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

CASE NO: 12998/2020

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

[1 February 2022] .....
SIGNATURE

In the matter between:

TSHEPISO SELBY MOFOKENG Applicant

and

THE STANDARD BANK OF SOUTH AFRICA Respondent

J U D G M E N T:

NEL AJ

[1] This is an opposed application in terms of Rule 30A of the Uniform Rules of Court. The Applicant seeks the following relief:

[1.1] That the Respondent is directed to comply with the Applicant's Notice in terms of Rule 35(3) by dispatching to the Registrar and the Applicant a complete record containing electronic and/or telephonic records pertaining to the agreement as referred to in the Applicant's Rule 35(3) Notice;

[1.2] In the event that the Respondent fails to comply with the relief as sought in paragraph 1 of the Notice of Motion (paragraph [1.1] above), that the Applicant may return to Court on the same papers, duly supplemented, for further relief, including an Order for the striking-out of the Respondent's defence to the Applicant's claim in the main action;

[1.3] That the Respondent pay the costs of the Rule 30A Application.

[2] The Notice of Motion also contained the standard prayer that the Applicant seeks "*Further and/or alternative relief*".

[3] In the Founding Affidavit deposed to by the Applicant, and filed in support of the relief sought, the Applicant sets out that on 8 December 2020 the Respondent filed its Discovery Affidavit, but that the Applicant had "*valid reasons*" to believe that the Respondent's discovery was incomplete or inadequate, and based on such belief, the Applicant caused a Rule 35(3) Notice to be served on the Respondent's attorney of record on 11 February 2021, which Notice the Respondent failed to comply with.

[4] The Applicant alleged that the Applicant was being "*extremely prejudiced*", as the documentation sought from the Respondent was crucial to the

Applicant's action, and the Applicant had previously requested the documents and recordings from the Respondent.

[5] The documents and recordings sought by the Applicant in his Rule 35(3) Notice relate to telephonic recordings and/or records relating to the Applicant's "*pre-confirmation, discussion and/or acknowledgment of the purchase transaction executed on 3 January 2012, as per paragraph 12.3 of the pre-agreement statement and quotation/cost of credit*".

[6] The Applicant also sought recordings or records relating to a "*pre-acknowledgement discussion and/or confirmation with the defendant to the drafting of the Pre-Agreement statement, Quotation/cost of credit*" on 15 February 2012.

[7] The Applicant also sought recordings or records relating to the Applicants "*pre-acknowledgment, arrangements, permission or Justification and grounds on which the debit order amounts were altered*" by the Respondent as from 2 April 2013.

[8] The Respondent ought to have responded to the Rule 35(3) Notice by the end of February 2021.

[9] By 11 March 2021 the Respondent had not replied, and on such date the Applicant launched the Rule 30A application.

[10] The Applicant alleged that the Respondent's failure to timeously respond to the Rule 35(3) Notice evidences *mala fides* on the part of the Respondent.

[11] The Applicant submitted in the Founding Affidavit that he had been advised that he could approach the Court, in order to request the Court to "*sanction*" the Respondent by ordering the Respondent to "*respond to my Rule 35(3) Notice*" but such "*sanction*" is not what was sought in the Notice of Motion.

[12] On 14 April 2021, the Respondent filed an affidavit deposed to by Ms Farhana Essop ("Ms Essop"), described as the Head: Defended Legal, Personal and Business Banking Credit, in response to the Applicant's Rule 35(3) Notice. In the affidavit, Ms Essop explains in detail the steps that the Respondent took to search for recordings and documents as sought by the Applicant in terms of the Applicant's Rule 35(3) Notice. Ms Essop identifies and lists the documentation that was found and was then provided to the Applicant.

[13] In paragraph 10 of the affidavit, it is alleged as follows:

> *"Despite a diligent search, the telephone call recordings referred to earlier in this affidavit are the only telephone call recordings relating to the home loan that were located. Furthermore, all records and supporting documentation in the Defendant's possession relating to the requests contained in paragraphs 1 to 3 of the Plaintiff's Rule 35(3) and (6) Notice have been attached to this affidavit."*

[14] Ms Essop referred in the affidavit to four other employees of the Respondent who assisted with the search, and who all deposed to Confirmatory Affidavits relating to what was set out by Ms Essop in her affidavit.

[15] In the Answering Affidavit filed in the Rule 3A Application, also deposed to by Ms Essop, the Respondent sets out the alleged defective nature of the Rule 30A Application and the Applicant's approach to the Rule 30A Application.

[16] Ms Essop also referred to her affidavit filed in response to the Rule 35(3) Notice, wherein she had stated that despite a diligent search the call recordings that were provided to the Applicant were the only call recordings that could be located by the Respondent.

[17] It was also alleged in the Answering Affidavit, as follows:

> *"In the circumstances, the defendant has provided all telephone call recordings and supporting documentation in the defendant's possession relating to the requests contained in paragraphs 1 to 3 of the plaintiff's Rule 35(3) and (6) notice and is not in a position to make available any further recordings or supporting documentation."*

THE RELEVANT LEGAL PRINCIPLES

[18] Rule 30A replaced the old Rule 30(5) of the Uniform Rules of Court and provides a litigant with a remedy to seek compliance with a Rule or a request made in terms of a Rule, and in the event of non-compliance, that a litigant's claim or defence be struck-out.

[19] Rule 30A reads as follows;

> *"(1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, or with an order or direction made in a judicial case management process referred to in rule 37A, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days from the date of delivery of such notification, to apply for an order -*
>
> *(a) that such rule, notice, request, order or direction be complied with; or*
>
> *(b) that the claimant's defence be struck out.*
>
> *(2) Where a party fails to comply within the period of 10 days contemplated in subrule (1), application may on notice be made to the court and the court may make such order thereon as it deems fit."*

[20] In terms of Rule 35(3) of the Uniform Rules of Court, any party who believes that there are, in addition to the documents or tape recordings disclosed by the other party or parties in the litigation proceedings, other recordings or documents which may be relevant to the legal proceedings, in the possession of the other party or parties, the party who is dissatisfied with the discovery, may give notice requiring the documentation and recordings to be made available for inspection, or for the other party or parties to state on oath that such documents or tape recordings are not in the possession of the other party or parties.

[21] Rule 35(3) reads as follows:

> *"(3) If any party believes that there are, in addition to documents or tape recordings disclosed as aforesaid, other documents (including copies thereof) or tape recordings which may be relevant to any matter in question in the possession of any party thereto, the former may give notice to the latter requiring such party to make the same available for inspection in accordance with subrule (6), or to state on oath within 10 days that such documents or tape recordings are not in such party's possession, in which event the party making the disclosure shall state their whereabouts, if known."*

[22] As is clear from Rule 35(3) the subrule provides a procedure for a party dissatisfied with the discovery of another party to call for the supplementation of discovery which has already taken place, but which is regarded as being inadequate.

[23] The party called upon to supplement its discovery is required to make the documentation or recordings sought available, or to explain on oath why it cannot make such documentation or recordings available.

[24] If the party from whom the supplementation is sought cannot make the documents or recordings available, because it is not in such party's possession, the party is required to state such fact in an affidavit.

[25] If the party that sought the supplementation is dissatisfied with the explanation as to why the documents or the recordings cannot be made available, such party may seek compliance with its Rule 35(3) Notice, by way of a formal application.

[26] The party seeking compliance must set out proper grounds in its application as to why the Court should order compliance, despite the explanation provided on oath by the party from whom supplementation has been sought.

[27] In Erasmus, Superior Court Practice[1] the authors state the following:

> *"The courts are reluctant to go behind a discovery affidavit which is regarded as conclusive, save where it can be shown either (i) from the discovery affidavit itself, (ii) from the documents referred to in the discovery affidavit, (iii) from the pleadings in the action, (iv) from any admission made by the party making the discovery affidavit, or (v) the nature of the case or the documents in issue, that there are reasonable grounds for supposing that the party has or has had other relevant documents or tape recordings in his possession or power, or has misconceived the principles upon which the affidavit should be made."*

[28] The extract from Erasmus is based on what was stated by the Court in the matter of *Federal Wine and Brandy Company Ltd v Kantor*[2].

[29] In Herbstein & Van Winsen, Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa[3] it is stated as follows:

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[1] 2nd Edition, Revision Service 16, at page D1-472.
[2] 1958 (4) SA 735 (E) at 749G.
[3] 5th Edition, at CH32 - p 815.

> *"It has been held that the court will generally regard the discovery affidavit as conclusive against the party seeking relief, as to both the possession of documents or (tape) recordings and the relevance of their contents. The party who seeks further discovery has the onus of establishing facts which raise a strong possibility that there are further relevant documents or (tape) recordings."*

[30] A party seeking an order that documentation or recordings sought in terms of a Rule 35(3) Notice must be provided, must show that there are reasonable grounds for believing that the documentation or recordings are in the opposing party's possession or under its control.

[31] In Herbstein & Van Winsen it is recorded that the requirement of "*reasonable grounds*" or "*grounds for suspicion*" has been held to mean that the Court must be satisfied to a degree of conviction approaching practical certainty.[4]

[32] In the circumstances, a Court must be satisfied that despite what is set out in the affidavit of the other party, reasonable grounds exist for the Court to order the production of the documentation, or the recordings sought.

THE MERITS OF THE RULE 30A APPLICATION

[33] Respondent's counsel referred me during argument to the matter of *Swissborough Diamond Mines and Others v Government of the RSA*[5]. The portion I was referred to reads as follows:

> *"Accepting that the onus is on the party seeking to go behind the discovery affidavit, the court, in determining whether to go behind the discovery affidavit, will only have regard to the following:*
>
> *(i) the discovery affidavit itself; or*
>
> *(ii) the documents referred to in the discovery affidavit; or*

[4] At CH32 – p 816; See also *Federal Wine and Brandy Company Ltd v Kantor*, *supra*, at p 749.
[5] 1999 (2) SA 279 (T) at 320F-H.

(iii) the pleadings in the action; or

(iv) any admissions made by the party making the discovery affidavit; or

(v) the nature of the case or the documents in issue."

[34] Respondent's counsel submitted that in simply applying such principles to the Applicant's Rule 30A Application, the Rule 30A Application must fail, on the basis that the Applicant would have had to make out a case for the Court to go behind the Respondent's Discovery Affidavit (and its affidavit of 14 April 2021), having regard to what was set out in the *Swissborough Diamond Mines* matter, and that the Applicant has not made out such a case.

[35] It is clear from the affidavits filed in the Rule 30A Application, and the submissions made to me during the hearing of the Application, that the Applicant failed to make out a proper case for me to "*go behind*" the Discovery Affidavits as filed by the Respondent.

[36] The relief that the Applicant seeks in his Notice of Motion cannot be determined on its merits, as the merits for the relief sought have not been addressed in any of the affidavits filed by the Applicant.

[37] This Application was doomed from its commencement, having regard to the process followed by the Applicant.

[38] The Applicant was clearly entitled to compel a response to his Rule 35(3) Notice, as he states in paragraph 13 of his Founding Affidavit. Despite such entitlement the Applicant did not seek an order compelling the Respondent to provide a response. The Applicant instead sought strict compliance with the Applicant's Rule 35(3) Notice.

[39] Such relief was sought, and supported by a Founding Affidavit, which was deposed to prior to receipt of the Respondent's Reply to the Applicant's Rule 35(3) Notice. In such circumstances, it was practically impossible for the Applicant to have set out in his Founding Affidavit why the Court should "go behind" the Discovery Affidavits of the Respondent, and to have set out grounds as to why the Court should do so. The Applicant conceded during argument that he was unable to make out such a case in his Founding Affidavit.

THE REPLYING AFFIDAVIT

[40] That is however not the end of this Application.

[41] As appears from the Replying Affidavit, and the Applicant's Practice Note and Heads of Argument, at the hearing of the Rule 30A Application the Applicant sought entirely different relief to what was set out in the Applicant's Notice of Motion.

[42] The Applicant did not file an Amended Notice of Motion and did not file a Supplementary Founding Affidavit.

[43] At the hearing of the Rule 30A Application, the Applicant stated that he did not launch a fresh application, as it would have been impractical, and a waste of the Court's time. He suggested that he persisted with the Application "*for the Court's convenience*".

[44] Whilst it is certainly desirable that litigants should not be overly technical, and that legal proceedings should be dealt with in as practical a manner as is

possible, the rules of procedure cannot be abandoned entirely, as the rules clearly serve a valuable and practical purpose.

[45] It is certainly not practical for an applicant to seek different relief to what was sought in a notice of motion at the hearing of an application based on what was alleged in a replying affidavit.

[46] The Applicant informed me at the hearing that he abandoned the relief sought in paragraphs 1 and 2 of the Notice of Motion, as the relief sought in the Replying Affidavit, Practice Note and Heads of Argument fell under paragraph 4 of the Notice of Motion, being "*Further and/or alternative relief*".

[47] The Applicant informed me that there was accordingly no need for me to "*go behind*" the Respondent's Discovery Affidavits and that the different relief sought does not fall outside the ambit of the Application.

[48] The Applicant submitted that I was entitled to grant him "*other relief*" under the category of "Further and/or alternative relief".

[49] I was accordingly required to consider the Applicant's contentions that he was entitled to the "alternative" relief as sought.

[50] In the Replying Affidavit the Applicant contended that the Respondent's failure to locate the telephonic recordings which the Respondent was obliged to maintain, was not the Applicant's fault, that he was not obliged to entertain such failure, and that the failure of the Respondent to produce such recordings was a deliberate attempt to undermine the importance of the call recordings and the Respondent's duty to deliver such recordings to the Applicant.

[51] The Applicant placed reliance on the National Credit Act, number 34 of 2005, the Electronic Communication and Transactions Act, number 25 of 2002, and the National Credit Regulations in support of his contention that the Respondent is required to maintain records of all applications for credit agreements for a period of three years after the termination of a credit agreement.

[52] In the Replying Affidavit the Applicant accepts that the Respondent has confirmed that it is unable to locate the call recordings, but however submits that such failure constitutes evidence of professional negligence on the part of the Respondent.

[53] The Applicant further submits in the Replying Affidavit that his application (for the alternative relief) has merit, on the basis that the Respondent has breached the provisions of the National Credit Act, and in so doing has caused prejudice to the Applicant.

[54] The Applicant accordingly sought an order that I impose a sanction on the Respondent "*such as*" finding the Respondent to be professionally negligent, and to strike out the Respondent's entire defence.

[55] In the Replying Affidavit itself the Applicant records that the relief sought in the Replying Affidavit is sought in terms of paragraph 4 of the Applicant's Notice of Motion.

[56] The Applicant submitted that the Respondent's admitted failure to locate the required "*electronic signatures*" despite its statutory obligation and legal duty

to maintain such records constitutes a breach of the Respondent's statutory duty.

[57] The Applicant accordingly submitted that I should find the Respondent to be professionally negligent and to impose an appropriate sanction, which would be the striking-out of the Respondent's defence. The Applicant submitted that the conduct of the Respondent amounted to "*gross negligence and contempt*".

[58] Respondent's counsel submitted in response that the Rule 30A Application relates to the production of relevant documentation which can be located, and that it is not about testing or making findings in respect of the Respondent's document management system. Counsel submitted that the Applicant was not entitled to convert a Rule 30A Application into an entirely different application.

[59] Respondent's counsel also submitted that the Applicant cannot rely on the reference to "further and/or alternative relief" as set out in paragraph 4 of the Notice of Motion in order to obtain the relief the Applicant seeks in its Heads of Argument, Practice Note and Replying Affidavit.

[60] It is trite that an applicant must make out its case for the relief it seeks in its founding affidavit and cannot make out its case for the relief it seeks in a replying affidavit.[6]

[61] In addition, an applicant cannot seek entirely different relief in the replying affidavit to that which is sought in the notice of motion without seeking at

[6] *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) at paragraph [29].

least an amendment and providing a respondent with an opportunity to deal fully with such new relief.

[62] The Applicant's submissions that the relief sought in the Replying Affidavit and Heads of Argument can be sought under the heading of "Further and/or alternative relief" is not legally sustainable.

[63] The reference to "Further and/or alternative relief", as set out in almost every notice of motion that is filed in an application, clearly refers to alternative relief that relates to, or is subsidiary or accessory to, the main relief as sought in the notice of motion.

[64] In the circumstances, the Applicant is clearly not entitled to the relief sought in the Notice of Motion, and is also not entitled to the alternative relief as sought in the Heads of Argument, Practice Note and Replying Affidavit, and during argument.

COSTS

[65] The Applicant is not a legal practitioner, and as a litigant in person has clearly attempted to seek the recourse he believes he is entitled to, to the best of his abilities.

[66] The Respondent did however point out to the Applicant, as early as 11 March 2021, that the Applicant's Rule 30A Application was defective.

[67] The Applicant's response to such warning was that "*all procedural issues will be addressed in court on the day*".

[68] Whilst the Court attempts to assist all litigants acting in person, the fact that such persons are not legal practitioners cannot always provide protection against an adverse costs order. The other party to the litigation is entitled to be protected from unwarranted litigation and the costs associated with defending such unnecessary litigation.

[69] In the circumstances, I cannot find any reason why the costs order should not follow the result of the Application.

[70] In considering the issue of costs, I find that in this particular application the services of a Senior Counsel to represent the Respondent was clearly not warranted.

THE ORDER

[71] In the circumstances, I make the following order:

[70.1] The Application is dismissed.

[70.2] The Applicant is to pay the costs of the Application.

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G NEL
[Acting Judge of the High Court,
Gauteng Local Division,

Date of Judgment: 1 February 2022

APPEARANCES

For the Applicant: Applicant appeared personally

For the Respondent: Adv. A Bham SC

Instructed by ENS Africa