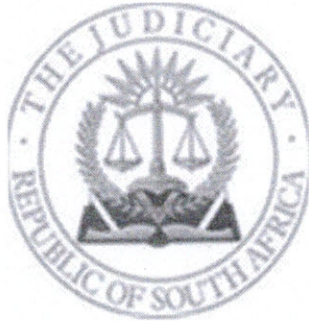


IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



CASE NO.: 77188/2015

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

12/09/2019

A handwritten signature in black ink, appearing to be "A. J. M.", is written over a dotted line.

In the matter between:

MINISTER OF DEFENCE AND MILITARY
VETERANS

First Applicant

ACTING DIRECTOR-GENERAL: DEPARTMENT
OF MILITARY VETERANS

Second Applicant

and

ZEAL HEALTH INNOVATIONS (PTY) LTD

Respondent

JUDGMENT

VAN DER WESTHUIZEN, J

[1] This is an interlocutory application in terms of the provisions of Rule 30 of the Uniform Rules of Court in that the respondent has taken an

irregular step when it filed amended pages in terms of the provisions of Rule 28 in respect of a notice of intention to amend its notice of motion and furthermore, for the striking out of the respondent's answering affidavit.

- [2] The respondent has set this application down for adjudication, the applicants being dilatory in that regard.
- [3] Some background will assist in defining the issues and the procedure to be taken in that regard. The following is relevant:
 - (a) The respondent instituted an urgent application during September 2015 for payment of monies due in terms of a written contract concluded with the applicants for the provision of a managed healthcare service for a three year period and for further amounts that may be due and payable at the time of judgment in terms of the contract.
 - (b) The applicants instituted a counterapplication in their answering affidavit for the judicial review of its decision to award the contract.
 - (c) The application was struck from the urgent roll and the applicants filed a record and a supplementary affidavit in respect of its counterapplication.
 - (d) The respondent filed a supplementary affidavit in respect of the counterapplication. In that affidavit the respondent dealt with the various grounds for review and sought the dismissal of the counterapplication.
 - (e) In the light of its contention that the contract was valid, the respondent persisted with the relief sought in the urgent application with proposed modifications set out in

an amended notice of motion appended to its supplementary affidavit. The amendment to the notice of motion constituted the proposed amendment of June 2016.

- (f) The applicants responded by objecting to the proposed amendment and to that effect filed a notice of objection setting out the grounds of objection.
- (g) A replying affidavit in the counterapplication was filed on behalf of the applicants. The respondent filed a further supplementary affidavit in response to the replying affidavit.
- (h) The respondent did not proceed with the intended amendment and consequently did not file an application to amend as required in terms of the provisions of Rule 28.
- (i) The decision not to proceed with the proposed amendment was because the respondent elected in April 2018 to accept the applicants' repudiation and to cancel the contract. That election rendered the bulk of the proposed 2016 amendment superfluous. During April 2018 the applicants were duly informed of the respondent's contention and decision not to proceed with the 2016 amendment.
- (j) The applicants were duly informed of the respondent's intention to proceed with another amendment in terms of a formal notice of intention to amend, namely the 2018 amendment.

(k) No new notice of objection was filed by the applicants in respect of the 2018 amendment. They contended that the 2018 Rule 28 notice of intention to amend constituted an irregular step. Consequently, a Rule 30 notice was served and filed in respect of the 2018 notice to amend in terms of Rule 28.

(l) The applicants further contended that the initial objection in respect of the 2016 proposed amendment “still stands”. The applicants further contended that there has been no “formal withdrawal” of the 2016 amendment.

[4] It is the respondent’s contention that the 2016 proposed amendment was foreshadowed in the supplementary affidavit filed and that it would be moved at the hearing of the main application. No formal Rule 28 notice of amendment was filed that could “formally be withdrawn”.

[5] Rule 28 specifically stipulates that a party is obliged to apply for an amendment proposed in a notice of intention to amend where there is an objection thereto and the party intends to proceed with the amendment.¹

[6] No amendment can be effected, i.e. the filing of amended pages, in the absence of an order allowing the proposed amendment where an objection has been taken thereto. It follows, that should the party that serves and files a notice of intention to amend, not proceed with the amendment in the face of an objection thereto, that proposed amendment falls by the wayside. To hold otherwise would defeat the purpose of Rule 28(4).

¹ Rule 28(4)

- [7] It would further follow that any objection taken to the proposed amendment has served its purpose and is further of no cause and effect.
- [8] Should a party consider a further amendment at a later stage, logic dictates that the procedure provided in Rule 28 applies and the process is repeated. If the other party is of the view that the “new” amendment is objectionable, it is obliged to file a notice of objection in terms of Rule 28. However, if no objection to the proposed amendment is taken within the prescribed time period, the party seeking the proposed amendment may effect the amendment by filing the amended pages within the prescribed period. If the party fails to file the amended pages within the prescribe period, the amendment falls away.
- [9] It follows that where the applicants have failed to object to the “new” proposed amendment, the respondent was obliged to file its amended pages within the prescribed period to effect the amendment. Thus the respondent’s serve and filing of the amended pages did not amount to an irregular step as contemplated in Rule 30.
- [10] The application in terms of Rule 30 stands to be dismissed.
- [11] The second applicant has requested the striking out of certain paragraphs contained in the respondent’s answering affidavit in terms of the provisions of Rule 6(15). However, the applicants only persist with the issue of irrelevance in the heads of argument filed on behalf of the applicants.
- [12] It is trite that the test for irrelevance is whether the allegations do not apply to the matter in hand, or do not contribute one way or another to a decision of that matter.²

² *National Director of Public Prosecutions v Zuma* 2009(2) SA 277 (SCA) at [23]

[13] In the present instance the paragraphs complained of are relevant in that:

- (a) they deal with the issue whether the respondent's application is still extant; or
- (b) they explain the rationale for the 2016 proposed amendment; or
- (c) they deal with procedural matters that are common cause; or
- (d) they deal with the applicants' case in the founding affidavit.

[14] It is trite that a party cannot rely on a striking out application as a device to counter allegations that refutes its case. It would clearly constitute an abuse of process. The party applying to strike out bears the onus in that regard to prove that the paragraphs are irrelevant. The applicants have dismally failed on this issue.

[15] In my view there is no merit in the applicants' application to strike out and it stands to be refused.

I grant the following order:

- (a) The application in terms of Rule 30 is dismissed;
- (b) The application to strike out is refused;
- (c) The applicants are directed to pay the costs.


C J VAN DER WESTHUIZEN
JUDGE OF THE HIGH COURT

On behalf of Applicants: Ms I Ellis SC
Instructed by: The State Attorney, Pretoria

On behalf of Respondent: I Currie
P Moll
Instructed by: Allan Levin & Associates