

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION. PRETORIA

Case number: 57946/2011

Date: 17 September 2014

In the matter between:

CHRISTIAAN FREDERIK DE WET N.O.

First Applicant

JOHANNA WILHELMINA YSSEL N.O.

Second Applicant

and

RITA NEL

First Respondent

JUDGMENT

PRETORIUS J.

[1] In this application the applicants seek an order to strike the respondent's defence and that the respondent be ordered to pay the costs of this application.

[2] The applicants instituted action against the respondent. The applicants instituted action against the respondent for payment in the amount of R800 000.00 owed to Temla 7 CC (in liquidation) for the construction of a residence by Temla 7 CC for the respondent.

[3] The application is based on the fact that on 6 February 2013 the applicant served a request for further and better discovery in terms of Rule 35 (6) on the respondent's attorney of record. The respondent did not comply to this request and on 2 August 2013 this court granted an order in terms of Rule 35 (3). Rule 35 (3) provides:

[4] *"Any party to any action may require any other party thereto, by notice in writing, to make discovery on oath within 20 days of all documents and tape recordings relating to any matter in question in such action (whether such matter is one arising between the party requiring discovery and the party required to make discovery or not) which are or have at any time been in the possession or control of such other party. Such notice shall not, save with the leave of a judge, be given before the close of pleadings."*

[5] compelling the respondent to reply to the applicant's request for further and better discovery within ten days of the order being granted.

[6] The respondent failed to comply with the court order and failed to depose to an affidavit as required by Rule 35 (3). The respondent's attorney stated in the answering affidavit paragraph 15.1 page 30 that:

a. *"The respondent attempted throughout to comply with the lawful and regular requests by the applicants and did not merely ignore or fail to comply with same."*

[7] Although the respondent's attorney attached to his answering affidavit a confirmatory affidavit of the respondent in which she answer to the request for further and better discovery it was not properly commissioned. A proper commissioned affidavit was only provided to the applicant on Monday 8 September 2014, the date this application was to be heard. A proper commissioned affidavit was only provided to the applicant on Monday 8 September 2014, the date this application was to be heard.

[8] Mr van den Bergh, for the respondent conceded that the respondent had not complied with the court order of Kruger J of 2 August 2013.

[9] It is clear that it had taken the respondent more than a year to comply with a court order.

[10] I have considered striking the defensive due to the respondent's contemptuous disregard for an order issued by this court, however the respondent has now complied. I will therefore not strike out the respondent's defence.

[11] The following order is made:

1. Prayer 1 of the notice of motion is not granted;
2. The respondent to pay the costs of the applicant in this application.

Judge C Pretorius

Case number: 57946/2011

Heard on: 11 September 2014

For the Applicant: Adv Venter

Instructed by: Whalley vd Lith Inc.

For the Respondent: Mr van den Berg

Instructed by: Doman Wetz

Date of Judgment: 17 September 2014