

SOUTH AFRICA / JUDGMENT

Botha v 4D Health (Pty) Limited (2019/18976) [2020] ZAGPPHC 268 (15 June 2020) [2020] ZAGPPHC 268

COURT

North Gauteng High Court, Pretoria

BEFORE

Mokose

CASE / FILE NUMBER

2019/18976

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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1)

REPORT

ABLE: NO

(2)

OF

INTEREST

TO

OTHER

JUDGES:

NO

(3)

REVISED

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CASE

NO: 2019/18976

15/6/2020

In

the matter between: JOHANNA
MAGRIETA SUSANNA BOTHA
Applicant
and
4D
HEALTH (PTY)
LIMITED
Respondent
(Registration
No: 1999/009737/07)

JUDGMENT

MOKOSE J

[1] This is an application which emanates from an application for the liquidation of the respondent company, which matter is pending. This is an application in terms of Rules 30A and 6(11) of the Uniform Rules of Court to compel the respondent to produce for inspection the documentation referred to in its answering affidavit and in particular, those referred to in the respondent's expert opinion annexed to its answering affidavit in the main application.

[2] The facts are briefly that during March 2019 the applicant issued and served an application for the liquidation of the respondent. This application was opposed by the respondent who filed an answering

affidavit on 27 March 2019. In opposing the application, the respondent relied on an expert opinion and reasons of two chartered

accountants, practising as forensic accounting experts, Macphail and Guillardmod.

[3] On 12 June 2019 the applicant served a notice in terms of Rule 35(12) of the Uniform Rules of Court calling upon the respondent to produce documents as listed in the expert report annexed to the answering

affidavit for inspection. On 28 June 2019 the applicant Issued a further written request to the respondents to adhere to the notice

and recorded that in the absence of an adherence thereto, the applicant would have no option but to approach the court for appropriate relief. This written request was met with a response from the respondent advising that the attorney responsible for the matter was not available but would attend to the request in due course.

[4] A second request was issued requesting the respondent to adhere to the notice by 3 July 2019. On 2 July, the respondent's attorneys responded that they had not had an opportunity to attend to the matter and requested more time to prepare the documents for inspection and further that the documents would be ready for the inspection on 19 July 2019 at their

offices. On 19 July, the respondents advised the applicant's attorneys that they cannot conduct their inspection as the relevant documents were not available. On 23 July the applicant's attorneys attended at the offices of the respondent's attorneys to conduct an inspection of the documents. The missing documents which had not been produced for inspection were noted and requested by the applicant's attorneys by 24 July on which day the applicant's attorney was advised that the attorney responsible for the matter on behalf of the respondent was not available and would only return to the office on 26 July.

- [5] On 26 July the respondent's attorneys advised that they would only be able to respond to the letter of 23 July by 2 August. On 2 August the attorney for the respondent advised that the documents not produced for inspection as had been agreed to were confidential and not relevant to the subject matter. A notice in terms of Rule 30A was then served by the applicant on the respondent.
- [6] Paragraph 5 of the expert witnesses report made reference to a number of documents which they had examined in the preparation of the report. The experts had not expressed any opinion as to the relevance

or not of any of the documents examined by them. The applicant then made a request in terms of the provisions of Rule 35(12) in respect of the documentation as referred to in paragraph 5 of the report.

- [7] Rule 35(12) of the Uniform Rules of Court reads as follows:

"Any party to any proceedings may at any time before the hearing deliver a notice as near as may be in accordance with form 15 of the first schedule to any other party in whose pleadings or affidavits reference is made to any document or tape recording to produce such document or tape recording for his inspection and to permit him to make a copy or transcription."

- [8] Uniform Rule 30A reads:

"(1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days, to apply for an order that such rule, notice or request be complied with or that the claim or defence be struck out.

- (2) Failing compliance within 10 days, application may on notice be made to the court and the court may make such order thereon as to it seems meet."
- [9] The issue to be determined by this court is whether the respondent, who received a notice to produce the documents that he has referred to in the answering affidavit, may object to the production thereof on the grounds that they are confidential or not relevant.
- [10] It is common cause that the expert report relied upon by the respondent and annexed to its answering affidavit makes reference to the documents which forms the subject matter of the Rule 35(12) notice. The applicant contends that it is entitled to inspect the documents and that such entitlement emanates from the unambiguous wording of Rule 35(12) whose

purpose is to facilitate the ventilation of disputes by, inter alia, affording the applicant the opportunity of inspecting and copying the documents referred to for the purpose of considering same in reply.

- [11] The respondent contends that the essence of its defence and the reasons why the respondent in law should not be obliged to make such discovery of the items as per the Rule 35(12) notice is contained in Annexure "L" annexed to the founding affidavit. This is the letter from the respondent's attorneys to the applicant's attorneys wherein the respondent explains the reasons why it was of the opinion that the documents were confidential or irrelevant.
- [12] Rule 30A gives the court a discretion to make an order that 'seems met'. The court in the matter of *Centre for Child Law v Hoerskool Fochville*[1] held that the court had to weigh the parties' interests in the exercise of its discretion. It ruled further that a court should not order the production of documents that were privileged, irrelevant or not in a party's possession.
- [13] The rules as contained in the Uniform Rules of Court exist to regulate the practice and procedure of our courts. Their object is to secure the 'inexpensive and expeditious completion of litigation before the courts' and they are not an end in and of themselves.[2]
- [14] Vermooten J in the matter of *Magnum Aviation Operations v Chairman National Transport Commission & Another*[3] said:

"In my opinion the ordinary grammatical meaning of the words is clear: once you make reference to the document you must produce it..... I am consequently of the opinion that, having made reference to the financial statements, Operations is obliged to produce them for inspection."

- [15] The court in the matter of *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services : In re Masetlha v President of the Republic of South Africa & Another*[4] said:

"Even before the advent of the Constitution, courts often, and correctly in my view, recognized that when there is a claim of confidentiality over information that is sought to be discovered or disclosed, other considerations of fairness arise."

- [16] The applicant contends that the essential requirement in Rule 35(12) is a 'reference' to a document and not necessarily a detailed or descriptive reference to such documents. A reading of paragraph 5 of the respondent's expert report does not only make reference to documents but has also given a detailed description of such documents upon which the expert's opinion appears to be based upon. A document which has not been described in the 1 affidavit but which is referred to in the opinion may fall within the ambit of Rule 35(12).

- [17] The respondent avers that the applicant is not entitled to the documentation and that the court should not legitimize her possession of information and documentation which it alleges she unlawfully obtained. By granting such an order, the court would allow relief under the guise of Rule 35(12) where she would not ordinarily be entitled to such information.
- [18] In exercising its discretion, the court is obliged to strike a balance between the conflicting interests of the parties. However, considerations of fairness also need to be considered. The considerations of fairness that arise include the right to a fair trial which is enshrined in the Bill of Rights.[5] In granting the relief sought, the court may also impose suitable conditions upon which the inspection may take place while still
- affording the party seeking an inspection a reasonable opportunity of achieving its purpose.[6]

- [19] Paragraph 5 of the expert witnesses report made reference to a number of documents which had been examined in the preparation of the report. The experts had not expressed any opinion as to the relevance or not of any of the documents examined by them. In response to the request by the applicant in terms of the provisions of Rule 35(12) the respondent then claimed that the documents were confidential and that they were irrelevant. The question that needs to be asked in deciding whether the documents are really privileged or irrelevant is why the documents were referred to in the affidavit and if they were

really privileged or irrelevant. Furthermore, one has also to ask how the applicant is supposed to deal with the documents which have not been availed to her and are said to be privileged or irrelevant.

- [20] I am not persuaded that the refusal to make available for inspection the documents as contained in the affidavit are in fact privileged and irrelevant and that the applicant is not entitled to the relief sought.

- [21] Accordingly, the following order is granted:

- (i) The respondent is ordered to make the reports referred to in paragraph 5 of the respondent's expert witness report available for inspection by the applicants within 10 days of the date upon which this judgment is handed down;
- (ii) The respondent is ordered to pay the costs of this application.

MOKOSE J

Judge of the High Court of South Africa

Gauteng Division, Pretoria

For the Applicant:

Adv JA Klapper

instructed by

Cavanagh & Richards Attorneys

For the Respondents:

Adv NC Maritz

Van der Merwe & Bester Inc

Date of Judgement handed down electronically: 19 June 2020

- [1] 2016 (2) SA 121(SCA) at para [18]
 - [2] Hudson v Hudson & Another 1927 AD 259 at 267
 - [3] 1984 (2) SA 398 (W) at page 400 B-C
 - [4] 2008 (5) SA 31 (CC) at para (27)
 - [5] Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (supra)
 - [6] Moulded Components & Rotomoulding South Africa (Pty) Ltd v Coucourakis & Another 1979 (2) SA 457 (W)
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