

SOUTH AFRICA / JUDGMENT

Blue Ridge Mine v Peer; In Re Peer v Blue Ridge Mine (23641/2012) [2017] ZAGPPHC 227 (17 May 2017) [2017] ZAGPPHC 227

COURT

North Gauteng High Court, Pretoria

BEFORE

TJ Raulinga

CASE / FILE NUMBER

23641/2012

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION. PRETORIA

CASE

NO: 23641/ 2012

17/5/2017

Not

reportable

Not

of interest to other judges

Revised.

In

the matter between:

BLUE
RIDGE
MINE APPLICANT
and
DR
FAZLE WAHAB
PEER RESPONDENT
IN

RE: DR
FAZLE WAHAB
PEER PLAINTIFF
BLUE
RIDGE
MINE DEFENDANT

JUDGMENT

RAULINGA J,

1. The applicant seeks an order for the dismissal of the action instituted by the respondent against it in terms of Rule 35(7) and

the common law for failure to comply with a court order directing compliance with a request in terms of Rule 35(3) and to prosecute the action with the necessary diligence. The applicant also seeks an order for costs on the attorney and client scale.

2. On or about 25 April 2012, the respondent instituted an action against the defendant for damages suffered for inter alia loss of income as a result of alleged defamation committed by the defendant. In essence, the respondent, a medical doctor, complains of decrease in patient visits from employees of the applicant, a mine, arising from an alleged malicious defamatory statement that the respondent was an illegal practitioner and his sick notes not be accepted by the applicant. As a consequence, the applicant was prompted to request the respondent to discover certain documents.
3. On 17 April 2013, the applicant served a notice in terms of Rules 35(1), (6)(8) and (10) on the respondent, calling upon him to make discovery. After numerous requests and in excess of two years later, the respondent provided a discovery affidavit on or about 6 August 2015.
2015. On 12 August 2015, the applicant gave the respondent notice in terms of Rule 35(6) requesting inspection of the documents so discovered which were provided on 20 August 2015.
4. On 30 September 2015, the applicant requested the omitted documents, inter alia, tax returns and financial statements, for the years ending 2009 and 2010.
5. After numerous requests by the applicant that the respondent complies with Rule 35 notice and requests by the respondent for extension of time to comply therewith, the applicant launched an application to compel the respondent to comply with Rule 35 notice. On 11 January 2016, this court, granted by consent between the parties, the court order - whereby the respondent was compelled and obliged to comply with the Rule 35 notice.
6. Pursuant to service of the court order, the respondent replied to the Rule 35 notice by way of an affidavit ("the Rule 35(3)

affidavit"), recording that he was not in possession of the tax returns and financial statements, for the years ending 2009 and 2010. ("the omitted documents' In the same affidavit the respondent invited the applicant to inspect the omitted documents listed in the Rule 35 notice.

7. Upon inspection of copies of the documents tendered, the applicant noticed that the omitted documents were absent and on 7 March 2016, the respondent was requested to comply with the Court order and provide the omitted documents as invited in terms of the Rule 35(3) affidavit, failing which an application would be brought for the dismissal of the action in terms of Rule 35(7).
8. On 8 March 2016 the respondent's attorneys confirmed that the omitted documents would be obtained from the respondent. On 11 March 2016, the respondent's attorneys wrote that the respondent had provided the applicant with all the documents that were available at the time and that the tax returns for the respondent for 2008, 2009 and 2010 were previously submitted to SARS and attached an email from gmail account of one Mr A.S Sekhukhune which had been sent to the respondent's attorneys on the same date. It was further stated in the email that the relevant information would be forwarded to the applicant as soon as SARS made confirmation to that effect. This resulted in the applicant launching the present application.
9. The applicant contends that the respondent by consent, agreed to a court order being granted compelling the respondent to comply with a request in terms of Rules 35(3) and (6). However, after numerous undertakings for an extension of time to allow the respondent to comply with Rule 35, the respondent filed a Rule 35(3) and (6) reply affidavit expressly recording that the omitted documents sought by the applicant were not in his possession but in the possession of SARS. As a consequence there has been non-compliance, and provisions of Rule 35 (7) apply. Further, the action has not been prosecuted by the respondent with vigour. The inescapable conclusion drawn from the respondent's lethargic conduct in respect of the action is therefore vexatious and an abuse of process, designed for an ulterior motive.
10. On the other hand, the respondent argues that he made available for inspection all other documents in its possession or under its control. The documents however included in the respondent's reply to the applicant's notice in terms of Rule 35(3) and (6) were not in his possession. Therefore the respondent cannot discover documents which are not in his possession. Further that, the fact that the email pertaining to the tax returns were sent from a gmail account with no formal signature, by no means constitutes a fraudulent email: The respondent omitted to include the omitted documents in its reply to the Rule 35(3) notice, but it cannot be said that a bona fide omission constitutes contempt of the order. The fact is that, so the respondent argues, the omitted documents are not in the respondent's possession, neither does the respondent know where they are. Therefore the respondent complied with the court order as far as it was possible and within its means to so comply.

11. The purpose of discovery as stated in *Durbach V Fairway Natal Limited* 1949 (3) SA 1081(SR) at 1083 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.
12. Discovery expects of a party to make available to any other party to the proceedings, all documents, tape recordings ect that the party intends to use at the trial.
13. Further, the party who is not satisfied with the discovery has the onus of proving on the probability that the documents exist or are relevant -*Swissborough Diamond Mine (pty) Ltd & Others v Government of the Republic of South Africa*, 1999(2) SA 279 (7)at 320C - 321F.
14. In the first place, I deplore the conduct of the respondent in that he was ducking and diving by delaying the discovery of documents

which were in his possession. The respondent was obliged to discover the omitted documents as same would contain information that "might directly or indirectly-advance or damage either party's case". It is therefore disingenuous of the respondent to boldly say that "if the respondent does not succeed in discharging the onus placed upon him at the hearing of the matter, the applicant can apply for absolution from the instance," and that the onus in the defamatory case will rest on the respondent to prove its claim on a balance of probabilities. Clearly this confirms the applicant's contention that the respondent instituted the action for ulterior motive, with the hope of pushing for a settlement. Whether the respondent intends to use the omitted documents or not is immaterial. it is the applicant who wishes to inspect the documents in order to prepare a proper defence.

15. In my view, the applicant correctly submits that 'having regard to the context of Rule 35(1) and (2) as well as the provisions of Rule 38(1), it is evident that the purpose of Rule 35 and the intention of the rule is not to oblige a party to search for and obtain any documents that were previously in his or her possession in order to discover and make same available for inspection. All that is required from the discovering party is to specify such documents, state when the documents were last in his or her possession or power and what has become of the documents and in whose possession they are".
16. What is disturbing in this case is that after numerous requests and the granting of extensions, the respondent provided a discovery

affidavit on or about 6 August 2015, in which he stated that he would discover the documents. However, it turned out on inspection by the applicant that the omitted documents were not discovered.

17. After numerous requests for discovery of the omitted documents and when nothing happened, the applicant was left with no alternative but to institute an application to compel the respondent to comply with the Rule 35 notice. An order to compel was granted by this court by consent between the parties on 11January 2016.

18. It was only pursuant to service of the court order that the respondent replied to the Rule 35 notice by way of an affidavit

stating that he was not in possession of the omitted documents. He invited the applicant to inspect the remainder of the items listed in the Rule 35 notice (and thus including the omitted documents), well knowing what documents were in his possession. It was only upon closer inspection that the applicant discovered that the omitted documents were absent. The applicant on 7 March 2016 requested the respondent to comply with the court order to provide the omitted documents, failing which an application would be brought for the dismissal of the action in terms of Rule 35(7). However, after the respondent's attorneys confirmed on 8 March 2016 that the omitted documents would be obtained from the respondent, they on 11 March 2016, wrote that the respondent had provided the applicant with all the documents that were available at the time and that the tax returns for the respondent for 2008, 2009 and 2010 were previously submitted to SARS and attached an e-mail from a gmail account of Mr AS Sekhukhune which had been sent to the respondent's attorneys on the same date. This gmail account was without any formal e-mail signature designating its source as a professional tax advisory or consultancy. This email was sent on the same date upon the deadline set by the applicant in compliance with the court order.

19. The applicant correctly submits that the tax advisor or the respondent himself was obliged to keep copies of the record submitted

to SARS. The said tax advisor did not confirm under oath the fact that the tax returns were submitted to SARS. Accordingly this

constitutes inadmissible hearsay evidence. Moreover, the respondent had earlier in his affidavit confirmed that he was in possession of the omitted documents. The respondent could have indicated at that time that he was not in possession of the omitted documents, but they were in SARS's possession. Instead the respondent had to be prodded before he could disclose the whereabouts of the omitted documents. Even then, with all the discrepancies in his evidence it is hard to believe that his version is true. The only conclusion one can draw is that he realised that he was in contempt of the court order and he had to find an escape route.

20. In the normal parlance of events, I would have been inclined to use my discretion and order the respondent to produce the omitted

documents for inspection by the applicant, as contemplated in Rule 35(3). Such an order would have ensured a fair hearing for both

parties. However, having made a careful examination of all relevant circumstances I have reached a conclusion that the delay to prosecute the action is enormous and the prejudice caused to the applicant cannot be compensated by a cost order. Moreover, the reasons given by the respondent for the delay are not convincing and are inexcusable.

21. In the circumstances I make the following order:

The Plaintiff's action is dismissed with costs on the attorney and client scale in terms of Rule 35(7).

TJ RAULINGA

JUDGE OF THE GAUTENG DIVISION, PRETORIA

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Respondent's Counsel: Unknown at date hereof

Respondent's Attorneys: Mohamed Seedat Attorneys

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