

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 47820/2012

(1)	REPORTABLE <input checked="" type="checkbox"/> YES / <input type="checkbox"/> NO
(2)	OF INTEREST TO OTHER JUDGES: <input checked="" type="checkbox"/> YES / <input type="checkbox"/> NO
(3)	REVISED <input checked="" type="checkbox"/>
Date: 14.9.16 <div style="float: right;"> WHG VAN DER LINDE </div>	

In the matter between:

EZIMBOKODWENI MINING (PTY) LTD

Plaintiff/ Respondent

and

BHP BILLITON ENERGY COAL
SOUTH AFRICA LIMITED

Defendant/ Applicant

JUDGMENT

Van der Linde, J

[1] This application began as one by the defendant for the dismissal of the plaintiff's claims for failure to have complied with two interlocutory court orders, to furnish responses respectively to a request for further particulars and to the defendant's rule 35 (3) notice,

both granted on 2 August 2016 by Modiba, J. In the event the required responses were availed on 13 September 2016, when the matter was enrolled and called, and consequently the defendant no longer moved for a dismissal of the plaintiff's claims.

- [2] The defendant instead moved for costs of the application, and in addition for an order that the plaintiff be ordered to furnish security for costs in the amount of R750 000 in terms of rule 47. The plaintiff opposed the relief claimed. I deal with these two issues in turn.
- [3] As to costs of the application, the plaintiff argued that there had been substantial compliance with the court orders. This was said to be represented by the further particulars dated 26 August 2016, actually delivered, although not signed by an advocate or an attorney duly admitted to do so; and the response to the rule 35(3) also dated 26 August 2016, actually, although not in affidavit form.
- [4] I do not believe the submission is sound. The rule 35(3) response is explicitly required to be on affidavit. If it is not on affidavit, there cannot be said to have been a response. After all, the rule 35(3) response forms part of the discovery process, and serves to adumbrate the primary discovery affidavit to be made under rule 35(2). Although informal discovery is often agreed upon, this involves a waiver, and is not what the discovery obligation entails.
- [5] Rule 21 (3) expressly requires the request and the reply to be signed by both an advocate and an attorney, or an attorney with rights of appearance. If that is not done, there is at best for the plaintiff an irregular step. But it does not follow, as was argued, that the defendant is duty-bound to apply for its setting aside.¹ The defendant is not here taking a further step in the proceedings towards bringing the litigation to its final conclusion by having the disputes determined.

¹ Compare Erasmus, Superior Court Practice, vol 2, p.D1-230 at footnote 2. See rule 18(12).

[6] Instead, the defendant is actually applying for the claim to be dismissed for non-compliance with a court order directing compliance with those rules. In those circumstances it need not first apply to have the irregular steps set aside.²

[7] It follows that in my view the defendant is entitled to the costs of the application.

[8] As regards the application for security for costs, notice was first given in the replying affidavit that at this hearing the defendant would be moving for that relief. The plaintiff has not had the opportunity to answer the assertions that the defendant relies on for the relief.

[9] Moreover, the replying affidavit says the security would be sought in terms of rule 47. That rule requires a prior notice to have been given and this is a prerequisite.³ That was done, but the period of ten days referred to therein had not expired by the time the application was moved.

[10] The fundamental problem remains that of audi alteram partem. The plaintiff has not had the opportunity to respond to the case asserted for security for costs, and accordingly no relief can be granted on that request.

[11] In the result I make the following order:

(a) The plaintiff is directed to pay the costs of the application.



WHG van der Linde
Judge, High Court
Johannesburg

For the plaintiff/respondent: Adv. Boonzaier
Instructed by: Cliffe Dekker Hofmeyr Inc
1 Protea Place
Sandown
Sandton
Johannesburg
Tel: 011 562 1146
Ref: J Witts-Hewinson/20093975

² Ibid, p.D1-352.

³ Compare MV Rizcun Trader (1) 1999 (3) SA 953 (C).

For the defendants/ applicant: Adv. Reyneke
Instructed by: Zwiegers Attorneys
2nd Floor Dunkeld West Centre
Cnr Jan Smuts Avenue and Bompas
Johannesburg
Tel: 087 945 2100
Ref: WBJ Zwiegers/ ZE1

Date argued: 13 September, 2016
Date of judgment: 16 September, 2016