

SOUTH AFRICA / JUDGMENT

Brown v Member of the Executive Council for the Education and Sport Development, North West Province (96/2021) [2023] ZANWHC 4 (19 January 2023)

[2023] ZANWHC 4

COURT

North West High Court, Mafikeng

BEFORE

K Mongale

CASE / FILE NUMBER

96/2021

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IN

THE NORTH WEST HIGH COURT, MAFIKENG

CASE

NUMBER: 96/2021

Reportable:

YES / NO

Circulate

to Judges: YES / NO

Circulate

to Magistrates: YES / NO

Circulate

to Regional Magistrates: YES / NO

In

the matter

between: JACOBUS
BROWN
Applicant
and
THE
MEMBER
OF THE
EXECUTIVE
COUNCIL
Respondent
FOR
EDUCATION & SPORT DEVELOPMENT,
NORTH
WEST PROVINCE
DATE
OF HEARING
: 06
OCTOBER 2022
DATE
OF JUDGMENT
: 19
JANUARY 2023

JUDGMENT

Mongale AJ

Introduction

- [1] This is an application in terms of Rule 30(2)(b) of the Uniform Rules of Court brought by the First and Second Third parties to set aside the defendant's Rule 35(12) as an irregular step.
- [2] The defendant's Rule 35(12) was served and filed on 8 March 2022 and the first and second third parties filed Rule 30(2)(b) on the basis that the documents requested by the defendant in its Rule 35(12) are not referred to by neither of the Third parties in their pleadings.
- [3] The defendant was afforded the opportunity to remove the cause of complaint, which was not removed.
- [4] The Rule 35(12) notice of the defendant reads:

"KINDLY TAKE NOTICE THAT the Defendant requires the first Third Party to produce for the Defendant's inspection and to permit the Defendant to make a copy or transcription of the documents specified hereunder in terms of Rule 35(12) of the Uniform Rules of Court:

4.1 all copies of the documents in terms of which the SGB enrolled the plaintiff at the school;

4.2 minutes of the information/documents and tape recordings;

4.3 medical reports and any other documents sought to be utilised in the trial by the plaintiff;

4.4 minutes or reports regarding any proceedings held to discuss any proposal to settle with the plaintiff or his parents."

[5] The only difference between the two Rule 35(12) notices served on the two Third parties is what the defendant requests from respective Third parties. The second Third party, is requested to produce the following documents for purposes of inspection:

5.1 certified copies of the policy concluded with the SGS;

5.2 any delegation of authority received from the SGS by second third party;

5.3 copies or transcript of the call centre conversation during application, or policy application forms, at the time the policy was issued.

Submissions

by the Third parties

[6] The First and Second Third party contend that the only time a party can request production of documents in terms of Rule 35(12) is if reference is made by another party in any of the pleadings filed by such party, in this instance the notice of exception and the plea over filed by the First and Second Third parties respectively.

[7] The two Third parties further submit that, except for the insurance policy, they did not make reference to any of the documents requested by the defendant in its Rule 35(12) notices.

[8] The second Third party concedes however that by admitting in its plea over that it issued a third-party liability insurance policy, it made reference to a third-party liability insurance policy concluded with the SGS, as contemplated by Rule 35(12). To that extent, the Second Third party served the liability insurance policy on the morning of the hearing of this matter, a copy of which was availed to the Court after oral submissions by both Counsel.

[9] With regard to the other documents that the defendant requires the Second Third party to produce, the Second Third party disputes that the documents are reasonably inferred in its plea over.

Submissions

by the defendant

[10] The defendant contends that their request for production of the documents through Rule 35(12) is valid and it further submits that should the Court not confirm the validity of its Rule 35(12), the plaintiff will not be able to properly prove its case.

- [11] The defendant further contends that the requested documents will assist it in its defence and to determine the extent to which evidence may need to be led against other parties in this matter. The defendant further submits that if the Second Third party was able to produce the third-party liability insurance policy, it can also produce the remaining two documents required by the defendant.
- [12] The defendant strongly contends that the documents requested from both the First and the Second Third party are referred to, or reasonably inferred in the plea delivered by the Second Third party and can also reasonably be inferred from the exception of the First Third party.
- [13] The defendant refers the Court to *Durbach v Fairway Hotel Ltd* 1949 (3) at 1083 where the Court remarked that: "a party is required to discover every document relating to the matters in question, and that means to every aspect of the case".
- [14] The defendant submits that the Court has inherent powers to regulate its proceedings and that rules are made for the court and not the court for the rules. The defendant refers the court to *Moulded Components v Coucourakis and Another* 1979 (2) SA 457 (W) @ 461 F-H and submits that the court has inherent power to order the other party to produce documents that the other party has not referred the court to.

Analysis

of the law

- [15] Rule 35(12)(a) provides that:

"Any party to any proceeding may at any time before the hearing thereof deliver a notice in accordance with Form 15 in the First Schedule to any other party in whose pleadings or affidavits reference is made to any document or tape recording to -..." my emphasis

- [16] On the other hand Rule 35(14) reads:

"After appearance to defend has been entered, any party to any action may, for purposes of pleading, require any other party to -

(a)make available for inspection a clearly specified document or tape recording in such party's possession which is relevant to a reasonably anticipated issue in the action or to allow a copy or transcription to be made thereof,·

or

(b)state in writing within 10 days whether the party receiving the notice objects to the production of the document or tape recording and the grounds thereof,· or

(c)state on oath, within 10. days, that such document or tape recording is not in such party's possession and in such event to state its whereabouts, if known."

- [17] What needs to be determined by this Court is the purpose for which the defendant employed Rule 35(12); whether the defendant employed the correct Rule to request the specified documents and whether or not the defendant's Rule 35(12) is in accordance with Form 15 in the First Schedule.
- [18] The defendant has failed to indicate in its Rule 35(12) notices, as required by Form 15 of the First Schedule, in which pleading the First and Second Third parties make reference to the documents sought by the defendant.
- [19] The defendant's Rule 35(12) notices are a circumvention of Form 15 of the First Schedule, as such the two Rule 35(12) notices are not in accordance with Form 15 in the First Schedule as required by Rule 35(12).
- [20] On paragraph 7 of its opposing affidavit, the defendant states that:
- "Early on, during consultations with the members of staff, correspondence especially relating to the personal enrolment forms of the plaintiff
- as a learner and minutes regarding any possible settlements that may have been made by the school to the plaintiff or his parents after the incident alleged, amongst other document which would have assisted the respondent in formulating its defence to the claim." My emphasis.
- [21] The defendant continues to aver at paragraph 27 of its opposing affidavit that:
- "In the premises, it is the respondent's contention that the objections and refusal to produce the document in the Rule 35(12) notices of the respondent, constitute an unlawful and unreasonable refusal which prejudices the respondent's preparation for the defence in the action."
- [22] Rule 35(14) is applicable for purposes of pleading and the document in which defendant can formulate its defence, is a plea. From the above two paragraphs quoted from the defendant's opposing affidavit, it is evident that the documents requested in the Rule 35(12) notices are for purposes of pleading and to enable the defendant to formulate a defence and to plead to the plaintiff's claim.
- [23] The defendant has clearly specified the documents that are relevant for purposes of its defence and relevant for a reasonable anticipated issue.
- [24] On whether or not the defendant employed the correct rule, in *Caxton and CTP Publishers and Printers limited v Novus Holdings Limited*
- [2022] 2 ALL SA 299 SCA @ para 17, the court held that the party's entitlement to see a document or tape recording referenced in the other party's pleadings or affidavit, is that a party cannot ordinarily be required to answer issuably before they are given the opportunity to inspect and copy or transcribe the document or tape recording mentioned in the adversary's pleadings or affidavits.

- [25] In *Protea Assurance Co LTD v Waverley Agencies CC And Others* 1994 (3) SA 247 @ 249B-C, the court held that entitlement to see the whole document or recording arises as soon as reference is made in the pleading or affidavit to a document or tape recording.
- [26] This Court must determine, as it was held in *Caxton's* case, whether there is in casu any reference in general terms in the Third parties' pleadings of the requested documents that the defendant want to be produced.
- [27] There is nowhere in the First Third party's exception where any reference is made, be it in descriptive or in general terms, of the requested documents sought to be produced by the Third party. There is also no direct or indirect reference by the First Third party of the requested documents.
- [28] The defendant did not make out a case for this Court to exercise its discretion or inherent powers to order the First Third party to produce the requested documents through Rule 35(12).
- [29] On the other hand, the inference to be drawn from this concession by the Second Third party regarding the third-party liability insurance policy, is that copies or a transcript of the call centre conversation during the application of the insurance policy that led to the conclusion of the insurance policy are available, a copy of which was shared with the defendant.
- [30] Emanating from the Second Third party liability insurance policy made available to the defendant, it is appropriate for the second Third party to be ordered to avail the transcript of the call centre conversation that happened during the application to the defendant. The Second Third party should indicate if it is not in possession of the transcript or policy application forms.

Conclusion

- [31] Under the circumstances, the rule that finds application to assist the defendant to formulate and prepare its defence is Rule 35(14). The defendant's notices in terms of Rule 35(12) are irregular steps to be set aside.

Costs

- [32] This Court cannot ignore the fact that the third-party liability insurance policy was served on the day of the argument of this matter. This means that both parties are partially successful.

ORDER

- [33] Therefore, the following order is made:

(i) To the extent that the defendant's notices in terms of Rule 35(12) do not relate to the third-party liability insurance policy and a copy or transcript of the call centre conversation at the time the application was made or policy application forms, they are set aside as irregular steps.

(ii) Each party to pay its own costs.

K MONGALE

ACTING JUDGE OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

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