

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

- (1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: **NO**

Date: **15 July 2024** Signature: _____

CASE NO: 21244/18

In the matter between:

MOTHOABELA KGOLO EPHRAIM MAKGATO N.O
APPLICANT

FIRST

THIZWILONDI SHARON MAKGATO N.O

SECOND APPLICANT

and

LOCAL GOVERNMENT SECTOR EDUCATION
AND TRAINING AUTHORITY

RESPONDENT

Coram:

Dlamini J

Date of request for reasons:

08 July 2024

Delivered: 15 July 2024 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, uploaded to *CaseLines*, and released to SAFLII. The date and time for hand-down is deemed to be 10:30 on 15 July 2024.

JUDGMENT

DLAMINI J

[1] On 20 March 2024, I made an order marked “X” an order of this court, What follows hereunder are my reasons for that order.

[2] This is an interlocutory application in terms of Rule 35 (7) to compel the respondent to comply with the applicant’s notice in terms of Rule 35(3).

[3] it is apposite at this stage to look at the background of this application.

[4] On 11 September 2019, the applicant served its notice in terms of Rule 35 on the respondent.

[5] The applicants submit that the respondent has not made a full and complete discovery of the documents. That the document sought are relevant to the Funding Agreement awarded to the applicant and more specifically to the pending action between the parties.

[6] On 1 November 2019, the respondent by way of affidavit notified the fact that the respondent did not have the requested documents, detailing that the respondent upon diligent search the respondent could not locate the documents nor was it aware of the whereabouts of such documents.

[7] The established principle of our law in deciding an application in terms of Rule 35 (7) is that a court has the discretion whether or not to grant the order sought. In ***Swissborough Diamond Mines and Others v Government of the RSA***,¹ the court held that In determining whether to go behind the discovery affidavit the court must have regard to the following;-

- (i) *the discovery affidavit itself; or*
- (ii) *the documents referred to in the discovery affidavit; or*
- (iii) *the pleadings in the action;*
- (iv) *any admissions made by the party making the discovery affidavit;*
or
- (v) *the nature of the case or the documents*

[8] Having regard to the pleadings, the discovery affidavit, and having heard counsel for both parties, I am satisfied the respondent has been open frank, and candid in the conduct of their defence in this application in its discovery affidavit. Significantly the respondent have testified under oath that after a due and diligent search, it was not possession of some of the requested documents and does not know their whereabouts. The trite principle of our law is that a court must be able to give effect to its judgment or order. Therefore this court cannot make an order to compel the respondent to discover unknown documents.

[9] In all the circumstances mentioned above, the applicants have not established that they are entitled to the order that they seek. There is no reason why the costs should not follow suit.

ORDER

1. The order marked "X" that I signed on 20 March 2024 is made an order of this court.

¹ 1999 (2) SA 279 (T)

J DLAMINI
Judge of the High Court
Gauteng Division, Johannesburg

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