IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No. **38673/2022**

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

.... 04 JUNE 2024
SIGNATURE **DATE**

In the matter between:

LETUMILE MASHADI MOTLANA Applicant

and

KHANDANI MSIBI N.O. First Respondent

ZINHLE MJALI N.O Second Respondent

In Re

KHUMO NALEDI SIBEKO First Applicant

KHUMO NALEDI SIBEKO obo MORONGOE KEARABETSWE SIBEKO Second Applicant

KHUMO NALEDI SIBEKO obo MARANG GABONTHONE WARONA SIBEKO Third Applicant

and

KHANDANI MSIBI N.O. First Respondent

ZINHLE MJALI N.O Second Respondent

KGOSEGO DINGAKE Third Respondent

LETUMILE MASHADI MOTLANA Fourth Respondent

THATO DINGAKE Fifth Respondent

THE MASTER OF THE HIGH COURT Sixth Respondent

This judgment is prepared and authored by the Judge whose name is reflected as such, and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 04 June 2024.

JUDGMENT

RETIEF J

INTRODUCTION

[1] This is an interlocutory application in which the applicant, the fourth respondent in the main application, seeks to compel the first and second respondents [respondents] in the main and interlocutory application, to make discovery of documents in terms of uniform Rules 35(12) and (14) in terms of a

notice she delivered on the 3 May 2023 [the notice] [compel relief]. The applicant too, as far as is necessary, seeks this Court to direct that Rule 35(14) is applicable to the application proceedings under case number: 338673/2022 [request relief]. The request relief is sought after the notice was served and Rule 35(14) too is sought in the compel relief. A factor for consideration.

[2] By way of introduction the correct case number in this application is 38673/2022 and not 338673/2022 as prayed for. No amendment of the prayer was sought nor moved, or for that matter, explained. A factor for consideration.

[3] To appreciate the relief sought requires a brief mention of the dispute on the papers. The respondents are the duly appointed trustees of the Toka Trust (IT10794/05) [trust]. The applicant in the main application see, *inter alia*, their removal. The applicant is cited as the fourth respondent in the main application as an interested party only against whom no relief is sought . Notwithstanding the applicant has opposed the relief in the main application and filed a counter application. One of the live disputes on the papers is whether the applicant is still a beneficiary of the trust.

[4] The applicant raised the counter application against respondents seeking that she, together with other interim trustees be appointed as trustees of the Trust. In their stead. Procedurally and on the face of it, the counter application is not brought in reconvention against the applicants in the main application as a counter application suggests.[1] The procedural consequences of the counter application in its present form are inevitable and have been foreshadowed in the respondents' argument in this interlocutory application. This too, is a factor for consideration.

[5] It is against this procedural background that the applicant seeks her compel and request relief. To deal with the relief sought requires this Court to return to basic principles governing discovery in application.

DISCOVERY OF DOCUMENTS IN APPLICATION PROCEDURES

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[1] Hosch-Fömrdertechnik South Africa (Pty) Ltd v Brelko CC and Others,1990 (1) SA 393 (W).

[6] To commence, discovery of documents is rare and not a usual occurrence in application proceedings. In consequence, it is not for the taking by a party as of a procedural right. It is for this reason that Rule 35(13) of the Uniform Rules of Court unequivocally provides that:

> "*(13) The provisions of this rule relating to discovery shall mutatis mutandis apply, in so far as the court may direct, to applications.*"

[7] The necessity for leave to initiate and to determine the scope of its applicability of discovery of documents in every matter on its own merits, is catered for in Rule 35(13).

[8] The requirements by any party to initiate utilise Rule 35 in applications was clearly dealt with in Lorentz v MacKenzie,[2] the Court in dealing with a Rule 35 said the following:

> "*It is clear that the uniform rules of court do make provision for the provisions of Rule 35 relating to discovery to apply to applications. But this is clearly and unequivocally stated to be subject to the proviso that the Court direct this to be so. The Applicant's first argument requires that the clear wording of the Rule insofar as this Court may direct be ignored. This clearly cannot be done and no authority for so doing was referred to."*

[9] As stated in Lewis Group Limited v Woollam:[3]

> "*[4] Rule 35, which regulates the discovery procedure in general civil litigation, is primarily applicable in action proceedings. Rule 35(13) provides, however, that 'The provisions of this rule relating to discovery shall mutatis mutandis apply, in so far as the court may direct, to applications'. The fact that, differently to the position in respect of actions, a party seeking discovery in motion proceedings is able to obtain it only insofar as the court might direct points to the*

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2 1999 (2) SA 72 (TDP) at 74F-G.

3 [2017] 1 All SA 231 (WCC).

availability of the procedure in applications as being out of the ordinary, and, to that extent, exceptional. Indeed, in Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis 1979 (2) SA 457 (W) at 470D-E, Botha J remarked: 'In application proceedings we know that discovery is a very, very rare and unusual procedure to be used and I have no doubt that that is a sound practice and it is only in exceptional circumstances, in my view, that discovery should be ordered in application proceedings'."

[10] See also Premier Freight (Pty) Ltd v Breathetex Corporation (Pty) Ltd,[4] where Plasket AJ, as he then was, had the following to say:

"*[9] The starting point in the enquiry as to the application of Rule 35(13) is that there is no discovery in applications: it is only possible for discovery to apply in applications if, in terms of Rule 35(13), a Court has been approached to make the Rules relating to discovery, or some of them, applicable and makes an order to this effect. A court has a discretion to allow discovery in applications."*

COMPEL RELIEF

[11] Against the principles above, this Court deals with the compel relief.

[12] To commence, the applicant served her notice before and without requiring leave and, to compound the issue, seeks compel relief on the basis of the respondent's non-compliance of such notice, complaining of the respondents' unsatisfactory reply.

[13] The applicant in her founding papers states at paragraph 7 that:

"*7. This is an interlocutory application to obtain an order compelling the trustees, in terms of the provisions of Rule 35(11) of the Uniform Rules of Court ("**the Rules**") (own emphasis), to furnish me (own emphasis)*

[4] 2003 (6) SA 190 at par [9] at pg 194C.

> *with the documentation required by virtue of my notice in terms of Rule 35(12) and/or (14) of the Rules dated the 3rd of May 2023 ("the notice"). In so far as necessary, I seek that the Court direct, in terms of 35(13) that the provisions of Rule 35(14) are applicable."*

[14] Applying the uniform rules and the principles laid down and attitude alluded to above, the leave in terms of Rule 35(13) is not only necessary but is required in respect of the applicant's Rule 35(12) and 35(14) request before the service of the notice. This was not done prior to 3 May 2023. The applicants compel relief is clear, she requires compliance with the notice. The applicant appears to appreciate the necessity by stating the same in the preamble of her notice. However referring to Rule 35(13 is not compliance of Rule 35(13).

[15] In any event, it appears that the applicant also requires compliance in terms of Rule 35(11). Reference of Rule 35(11) is misleading as Rule 35(11) as it is not a means for the applicant to compel production of documents "-*to furnish me*-" but for a Court to order the production of documents in proceedings.

[16] The applicant states in her founding papers that by virtue of her merely being a party to the proceedings, this would include the main application, that she is entitled to make the request for documents under Rule 35(12) and (14). Again entitlement to request is not compliance of Rule 35(13) nor does it sustain the compel relief in terms of Rule 35(11). The applicant's failure to obtain such direction prior to the service is fatal to the compel relief. It flows that the applicant's compel relief as couched and sought on the papers must fail.

REQUEST RELIEF

[17] However, what of the request relief in terms of Rule 35(14) where reference is made to an incorrect case number and now that the horse has bolted? The horse bolted in so far as leave is sought after the notice and compel relief has been prayed for in respect of the same subrule 14. In the premises, an after the fact request.

[18] Without amending the case number this Court is not inclined to grant the relief as prayed without consideration of a competent order. Therefore, this Court is inclined to deal with the basis of the request relief *per se*.

[19] It may be helpful to when considering the basis to consider what the applicant has already requested in terms of Rule 35(14).

[20] This is not an easy task as according to the applicant's notice she does not differentiate between the documents she requires in terms of Rule 35(12) and those in terms of Rule 35(14). It appears as if the finer nuances of the subrules are missed or the applicant simply casts her discovery request net so wide in the hope of catching something. This subrule was designed for the situation where a party to an action or with leave in applications, requires for the purpose of pleading, the production of a specific document of which he has knowledge and which he or she can describe precisely. This does not appear to be the case here according to the notice.

[21] Furthermore, the document request in the notice is wide, the applicant request is extensive and the applicant simply states that by virtue of being a party to the proceedings, she *"- is entitled to make the request for documentation under Rule 35(12) and (14)*". This is not entirely correct. Corrected in argument, as previously explained. The applicant's Counsel correctly made reference to exceptional circumstances.

[22] Returning to the Moulded Components and Rotomoulding SA (Pty) Ltd v Coucourakis[5] matter, the learned Judge did decline the request to make discovery procedure applicable for a number of reasons which, *inter alia*, included the wide form in which the relief was sought and the Court's perception that the contemplated exercise would be something of a "*fishing expedition*". In consequence, the determination of any request should be done upon an examination of the request with reference to its particular content assessed in the context of the peculiar characteristics of the litigation and mindful of the premise that the request should, as a matter of policy, be granted only exceptionally.

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[5] Paragraph [9].

[23] The determination of the request also requires reference to the Ingledew v Financial Services Board,[6] matter in which the Constitutional Court reminded litigants that Rule 35(14) grants a right to information which is narrow in so far as its terms unequivocally limit the nature of the documents and tape recordings covered by the rule to those "*relevant to a reasonably anticipated issue in an action*" and further limits the documents in question to those required for purposes of pleading if the issues pending between the parties are those that are reflected in the pleadings.[7]

[24] Considering the context of the peculiar procedural characteristics of the matter before this Court, what the applicant is asking this Court to do is to permit it to obtain documents which have not been clearly defined in the answering affidavit, which are not clearly and specifically requested in terms of this sub-rule in the notice itself, without leave, and in circumstances when the respondents in their answer to the applicants' counter application have unequivocally stated the following:

> "*9. I have read the affidavit of the fourth respondent, which apparently also serves as a founding affidavit, in her purported application against the trustees. This purported application for relief against the trustees is an abuse of the rules of court, and a material irregularity. She has not correctly joined the trustees, in her so-called application.*
>
> *13. The trustees deal with the allegation in the fourth respondent's affidavit ex abundanti cautela to demonstrate the factual inaccuracies in her affidavit -"*

[25] The veracity of the respondent's complaints although not for this Court to determine is a factor in the exercise of its discretion. To allow the applicant to obtain documents at this stage when, procedurally she may not even be entitled to pursue as a result of her own procedural choices, is a weighty factor to consider. The parties are not at full stretch yet.

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[6] 2003 (4) SA 584 (CC) at par [15].

[7] See **MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd and Others** 1999 (3) SA 500 (C) at 515B-I.

[26] Having regard to all the circumstances including all the factors highlighted in this judgment including, but to a lesser extent, the inaccuracies in the prayer couching the request relief. This Court, in exercising its discretion is not at this stage inclined to grant the request relief. The factors applied by this Court in the request relief apply equally to the compel relief. In consequence, the compel relief should also fail on the same basis.

[27] Lastly there is no reason why the costs should not follow the result.

In consequence, the following order follows:

1. The application is dismissed.

2. The Applicant to pay the First and Second Respondents' costs, including the appointment of two Counsel on scale B.

L.A. RETIEF
JUDGE OF THE HIGH COURT
GAUTENG DIVISION,
PRETORIA

Appearances:

For the applicant:	Adv L Hollander
Instructed by attorneys:	Nicole Ross Attorneys Email: nross@nicolerosslaw.com narina@nicolerosslaw.com
For the first & second respondent:	Adv P Daniels SC Cell: 083 600 0214 Email: jpdaniels@law.co.za
	Adv A Kohler Cell: 079 497 3955 Email: adv.akohler@gmail.com
Instructed by attorneys:	Vasco de Oliviera Inc Tel: 011 326 2505 Email: vasco@oliveira.co.za
Matter heard:	22 April 2024
Date of judgment:	04 June 2024