

[1] The applicant brought an application in terms of Rule 35(7) of the Uniform Rules of Court (the Rules) seeking the following relief:

- “1. First respondent is ordered to comply and make full discovery in terms of served notice of discovery in terms of Rule 35(3)
2. Respondents pay the cost of this application.
3. Further and / alternative legal relief”

The above application is intended to compel further and better discovery of the notice of discovery in terms of Rule 35(3) where the applicant requested the following:

- “1. The assurance and forensic unit investigative report relating to the Plaintiff and second defendant matter as mentioned by Dr. Penny TN Mkalipe at the stage 2 grievance hearing of 19 August 2019.
2. Audio-recordings of the disciplinary hearing of 26 November 2019 relating to the second defendant.
3. Audio-recordings of interview for the position of senior occupational nurse(P15) for the plaintiff held on or about 18 April 2018.
4. The scores and the psychometric report relating to the interview for the senior occupational health nurse (P15) of all applicants to the position held on or about 18 April 2018”

The first respondent opposed the application.

BACKGROUND

[2] The applicant is the plaintiff in an action for damages in the amount of R4 575 000.00 for past hospital expenses, future medical expenses, general damages, and emotional pain and suffering. The first and second respondents are the defendants in the action. The applicant's claim is based on remarks made by the second respondent who is alleged to have wrongfully fabricated and published false information to the employees of the first respondent in relation to a video of the

applicant and a male employee of the first respondent and wrongfully fabricated and communicated false information to members of an interview panel conducted by the first respondent in relation to interviews for the position of Senior Occupational Health Nurse, which the applicant applied for.

[3] After the pleadings have closed, the parties exchanged discovery affidavits in March 2021 and April 2021, respectively. These were annexed to the applicant's founding affidavit as annexures "A1" and "A2". The notice in terms of Rule 35(3) was served on the first respondent on 23 April 2021 requiring the first respondent to discover *inter alia*, the following documents:

- 1) the Assurance and Forensic unit investigative report as mentioned by Dr Penny TN Mkalipe at the Stage 2 Grievance Hearing of August 2019;
- 2) audio recordings of the disciplinary hearing of 26 November 2019 relating to the second respondent; and
- 3) the scores and psychometric report relating to the interview for the senior occupational health nurse (P 15) of all applicants to the position, held on or about 18 April 2018.

[4] The first respondent replied to the request indicating Eskom's investigative unit did not conduct an investigation into the matter. The applicant's attorney referred the attorney to the correspondence between Dr. Mkalipe and the representative from the Assurance and Forensic Department (A and F Department) dated 19th and 30th July 2019. This correspondence formed part of the first respondent's discovery affidavit¹. The first respondent objected to providing the document indicating it did not exist. Furthermore, the first respondent objected to providing the interview and test results on the basis that the request was too wide. This resulted in the applicant requesting further and better discovery on the basis that the first respondent's response did not constitute compliance with Rule 35(3). The respondent denies

¹ Annexure A2, Founding affidavit, item 11 and 13, Case Lines,

that the applicant is entitled to the relief in terms of the rule and stating that the applicant failed to make out a case in the founding affidavit for the relief requested in terms of the rule.

ISSUES FOR DETERMINATION

- [5] The issues for determination are whether:
- 5.1 The applicant made out a case for discovery in its founding affidavit?
 - 5.2 Whether the first respondent should be compelled to discover the Assurance & Forensic Report if it exists?
 - 5.3 Whether the first respondent may be compelled to reply to a request of discovery that was not originally made in the of Rule 35(3) Notice?
- [6] The purpose of discovery is to afford the parties the opportunity to gather the relevant documentary recorded data or testimony before the hearing of a matter. The consideration of the material enables parties to determine the strengths and weaknesses of their cases, it eliminates surprise and may reduce the costs of litigation.² A litigant is entitled to disclosure of the items discovered and to take copies of them. Rule 35(3) provides:
- “35(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 him to make the same available for inspection in accordance with subrule (6), or to state on oath within 10 days that such documents are not in his possession, in which event he shall state their whereabouts, if known to him.”

² *Herbstein & Van Winsen The Civil Practice of the Supreme Court of South Africa* (5 ed) (2009) by the late Louis de Villiers van Winsen, Andries Charl Cilliers and Cheryl Loots and edited by Mervyn Dendy at 778

[7] Rule 35(7) provides:

“35(7) If any party fails to give discovery as aforesaid or, having been served with a notice under subrule (6), omits to give notice of a time for inspection as aforesaid or fails to give inspection as required by that subrule, the party desiring discovery or inspection may apply to a court, which may order compliance with this rule and, failing such compliance, may dismiss the claim or strike out the defence.”

[8] In *Durbach v Fairways Hotel*³ the court stated the following:

“A party is required to discover every document relating to the matters in question, and that means to any aspect of the case. This obligation to discover is in very wide terms. Even if a party may lawfully object to producing a document, he must still discover it. The whole object of discovery is to ensure that before trial both parties are made aware of all the documentary evidence that is available. By this means the issues are narrowed and the debate of points which are incontrovertible is eliminated. It is easy to envisage the circumstances in which a party might possess a document which utterly destroyed his opponent's case, and which might yet be withheld from discovery on the interpretation which it is sought to place upon the rules. To withhold a document under such circumstances would be contrary to the spirit of modern practice, which encourages frankness and avoidance of unnecessary litigation.”

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THE APPLICANT'S CASE FOR DISCOVERY

[9] The applicant's initial request for discovery was dependant on Rule 35(1) and (2) in preparation for trial. Counsel for the applicant argued the request was made in accordance with the rule to which the first respondent failed to comply. They, therefore, requested further and better particulars in terms of Rule 35(3). The applicant specified that they required the report provided to Dr Mkalipe by the A and F Department during her investigation into the conduct of the second respondent flowing from a grievance lodged by the applicant. The report was referred to by Dr. Mkalipe as feedback from the A and F

³ 1949(3) SA 1081 at 1083

Department and was mentioned in the first respondent's discovery affidavit dated 9 April 2021 where reference is made to communication between Dr. Mkalipe and Mr. Bogale Molefe. This is further supported by correspondence wherein reference is made to such correspondence.

- [10] The applicant also requested the psychometric test assessments and scoring sheets of all candidates interviewed for the position of senior occupational health practitioner. Counsel for the applicant conceded that the second request was too wide and only requested copies of the psychometric assessments and scoring sheets of the applicant acknowledging that the request for all the information relating to all interviewees was too broad and breached the confidentiality of the interviewees and the applicant was not entitled to them.
- [11] Counsel for the applicant continued moreover that the applicant will be prejudiced if discovery was not made as the duration of the trial will be extended if the production of the documents requested were deferred to a later stage. The applicant will not be afforded the opportunity to evaluate her case and to prepare adequately. In addition, it would also extend the duration of the trial and the first respondent's failure to comply with the request will have cost implications for the applicant that may be disallowed due to the applicant's failure to request discovery.
- [12] The first respondent report denied the existence of a forensic report and averred that the report referred to was merely correspondence to Dr Mkalipe in response to her request for assistance from the A and F Department. This correspondence, the first respondent indicated was made available to the applicant wherein it was clear the A and F Department did not investigate the matter but referred it back to Dr Mkalipe as it was not related to their mandate. The first respondent maintains that there is no report in existence to discover. Despite the applicant's referral to a report, the first respondent persists with the view that a report does not exist in the form suggested and requested

by the applicant and the non- existence of the report precludes compliance with a request which was not in terms of the Rule.

- [13] The importance and practicality of discovery has been considered by this court in *Replication Technology Group & others v Gallo Africa Ltd: In re Gallo Africa Ltd v Replication Technology Group & Others*⁴ where the court referred to the decision in *Rellams (Pty) Ltd v James Brown & Hamer Ltd*⁵, noting the great weight attached to discovery affidavits and that they be drawn in a manner that do not offer an avenue of escape. It is thus important that parties disclose with the diligence indicated in *Van Vuuren v Agricura Laboratoria (Edms) Bpk*⁶

“[b]lootleggingsverklarings is belangrike dokumente en die voorlegger moet bewustelik die nodige inligting verstrek welwetende dat hy met 'n plegtige verlyding van 'n belangrike document te make het wanneer die eedsverklaring gedoen word.”⁷

- [14] The applicant did make a request in terms of the Rule 35 as appears from the record. The first respondent’s initial resistance was that the request was too wide which was conceded partially by the applicant. I am not persuaded by the first respondent’s resistance on the basis that the applicant had not made out a case in their founding affidavit in relation to feedback from the A and F Department. The importance of disclosure and the diligence with which this must be undertaken cannot be emphasised.
- [15] The position that Counsel for the first respondent took in arguing the matter was to assume a procedural advantage in placing reliance on the decision in *Molusi and others v Voges NO and Others*⁸. There is no basis for this where there was a request for documents referred to in the first respondent’s discovery affidavit and evidence which flowed

⁴ [2009] JOL 23517 (GSJ)

⁵ 1983 (1) SA 556 (N) at 558E

⁶ 1974 (2) SA 324 (NC) at 327H

⁷ TRANSLATION

“Disclosure statements are important documents and the submitter must consciously provide the necessary information knowing that he is dealing with a solemn execution of an important document when the affidavit is made.”

⁸ [2015] 3 All SA 131 (SCA) at p138, para[20]

therefrom in the interests of transparency. Moreover the first respondent furnished the applicant's psychometric reports after the application was launched and after an application was lodged requesting heads of argument in the matter. In view thereof I am persuaded that the applicant made out a case for further and better discovery.

[16] In view of my finding that the applicant having made out a case for discovery it follows that the first respondent be compelled to discover the information requested in relation to the A and F Department documents referred to in their discovery affidavit, the applicant's audio recordings relating to her interview as well as the psychometric test results which the first respondent indicated had been furnished after the application was lodged.

[17] There is no reason to deviate from the normal costs order. It follows that costs follow the cause. The applicant argued that the first respondent be ordered to pay the wasted costs of the application to compel filings of the heads of argument.

[18] For the reasons above I make the following order:

ORDER

1. The first respondent shall furnish the applicant within five (5) days of this order, discovery of the Assurance and Forensic (A&F) unit investigative report (including all the A&F's feedback on the allegations given to the stage 2 Grievance chairperson as reflected in pages 13, 14 and 16 of the outcome of the grievance meeting held on 19 August 2019;
2. The first respondent to effect within five (5) days of this order, discovery of the applicant's detailed psychometric

assessment report kept by first respondent's psychometric assessment centre and the feedback given to the manager by the service provider or Eskom professional, from which Psychometric Assessment Summary Report dated 08 May 2018 was extracted.

3. Failing compliance with 1 and 2 above, the applicant is hereby granted leave to apply to this Court on the same papers (duly amplified as necessary), for an order striking out the first respondent's defence to the applicant's claim with costs.
4. The first respondent is ordered to pay the costs of this application, as well as the wasted costs occasioned by the application to compel the first respondent to deliver its heads of argument.

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JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Appearances:

On behalf of the applicant : Adv. MD Maluleke
Instructed by : Agbarakwe Attorneys

On behalf of the respondents : Adv. PP Jara

Instructed by : Mchunu Attorneys

Date of hearing : 02 November 2021

Date of judgment : 23 August 2022