

SOUTH AFRICA / JUDGMENT

Janse Van Rensburg v South African Legal Practice Council (5946/2024) [2025] ZAMPMBHC 11 (17 March 2025)

[2025] ZAMPMBHC 11

COURT

Mbombela High Court, Mpumalanga

BEFORE

L.M. Montsho-Moloiwane

CASE / FILE NUMBER

5946/2024

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IN

THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION,

MBOMBELA

CASE NO: 5946/2024

REPORTABLE:

YES / NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED:

YES/NO

DATE:

17.03.2025

SIGNATURE

In

the matter between: ZIETTA
 JANSE VAN
 RENSBURG
 APPLICANT
 and
 THE
 SOUTH AFRICAN LEGAL PRACTICE COUNCIL
 RESPONDENT
 IN

RE: THE
 SOUTH AFRICAN LEGAL PRACTICE COUNCIL
 APPLICANT
 ZIETTA JANSE VAN
 RENSBURG
 RESPONDENT

JUDGMENT

MONTSHO-MOLOISANE AJ

[1.] This is an interlocutory application launched on urgent basis by the Applicant to compel the Respondent, as the Applicant in the main application, to furnish her with certain information in terms of Section 32 of the Constitution of the Republic of South Africa, 108 of 1996 (“the Constitution”), read with Rule 35(12) of the Uniform Rules of Court.

[2.] In this application, the Applicant seeks an order:

2.1. the application be disposed of as one of urgency and the non-compliance with the Rules regarding service and time limits, be condoned and the matter be heard as urgent in terms of Rule 6(12) (a);

2.2. that the Respondent be ordered to provide the Applicant with information pertaining to the charges referred to in the founding affidavit filed in support of the main application, within 10 (ten) days of the order being granted.

2.3. that should the Respondent fail to provide the documents or information requested, the Applicant may approach the Court on an urgent basis for further relief; and

2.4. that the Respondent pay the costs of the application on a punitive scale, as between attorney and own clients.

[3.] The Respondent opposes the interlocutory application, and raised the following points in limine, referred hereunder:

3.1. lack of urgency;

3.2. the application was not properly served in terms of Rule 4(1)(aA) , as it was not served on the Respondent's attorney;

3.3. the Applicant failed to comply with Rule 35(12); and

3.4. an interlocutory application in an application that is unopposed is irregular and amounts to a nullity.

History of litigation

[4.] The Applicant is an admitted attorney, conveyancer and notary public of the High Court. She was suspended from practicing as such, on 22 February 2024 in terms of the judgment and order granted by Honourable Justices Mashile et Bhengu in this Court, pending an investigation and the disciplinary proceedings to be instituted against her.

[5.] The application for the suspension of the Applicant was launched by the Respondent herein, in its capacity as the statutory regulatory

authority established in terms of Section 4 of the Legal Practice Act, 28 of 2014 ("the LPA"), and was brought in terms of the provisions of Section 43 thereof, which makes provision for the Respondent to institute urgent legal proceedings in the High Court to suspend a legal practitioner from practice, and to obtain alternative interim relief, upon considering a complaint lodged against him or her.

[6.] The Applicant opposed the application, but in the end the Court granted a judgment and order for her suspension.

[7.] The Applicant filed an application for leave to appeal the said judgment on 26 February 2025, which was refused.

[8.] The Respondent filed an urgent application in terms of Section 18(3) of the Superior Court Act, 10 of 2013, for an order that the suspension be executed with immediate effect, which was granted on 03 April 2024.

[9.] In terms of the above mentioned Court order, the Applicant was directed to hand and deliver her certificates of enrolment as a legal practitioner, notary public and conveyancer to the Registrar of this Court, and in the event of her failing to comply as ordered, within 2 (two) weeks from the date of the granting of the said order, the Sheriff was authorised to take possession of the certificates and hand them to the Registrar.

[10.] The Applicant was further prohibited from handling or operating any Trust account. The remainder of the orders granted pertains to the administration of the affairs of her practice as a legal practitioner.

[11.] On or about 15 November 2024, the Respondent launched an application against the Applicant in this Court, the essence of which is to obtain an order removing her as a legal practitioner, notary public and conveyancer, from the roll of legal practitioners kept by the Respondent in terms of the provisions of Section 30(3) of the LPA, on such terms and conditions as this Court may deem appropriate.

[12.] According to the Sheriff's Return of service, the application was served at the place of residence of the Applicant, given as stand no. 1[...], M[...], Komatipoort, on 21 November 2024 at 16h00, on one Isaac Zitha, referred to as a security guard at that address.

[13.] The Applicant subsequently filed her Notice to oppose the application on 09 December 2024, but has to date not filed any answering affidavit in the said application.

[14.] The Applicant filed a document titled "Notice of motion: Order to compel read with Section 32 of the Constitution Act 108 of 1996 and Rule 35(12) of the Uniform Rules of the Superior Court", on 23 January 2025, as reflected on the date stamp of the Registrar of this Court.

[15.] In terms of the said Notice of motion, the relief sought is an order directing the Respondent to provide the Applicant with the information listed in the Charges referred to in the founding affidavit in support of the main application.

[16.] The Respondent was required to file its notice of intention to oppose the application, on or before 27 January 2025, and its opposing affidavit (if any), on or before 6th February 2025.

[17.] The Respondent's answering affidavit to the application to compel, was filed on 03 February 2025.

[18.] The application was argued on 04 March 2024.

Legal submissions

[19.] Ms Ratshibvumo, on behalf of the Respondent, was afforded an opportunity to make submissions regarding the Points in limine raised, in the answering affidavit as it is procedural to deal with preliminary points which, if upheld, may be dispositive of the matter. Her submissions were based on the following:

19.1. The application was not properly served on the Respondent in terms of Rule 4 (1) (a A) which provides that "where the person to be served with any document initiating application proceedings is already represented by an attorney of record, such document may be served upon such attorney by the party initiating such proceedings". She contended that the Respondent had indicated in its Notice of motion dated 15 November 2024 that it appointed her firm, at which address service of all process was to be effected. There was therefore non-compliance with the said rule, as this application is not a new matter.

19.2. It was further submitted on the Respondent's behalf, that the application is irregular and amounts to a nullity, as the main application remains unopposed, due to the Applicant's failure to deliver her answering affidavit, which was due on 30 January

2025. It is on this basis that the main application has been enrolled on the unopposed roll of 14 April 2025.

19.3. Non-compliance with Rule 35(12): In this instance, Ms Ratshibvumo submitted that the Applicant failed to comply with Rule 35(12) in that sub-rule 13 unequivocally states that, although the provisions of Rule 35 relating to discovery apply to applications, such application is subject to the proviso that the Court direct that it be so;

19.4. Lack of urgency: she submitted that the application is not urgent as the main application was served on the Applicant by Sheriff of the Court on 21 November 2024; that her answering affidavit was due on 30 January 2025, but she failed to deliver same; and she has not furnished the reasons for having waited for 60 (sixty) calendar days before lodging the urgent application to compel on 24 January 2025, despite knowing which documents she needed in order to file her answering affidavit;

[20.] Ms Ratshibvumo submitted that the application ought to be struck off, alternatively be dismissed with costs, on any of the points in limine raised.

[21.] Mr van Rensburg on behalf of the Applicant, on the other hand, submitted that:

21.1. the application was urgent, as the information is urgently needed to compile the answering;

21.2. rule 35 (12)

(b) bars the Respondent from making use of the information not disclosed in terms of Rule 35(12) (a);

21.3. that the Applicant cannot answer any allegation made in the founding affidavit, without the information or documents sought;

21.4. that the enrolment of the application on the unopposed roll of 14 April 2025, amounts to an irregular step hence he Rule 30 (i) and 30(1); and

21.5. that the Applicant is entitled to the order sought, and costs on a punitive scale, of attorney and own client.

Issues

for determination

[22.] The key issue for consideration is whether the application falls to be struck off, alternatively dismissed with costs, based on the points in limine raised by the Respondent.

Evaluation

[23.] The Applicant's application is premised on the Uniform Rules of this Court. In this regard, I align myself with the sentiment

expressed by Rogers J in the case of ABSA BANK Ltd v Zalvest Twenty (Pty Ltd)[1] where, in a case regarding an exception, he held that:

“The rules of Court exist in order to ensure fair play and good order in the conduct of litigation. The rules do not lay down the substantive legal requirements for a cause of action nor in general are they concerned with substantive law of evidence”.

[24.] In confirming myself to the question as to whether there has been non-compliance with the rules to which I was referred to, it is apposite to consider the contents of the Applicant’s affidavit, wherein the relief sought in terms of Rule 6(12) and Rule 35(12), should be set out.

[25.] In this regard, the following facts remain undisputed:

25.1. the main application was served at the Applicant’s place of residence on 19 November 2024 ;

25.2. the Applicant launched this application after approximately 60(sixty) days, on 24 January 2025, after the main application was served at her place of residence;

25.3. there is no explanation furnished in the founding affidavit for the Applicant’s delay in approaching the Court after 60 (sixty) days;

25.4. there are no facts stated by the Applicant in the founding affidavit, as to why she cannot get substantial redress at a hearing in due course. All that the Applicant states regarding urgency, ex facie her affidavit, is that she requires the information to be able to file her answering affidavit; and

25.5. no leave was sought from the Court to invoke the provisions of Rule 35(12).

[26.] Section 32(1) of the Constitution simply entrenches the right of everyone to access information held by the state, and any other information that is held by another person, and that is required for the exercise of protection of any rights.

Legal principles

[27.] The requirements for urgency in applications have been dealt with on numerous times by the courts. Rule 6 (12) (b) of the Uniform Rules of Court stipulates the requirements to be satisfied by the Applicant in urgent application it provides:

“In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant shall set forth explicitly the circumstance which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial

redress at a hearing in due course”.

[28.] It is trite that it is not good enough to say that the relief cannot be obtained in due course. The averment that the relief cannot be obtained in due course must be substantiated. Failure to substantiate that averment will no doubt be fatal to the Applicants’ application.

[29.] In *Luna Meubelvervaardigers (Edms) BPK v Makin and Another (t/a Makin's Furniture Manufacturers)*[2] the Court reiterated the requirements set out in Rule 6 (12) (a) and (b).

[30.] Furthermore, in *East Rock Trading (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd others*[3], the Court remarked as follows in relation to urgent applications:

“(6) The import thereof is that the procedure set out in rule 6(12) is not there for taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.

- (7) It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his case in that regard”.

[31.] Regarding the issue of failure to serve the interlocutory application on the appointed attorney, the Applicant's conduct no doubt amounts to non-compliance with the provisions of Rule 41(a A), however that cannot, in my view, be fatal or be dispositive of the application to compel discovery.

[32.] In this matter, although the points in limine raised by Ms Ratshibvumo dispose regarding lack of urgency constitutes a valid ground to dispose of the matter, I find that as this Court has the inherent power to mero motu address any issue relevant to these proceedings, it will be in the interests of justice that I deal also with the application to compel discovery in terms of Rule 35(12), read with the right of access to information which is constitutionally guaranteed in section 32.

[33.] Rule 35(12) provides:

“(12)

- (a) Any party to any proceeding may at any time before 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-
- i. produce such document or tape recording for inspection and to permit the party requesting production to make a copy or transcription thereof; or
 - ii. 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 therefor; or

iii. 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.

- (b) Any party failing to comply with the notice referred to in paragraph (a) shall not, save with the leave of the court, use such document or tape recording in such proceeding provided that any other party may use such document or tape recording.

[34.] I am of the view that Rule 35(12) cannot be read in isolation, but should be read with Rule 35(13) which provides as follows:

“The provisions of this rule relating to discovery shall mutatis mutandis apply, in so far as the court may direct to applications”. (own emphasis).

[35.] It is therefore trite that although the provisions of Rule 35 relating to discovery apply to applications in so far as the Court may direct^[4], discovery should be ordered by the Court in exceptional circumstances.

[36.] Based on the qualification provided in subrule (13) it is settled that Rule 35(12) is not applicable to motion proceedings, save with the direction of the Court.

[37.] In STT Sales (Pty) Ltd v Fourie^[5], the Court endorsed the principle that an order directing discovery will only in exceptional circumstances be made in motion proceedings.

It will, as a general rule, only be made after the legal issues have been established, that is once all the affidavits have been filed^[6].

[38.] It is clear from the legal authorities, that discovery is not intended to be used as a sniping weapon in preliminary skirmishes. This is the caution that has been sounded by the Courts on numerous occasions. In my view, the fact of the matter it remains that a party as of right cannot invoke the rule pertaining to discovery in terms of Rule 35(12), as this is firstly conditional, upon obtaining the Court, prior to launching the application to compel discovery; and secondly, it is imperative that all affidavits be filed prior to doing so.

[39.] In the circumstances, I find that the Applicant's application falls to be struck off on the following grounds:

39.1. She failed to comply with the provisions of Rule 6(12)(b) which requires her to explicitly set out facts that render the application urgent, or to state why she cannot get substantial redress at a hearing in due course;

39.2. Secondly, the application to compel discovery in terms of Rule 35(12) read with Section 32 of the Constitution, is premature and amounts to an abuse of the process of the Court, as the procedure is inapplicable to motion proceedings, unless the Court has granted leave to do so.

ORDER

In the result, I make the following order:

1. The application is struck off;
2. The Applicant is to pay the costs of the Respondent on an attorney and client scale.

L.M. MONTSHO-MOLOISANE

ACTING JUDGE OF THE HIGH COURT

MPUMALANGA DIVISION, MBOMBELA

Date heard:

04 March 2025

Judgment

delivered:

17 March 2025

Electronically by circulation to all parties:

APPEARANCES

Counsel for the Applicant: H.C.J. Van Rensburg (SC) (In terms of Section 34(2)(b) of the Legal Practice Act, 28 of 2014) Instructed by: H.C.J. Van Rensburg (SC) PRETORIA Counsel for the Respondent: T. Ratshibvumo (In terms of Section 25 (2) read with 119 (2) (b) of the Legal Practice Act, 28 of 2014) Instructed by: Ratshibvumo Attorneys Inc. NELSPRUIT

- [1] ABSA BANK Ltd v Zalvest Twenty (Pty Ltd) 2014 (2) SA 119 (WCC) para 11
- [2] Luna Meubelvervaardigers (Edms) BPK v Makin and Another 1977 (4) SA 135 (W) at 136
- [3] East Rock Trading (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd others (11/33767) [2011] ZAGPJHC 196 23 September 2011
- [4] Provincial Government, North West province v Van Rooyen NO 2008 (4) SA 43 (SCA) at 48 G-I
- [5] STT Sales (Pty) Ltd v Fourie 2010 (6) SA 272 (GSJ)
- [6] At 276 D- 277 E

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