed.

Costs

- [13] The applicants have been remiss in the manner in which the review application has been dealt with from inception on 26 September 2020, notwithstanding punitive cost orders. The applicants have further persisted with seeking supplemented records and reasons, notwithstanding an order by this Court and when confronted with a Rule 30A, alternatively Rule 30 application in February 2022, simply failed to oppose the application. Notwithstanding the service of a Notice of Setdown for the adjudication of the actual review application by the first respondent, the applicants did nothing until the proverbial eleventh hour to brief Counsel to seek an unsubstantiated postponement of the matter. The first respondent on all occasions has had to litigate at ratepayers' expense when the applicant has taken a lackadaisical approach to the matter. In the exercise of my discretion on costs, I am satisfied that a punitive costs order is once again merited against the applicants.

Order

- [14] Consequently, the following order is made:
1. The Review Application by the applicants launched in terms of Uniform Rule 53 is dismissed.
 2. The applicants are to pay the costs of the application on an attorney client scale.

A H PETERSEN

HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

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MAHIKENG

Date of Hearing

: 27 May 2022

Date of Judgment : 21 June 2022

[1]

[1984] ZASCA 51; 1984 (3) SA 623 (A) at 634 E to 635 C.

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Prepared on 11 October 2026 · Esheria