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

CASE NUMBER: 31391/2013

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.
....
DATE **SIGNATURE**

In the matter between:

GERMISTON CENTRAL REAL ESTATE CC Applicant

And

EKURHULENI METROPOLITAN MUNICIPALITY Respondent

JUDGMENT

STRAUSS, AJ:

1. The applicant seeks an order that the respondent's claim be dismissed pursuant to the respondent's failure to comply with an order of court dated 16 April 2014 by Deverance AJ. The order referred to compelled the respondent to produce documentation listed in paragraphs 1, 2 and 5 of the applicant's notice in terms of Rule 35(12) and also inspection of

documents listed in paragraph 1, 2 and 3 of the applicant's notice in terms of Rule 35(14) within a period of 10 days of service of the order.

2. It is common cause between the parties that the respondent did not produce the said documents listed as ordered in terms of the court order. The applicant therefore made application for striking out of the respondent's claim due to non-compliance with the court order. The applicant does so in terms of Rule 30A of the Uniform Rules of Court.

3. There is also an application by the respondent to amend its particulars of claim, this amendment was objected to by the applicant.

It is necessary to set out the history of this matter and I will shortly do so.

4. The respondent in this matter is the plaintiff in the main action against the applicant as defendant. The respondent set out in its claim that it as a municipal public utility is empowered through the relevant legislation and bylaws to supply electricity, water, refuse removal and other municipal services to the applicant as regulated by the respondent's consumer credit agreement policy adopted by it on 30 November 2006.The municipal services provided to the applicant are in the relation to three accounts with their different account numbers set out in the particulars.

5. The respondent in its claim alleged that the applicant enjoyed the benefits of the supply of electricity, water and municipal services in respect of Erf 541, Wadeville Extension 12, alternatively, undertook to pay the respondent the sum determined by the respondent in respect of the supply of electricity, water and municipal services. The respondent

alleged that despite demand the applicant made no payment in respect of the aforementioned services for the period up until June 2013.

6. After receipt of the summons in September 2014, the applicant caused the two notices to be served on the respondent's attorney. The first notice was a notice in terms of Rule 35(12) which called on the respondent to make available for inspection or copies of documents pertaining to a consumer credit agreement that the respondent refers to in its particulars of claim, which customer agreement was entered into between the respondent and applicant. Every reference in this notice is directed to this consumer customer agreement.

7. The second notice was a notice in terms of Rule 35(14) which called on the respondent to produce copies of documents in respect of tax invoices despatched to the applicant in reference to certain accounts held by the applicant, as well as all monthly statements of those accounts and all water and electricity meter reading sheets and record of schedules in respect of these accounts.

8. The notices were served on 7 October 2013, the respondent answered to these notices by supplying not the customer agreement; between the parties, but the respondent's Electric Bylaws as well as their consumer deposit policy, credit control and debt collection policies. The respondent also supplied tax invoices from December 2002 to 2013 in respect of all the accounts held by the applicant, and also indicating that the linked account numbers for these accounts were specified with other numbers.

The respondent also supplied meter reading sheets in respect of the account numbers and the linked account numbers for these accounts.

9. After receipt of the documents produced by the respondent, none of the parties proceeded with any further applications herein.

10. The applicant then on 18 February 2014, served a notice to compel the respondent to produce now only documentation listed in paragraphs 1, 2 and 5 of the applicant's Rule 35(12) notice and also inspection of the documents listed in paragraph 1, 2 and 3 of the applicant's Rule 35(14) notice, within a period of 10 days of service of the order. The applicant therefore indicating that it had received some documents from the respondent but regarded the production insufficient and required the specific consumer credit agreement referred to in the respondent claim to be discovered.

11. The respondent delivered a notice of intention to oppose the application to compel, but failed to file an answering affidavit, and on 16 April 2014 in the unopposed motion court, Deverance AJ, granted an order that the respondent has to produce the documentation referred to within 10 days from date of service of the order. The notice did not set out that the applicant can after expiry of 10 days and after failure of the respondent to produce the documents, make application for striking out of the respondents claim.

12. The respondent also on 21 February 2014, served a notice of amendment indicating their intent to amend their particulars of claim. The applicant objected to the proposed amendment on 3 March 2014. The

applicant's main objection being that the proposed amendment sought to change the aforesaid cause of action against the applicant and would also render the respondent's particulars of claim excipiable on the basis that it would be vague and embarrassing.

13. The respondent also filed an application for condonation for the late filing of their application for leave to amend, which was served on the applicant on 5 August 2014. The applicant filed an answering affidavit. The respondent replied thereto. In the meantime the court order of 16 April 2014 still stood.

14. The applicant therefore on 10 July 2014, now made application that the respondent's claim be dismissed or struck out, pursuant to the respondent's failure to comply with the court order, dated 16 April 2014, and requested cost against the respondent. The respondent opposed this application filed and answering affidavit to which the applicant replied.

15. This application was enrolled for 8 August 2014, but was postponed to 13 April 2015 and is now before me, similarly the respondent's application for amendment of its particulars of claim is also to be determined.

16. The respondent after postponement of the matters on 8 august 2014, directed a letter to the applicant informing them again that they could not comply further with the notices in terms of Rule 35(12) and (14) as they had furnished the applicant with all the documents in its possession, and that it had no more other documents to produce and that they can therefore not comply with the court order.

17. The respondent also in this letter set out that it had launched various applications to amend its particulars of claim due to the fact that there were no written credit agreements concluded between the parties, but that the necessary municipal services were rendered by the respondent and that it would base its claim as indicated in the notice to amend, subsequently not on a consumer credit agreement, but on the provisions of the legislation and by-laws of the respondent. This was the very reason why they could not supply the written agreement as the parties had not entered into any such agreement as set out in its particulars of claim.

18. The applicable law in regards to an application in terms of rule 30A is as follows:

> "*Non-compliance with rules*
>
> *(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 it seems meet.*"

19. The applicant thus in terms of this rule seeks the respondent's claim to be struck due to the respondent's non-compliance with the order dated 16

April 2014. This rule is a general rule to remedy non-compliance with the rules where no other remedy exists. As set out in: ***Absa Bank Ltd v The Farm Klippan 490 CC 2000 (2) SA 211, Epstein, AJ found at 214 I-J:***

> "*Rule 30A has an important place in the rules, in that, as I stated, it provides a remedy where none exists elsewhere. However, it could not have been intended by the drafters of rule 30A to jettison the existing and effective remedies provided in the specific remedy rules. If it was so intended, it would render such remedies negatory. The remedies in the specific rules have always been effective and there is no reason to denude them of their efficacy.*"

20. Both Rule 30A and Rule 37 set out remedies for non-compliance. If one, however, has regards to the rules as set out in Erasmus, Rule 30A is applicable to non-compliance specifically with regards to non-compliance of a notice in terms of Rule 35(12). This is exactly why the applicant obviously brought the application in terms of Rule 30A due to the non-compliance it avers by the respondent not furnishing the documents as requested in its notice in terms of Rule 35(12), calling on the respondent to supply the consumer credit agreement.

21. It is admitted that the court order was not complied with, however, I have to have regard to the breach of the court order. I am mindful that a court will normally only grant striking out of a claim of a party in unusual cases, due to the fact that a party can always comply and provide reasons for their default. The applicant in the matter *in casu* has to place factors before this court to justify such an order. The respondent reasons for

non-compliance are that they cannot comply due to the fact that they have already produced all the documents in their possession, and they explain their default due to the fact that it is impossible for them to comply therewith as they are not in possession of the consumer credit agreement.

22. When considering dismissing or striking out the respondents claim, regards must be had if there was deliberate and continuous failure to comply and if it was done with contumacy. The ultimate remedy, the dismissal of an action or the striking of a defence, is a drastic remedy and it is clear that the power to grant such a remedy is discretionary and that discretion must no doubt be exercised judicially. This is set out in: ***Wanson Company of South Africa (Pty) Ltd v Establissements Wanson Construction De Material Thermieque Société Anonyme 1976 (1) SA 275 (T):***

> "*The central issue for decision was whether the striking out of a defence could only be ordered in cases of contumacy, i.e. in cases of wilful refusals to comply. The court held that a dictum in an earlier case had the effect that contumacy was required, puts an erroneous restriction on the discretion which the rule confers on the court stating that contumacy is a good reason for ordering the dismissal of an action or the striking out of a defence, but it is not the only reason.*"

23. In the matter *in casu* the respondent after receipt of the notices in September 2013, complied immediately and discovered all documents in

relation to what they had in their possession in relation to the services supplied by it to the applicant.

24. Respondent also later in letters directed to the applicant indicated that these were the only documents in its possession, and prior to the order to compel them, they had launched an application to amend their particulars of claim. The proposed amendment was launched to negate the very consumer agreement between it and the applicant by stating that its claim was not based on such a consumer agreement, simply because it did not exist. Respondent therefore with its notice of amendment made the applicant aware of the fact that it would not rely on any such consumer agreement and it would therefore not be able to provide any copies and/or documents in relation thereto. Despite this the applicant proceeded to apply to the court to compel the very discovery of these documents and after obtaining the court order on 16 April 2014, still went ahead to make application for striking out of the claim of the respondent well knowing that the respondent could not produce the very documents applicant requested.

25. The rules of court exist that judiciable disputes may be channelled through the courts in a fair, rational and predictable way. The public interest in the functioning of the courts of the land is undermined when parties simply ignore the rules. If the rules are allowed to be ignored the administration of justice would be brought into disrepute if the court was to condone any conduct of a party flagrantly ignoring the rules, and such conduct must be visited with the court's displeasure.

26. In view of the fact what I have set out and considered, I am of the view that the respondent has not shown contumacy and that such has not been established. The respondent has also not shown a flagrant disregard for the Rules of court and their explanation for their non-compliance is reasonable.

27. The applicant argues that they continued with the striking out application as the respondent was *male fide* and wanted to circumvent the order given on 16 April 2014. Applicant says so, firstly, due to the fact that when it served the notice to compel, the respondent in turn served a notice to amend. Applicant argues that the mere fact that this notice to amend was delivered a few days after its notice to set down the notice to compel, is an indication that he respondent well knowing that it could not produce the documents, continued to serve a notice to amend instead of filing an opposing affidavit setting out why it could not deliver such documents. They argue that the application for the amendment is not *bona fide*.

28. The applicant's contention in this regard is on the one side quite correct. The respondent should have filed an affidavit setting out to the court that it could not discover the said documents due to the fact that these documents were not in its possession and further that they were not going to rely on them for future litigation between the parties.

29. I am not told why the respondent did not file its affidavit in time before the order of Deverance AJ. If they had filed an affidavit I am sure that the order would not have been granted. I also have to consider the

knowledge of the applicant. The applicant already knew when the respondent filed their proposed amendment in February 2014,thus prior to the applicant obtaining the order to compel, that the respondent was changing track and was going to base its claim in future not on a consumer agreement, but on the municipal by-laws.

30. The applicant objected to the proposed amendment of the respondent on 3 March 2014, thus also prior to the order to compel was obtained. The applicant' objection is aimed at the respondent's cause of action being amended to now base its claim not on the written consumer credit agreement, that does not exist, but on electrical by- laws that provided for the supply of service to the applicant. The applicant well knowing that as set out by the respondent in the amendment that the agreement does not exist, still continued with an application to compel the respondent to produce this very agreement.

31. The argument of the applicant that the respondent's notice to amend its particulars of claim was made *mala fides* and to usurp the court order dated 16 April is incorrect and cannot be sustained. The application to amend was made nearly two and a half months prior to the court order granted on 16 April 2014. The respondent could by no way foresee that the applicant would continue with this application well knowing that the particulars of claim were going to be amended excluding the very documents it wanted the respondent to produce and secondly, the applicant had exercised its remedies and objected to the proposed amendment.

32. The law in regards to what the court has to consider when granting an amendment to a party has been set out in various cases, and I was referred to numerous matters in this regard by both counsel. It is trite that an amendment will normally be allowed unless the application to amend is *mala fides* or it would cause such an injustice to the other party that cannot be cured by costs. If there is a material amendment the court must consider the prejudice or injustice the other party would suffer. Courts would normally allow an amendment to allow the real issue between the parties to come to the fore. The court must always distinguish between an amendments introducing a new cause of action: that is a right of action and one which merely introduces fresh or alternative facts supporting the original right of action.

33. An amendment may also not be allowed to place on record an issue for which there is no supporting evidence where evidence is required. An amendment must raise an issue that can go to trail, i.e. it must be of sufficient importance to justify any procedural disadvantages caused by the amendment proceedings in the sense that the issue is viable or relevant or will probably be covered by the available evidence.

34. It is trite that each case has to be considered on its own facts. The granting or refusal of an application for an amendment of pleadings is a matter of discretion of the court, to be exercised judicially in the light of all the facts and circumstances of the case before it. In this regard see ***GMF Kontrakteurs (Edms) Bpk & Another v Pretoria City Council 1978 (2) SA 219 (T) and Zarich v Parfatti N.O. 1962 (3) SA 872 (D).***

35. The respondent argues that there would be no prejudice to the applicant if the amendment is granted and any prejudice can be cured by a costs order. They argue that the amendment is the right to proceed and having regard to the matter has there has been no indication from the applicant of any defence to claim, except to persist that there was non-compliance with the court order.

36. The applicant avers that if the amendment is allowed it will make the pleadings of the respondent excipiable due to the fact that the linked accounts show no nexus between the applicant and these linked accounts. I cannot at this stage find that this will be so, due to the fact that there are various references by the respondent to the linked accounts and respondent also referred to the matter of ***Rademan v Moqhaka Local Municipality 2013 (4) SA 225 CC*** that supports his argument to fact that accounts can be linked and may be consolidated by the respondent.

37. The applicant's contention that the amendment would make the pleadings vague and embarrassing is without merit. Further, I was not convinced that the pleadings would become excipiable as no other basis for such exception was argued by the applicant.

38. I was referred to the case of **Rademan** by the respondent that indicated that accounts of the respondent can be linked and consolidated with other accounts and, as I already stated, respondent referred to these linked accounts when producing certain documents after receipt of the notices in September 2013.

39. The applicant requested the court not to grant the notice to amend, but that the court strikes the respondents claim, and that the respondent must first get their house in order and reissue summons and start afresh.

40. Having regard to the cause of action between the parties, it is set out in the un-amended particulars of claim, as paragraph 7 - 9 also set out the cause of action *vis a vie* the applicant, the respondent does not seeks amendment of these paragraphs. The amendment introduces the electrical by- laws that regulate the supply of services to the applicant, and the terms and sections of the by-laws applicable are pleaded in detail.

41. The particulars that stand currently un-amended I find, sets out the cause of action, the right of action that the respondent has as a municipality against the applicant as a close corporation being the owner of Erf 542, Wadeville, to which the respondent provided services of electricity and all other services.

42. Paragraph 7 of the particulars of claim it set out that the applicant enjoyed the benefits of such supply of electricity, water and municipal services in respect of the abovementioned property and that in the alternative the respondent would aver that the applicant undertook to pay the respondent the sum determined by the respondent for the supply of electricity, water and/or municipal services to the property.

43. Thus, the cause of action is basically a supply of electricity, water and/or municipal services. The respondent, however, in its amendment now sets out, I find, fresh and alternative facts supporting the original right of

action and is not introducing a new cause of action, and respondent is simply introducing a new agreement on which this cause of action is based.

44. In finding this my order is the following:

1. The application to strike out the respondent's claim is dismissed.

2. The respondent is granted leave to amend its particulars of claim, dated 21 August 2013, as set out in the plaintiff's rule 28 notice of intention to amend, dated 19 February 2014.

3. The applicant is ordered to pay the costs of the dismissal of the application for striking out the respondent's claim such cost to be determined from 10 July 2014.(date of application for striking out).

4. The respondent is ordered to pay any costs of amending its particulars of claim from 19 February 2014.

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STRAUSS, AJ
ACTING JUDGE OF THE HIGH COURT

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