

SOUTH AFRICA / JUDGMENT

Dube v Member of Executive Council (6279/2017) [2018] ZAGPJHC 449 (26 April 2018) [2018] ZAGPJHC 449

COURT

South Gauteng High Court, Johannesburg

BEFORE

Roland Sutherland

CASE / FILE NUMBER

6279/2017

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REPUBLIC
OF SOUTH AFRICA
THE
HIGH COURT OF SOUTH AFRICA
GAUTENG
LOCAL DIVISION, JOHANNESBURG
CASE
NO: 6279/2017

DATE: 2018-04-26
NOT
REPORTABLE
NOT
FO INTEREST TO OTHER JUDGES
REVISED
In
the matter between
BRILLIANT
DUBE Applicant
and
MEMBER OF EXECUTIVE
COUNCIL Respondent

JUDGMENT

SUTHERLAND J:

Headnote – application to compel hospital to discovery records of a patient who was born with cerebral damage - hospital admitting

liability to produce but on oath stated the records could not be found and tendered to disclose if and when they were located

The discovery procedure is not available to compel discovery of documents which a party says it cannot locate – no breach on any legal obligation demonstrated

Application dismissed with costs.

[1] This week in the special interlocutory court an application was brought in order to compel the delivery of certain documentation

pursuant to uniform rule of court 35(3). The application was opposed.

[2] The relevant context in which the application was brought is that the plaintiff had sued the defendant for damages arising out of medical negligence. The documentation which is, at present, sought is the routinely generated records of the treatment administered to the patient whilst in the care of the hospital. The defendant acknowledges that the class of documentation sought ought to be in the possession of the hospital. The defence of the respondent/defendant is not to challenge the applicant's entitlement of the documentation but rather to excuse non-production.

[3] The reason why the documentation had not been discovered is that the staff of the hospital, so it is alleged, cannot find the material. There is a tender to discover whatever is found, when it is found. The argument on behalf of the applicant is that this excuse is unacceptable, emphasis being placed on the obligation in terms of law to keep records and the prima facie breach of that duty is alleged.

[4] In my view the de facto position is deplorable and the idea of a breach of statutory obligations is on the probabilities in my view a plain fact. Notwithstanding these considerations, the ambit of rule 35 of the uniform rules is limited to imposing a duty on a litigant to discover what it has got.

[5] In circumstances where it ought to have a document but cannot access it and may even confess to not knowing whether or not it still exists, and is still in its possession, the duty imposed by rule 35 is requires a party merely to frankly declare what the true state of affairs is at the time that discovery is demanded. Ostensibly that is what the respondent has done. Assuming that the defendant/respondent is rightly to be rebuked for its poor record keeping it has not violated rule 35 by stating that it cannot lay its hands on the relevant documentation.

- [6] In the absence of facts from which I can on these papers infer the affidavit of the defendant is untruthful, the plaintiff in such circumstances must unhappily accept the position as described, however disgraceful the conduct of the respondent, objectively, may be. Rule 35 itself plays no role in the disciplining of state officials to perform their statutory duties. There may indeed be other remedies in order to compel compliance with those statutory duties but they do not fall within the ambit of rule 35.
- [7] In the circumstances I have taken the view that there is no useful purpose in granting the relief which is sought, which would achieve no more than to provoke a contempt application which would be readily answered by the same explanation which is proffered now. In the circumstances, therefore, the application must be dismissed.
- [8] As regards the costs of the application given these peculiar circumstances and the self evident common sense considerations regarding the particular circumstances of the plaintiff who is unable to obtain what it is entitled to, in my view the appropriate costs order is that no costs order should be made.
- [9] In the result I make the following order:
1. The application is dismissed.

[09:45]

Roland Sutherland

Judge of the High Court

Gauteng Local division, Johannesburg

[edited:2018/06/18]

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