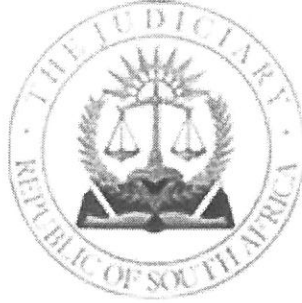


REPUBLIC OF SOUTH AFRICA



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

CASE NO: 07384/2016

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
13/11/2017	
DATE	SIGNATURE

In the matter between:

OFFICE OF THE PREMIER OF THE
NORTHWEST PROVINCE

First Applicant

THE DIRECTOR-GENERAL:
OFFICE OF THE PREMIER

Second Applicant

and

LIVIFUSION (PTY) LIMITED
WENDY IRENE EDWARDS
SAVANNA MAZIYA

First Respondent
Second Respondent
Third Respondent

JUDGMENT ON APPLICATION IN TERMS OF RULE 30 AND 30A

MODIBA, J:

[1] This is an application to set aside, alternatively, strike out the applicants' notice of motion and founding affidavit in terms of Rules 30 and

30A of the Uniform Rules of Court. It is brought by the respondents. For convenience, I refer to the parties as in the main application.

[2] In the main application, the applicants seek to review a Memorandum of Agreement (the MOU) concluded in December 2014 pursuant to a tender awarded to the respondents for the design, implementation and maintenance of the Provincial Enterprise Programme Management Office of the applicants.

[3] The issue for consideration is whether the respondents have made out a case for the relief sought in the notice of motion for the application in terms of the rules cited above.

[4] The relief sought by the respondents is a rather drastic one to be exercised judiciously upon consideration of all relevant circumstances. The factors to be taken into account in the exercise of the court's discretion include reasons for non-compliance with the court rules, whether the defaulting party has recklessly disregarded his obligations, whether the defaulting party's case appears to be hopeless and whether the defaulting party does not seriously intend to proceed.

[5] At the hearing of this matter, I took the *prima facie* view that the matter ought to be dealt with on an unopposed basis. This was predicated on the applicants' defective opposition. Counsel for the applicants made submissions to persuade me otherwise. I declined that request because as I illustrate below, the applicants have been tardy in their conduct of this matter.

[6] The applicants filed a notice of intention to oppose the present application but failed to file an answering affidavit. This resulted in the respondents setting the matter down on the unopposed roll for 30 August 2016. They caused a notice of set down to be served on the applicant's attorneys. During the morning of the 29th of August 2016 the applicants' attorneys sent an SMS to the respondents' attorneys and a facsimile informing the respondents' attorney that their instructions are to request that the matter be removed from the roll, alternatively be postponed. The respondents' attorneys refused this request.

[7] When counsel for the respondents called up the matter in the unopposed motion court on 30 August 2016, the applicants' counsel who was in court submitted to the court that the applicants are opposing the matter and will argue the matter on the papers as they stand. The court postponed the matter *sine die* to allow its enrolment on the opposed motion court roll and ordered the applicants to pay the respondents' wasted costs.

[8] On 16 September 2016, the applicants' attorneys amended the applicants' notice of motion (in the main application) in an attempt to remove the respondents' cause of complaint. This amendment was effected on 17 October 2016 when the applicants filed their amended papers without any objection by the respondents.

[9] When the matter served before me more than a year later, the applicants had still not delivered an opposing affidavit. Neither had they

delivered a notice in terms of Rule 6(5) (d) (iii) informing the respondents of their intention to oppose the application on a point of law and setting out their grounds of opposition. For that reason, the applicants' notice of intention to oppose, filed in terms of Rule 6 (5) (d) (i) renders the applicants' opposition defective. The defective nature of the applicants' opposition is not only prejudicial to the respondents who did not know the case they are required to meet; it is for the same reason also prejudicial to the court.

[10] What makes matters worse is that the applicants' counsel failed to file a practice note and heads of argument. On 17 October 2017, I issued a directive calling upon the applicants' attorneys to remedy this defect by 23 October 2017. They failed to do so. On 30 October 2017, when I dealt with this matter in court, I found the applicants' heads of argument and practice note in the court file, bearing a court date stamp for 26 October 2017. It is mysterious how and when these documents made their way into the court file. They were not filed within the time period provided for in my directive. They were not in the court file when I studied the papers. There is no filing sheet reflecting service on the respondents' attorneys. Counsel for the respondents submitted that they have not been service on the respondents' attorney and he had not had sight of them. I refused to consider these documents to have been properly delivered in terms of the court rules and to be used as a means to correct the applicant's defective opposition.

[11] Counsel for the applicants persisted in her quest to argue the matter on the basis of the respondents' papers. In the alternative she requested the

court to afford the applicants an opportunity to remedy the defect in their opposition. The request was vigorously opposed by counsel for the respondents who asserted the respondents' right to speedy resolution of the dispute, which right is compromised by the applicants' tardiness in bringing the review application and disregard for court rules. Relying on the authority in *Passenger Rail Agency of SA v Siyagena Technologies Pty Ltd & 2 others*¹ he argued that non-compliance with the Promotion of Administrative Justice Act 3 of 2000 (PAJA) alone is sufficient ground for granting the relief prayed for. He urged the court to deal with the application expeditiously.

[12] After judiciously considering the application as well as submissions by counsel for the respondents, for the reasons set out below, this court takes the view that it is in the interests of justice that issues between the parties are properly ventilated and that the appropriate relief is to afford the applicant to remedy the defect in their opposition.

[13] Although the applicants have disregarded court rules and have been reckless in fulfilling their obligations, in the present circumstances it cannot be said that they do not seriously intend to proceed. The allegations against the respondents contained in the review application are of a serious nature and of significant public interest. At stake in that application are hundreds of millions and possibly billions of rands in state resources, which the applicants allege is being paid to the first respondent in terms of the MOU in circumstances where

¹ (2016/7839) [2017] ZAGPPHC 138 (3 May 2017).

the first respondents did not tender for the work and is being paid an amount R17 million a month without any justification for the work done.

[14] As mentioned above, the applicants have amended their notice of motion in response to the respondents' notice to remove cause for complaint. The applicant's amended notice of motion contains a prayer for condonation for launching the review application outside the 180 days provided for by section 7 of PAJA. This prayer is supported by averments in the founding affidavit. The amended notice of motion also addresses various issues raised in the notice to remove the cause of complaint. It is worth noting that after the applicants filed the amended notice of motion, the respondents do not seem to have made them aware in writing in what respect their complaints remain unaddressed. They mention this for the first time in their heads of argument without specifically pointing out in what respect the review application remains defective. This is inappropriate. They should have addressed correspondence to the applicants in that regard prior to enrolling the matter in the opposed motion court.

[15] In these circumstances, it is in the interests of justice that the applicants are granted leave to remedy their opposition. It is also appropriate to direct the respondents to address a letter to the applicants pointing out defects in the applicants' response to their rule 30 and rule 30A notice.

[16] The court expresses its dismay at the applicants' flagrant disregard for the rules of court and for their tardy conduct of this matter. This is something for which the applicants' attorneys of record should be called to account. There is no reason why both the respondents and the tax payer should be saddled with the attendant wasted costs, particularly after the tax payer was saddled with the wasted costs on the previous occasion. The applicants' attorneys of record are directed to file an affidavit setting out reasons why they should not be ordered to pay the respondents' wasted costs on a punitive scale *de bonis popriis*.

[17] In the premises, the following order is made:

ORDER

1. The respondents shall within 5 days of this order, address a letter to the applicants pointing out in what respect the response to their notice in terms of rule 30 and 30A remains defective.
2. The applicants shall file a notice in terms of Rule 6(5) (d) (iii) within 10 days of the respondents' compliance with paragraph 1 or within 10 days of expiry of the period referred to in the same paragraph, whichever occurs first.
3. The applicants' attorneys of record shall file an affidavit and if deemed necessary heads of argument within 10 days of this order, setting out

reasons why they should not be ordered to pay the respondents' wasted costs on a punitive scale *de bonis popriis*.

4. Should they deem it necessary, the respondents shall, within 10 days of receipt of the documents referred to in paragraph 3 of this order or within 10 days of expiry of the period referred to in the same paragraph whichever comes first, file an answering affidavit and heads' of argument responding to the applicants' attorneys averments and submissions on costs.
5. The documents referred to in paragraph 3 and 4 of this order shall be directly filed with my registrar in chambers 503 after being served on the other party.



**MS. L.T. MODIBA
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

APPEARENCES:

Applicants' Counsel: R Tulk

Instructed by: Kgomo Attorneys

Respondent's Counsel: DC Mpofu SC & P. Sieberhagel

Instructed by: Edelstein Faber Grobler Incorporated

Date heard: 30 October 2017

Date delivered: 13 November 2017