

SOUTH AFRICA / JUDGMENT

Kajee v Special Investigating Unit and Others (GP22/2021) [2022] ZAST 21 (16 September 2022)

[2022] ZAST 21

COURT

Special Tribunal

BEFORE

L T Modiba

CASE / FILE NUMBER

GP22/2021

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IN

THE SPECIAL TRIBUNAL ESTABLISHED IN TERMS OF SECTION 2 (1) OF THE
SPECIAL INVESTIGATIONS UNIT AND
SPECIAL

TRIBUNALS ACT 74 OF 1996

CASE

NO: GP22/2021

In

the application between: Hassan
Ebrahim
Kajee
Applicant
and
The
Special Investigating
Unit
First Respondent
The
Minister of
Police
Second Respondent
The
Minister of Health
Third Respondent
The
Minister of Justice and Correctional
Services

the matter between: Fourth Respondent
In
The
Special Investigating
Unit
First Plaintiff
The
Minister of
Police
Second Plaintiff
The
Minister of Health
Third Plaintiff
Services
Fourth Plaintiff
Hassan
Ebrahim
Kajee
Defendant

JUDGMENT

Summary:

Civil procedure - application in terms of Tribunal Rule 17(2) to compel the inspection of documents and recordings in terms of Uniform Rule 35(14).

MODIBA J:

INTRODUCTION

- [1] Hassan Ebrahim Kajee as the applicant in this application and the defendant in the main action applies in terms of Tribunal Rule 17(2) to compel the respondents who are the plaintiffs in the main action, to make certain documents and recordings available for inspection in terms of Uniform Rule 35(14). The respondents are opposing the application.
- [2] For convenience, I refer to the parties as the applicant and respondents respectively. Where I need to draw a distinction between the respondents, I refer to their respective names as cited.
- [3] The applicant is an admitted Advocate of the High Court of South Africa. He was a member of the Johannesburg Society of Advocates until he was suspended from practicing as an advocate in terms of the

judgment

and order of the High Court of South Africa, Gauteng Division, Johannesburg (per Mokgoatlheng and I) delivered on 24 October 2018, pending an application to have him struck off from the roll of practicing advocates.[1] When the present application was heard, he was still enrolled as a practicing advocate.

[4] I disclosed the fact that I presided over the application to suspend the applicant from practicing as an advocate to counsel for the parties at the first judicial case management meeting in this matter, held on 18 August 2022. Counsel for the parties agreed with me that my involvement in the suspension application should not cause any apprehension regarding my involvement in this matter as the judicial case manager. As the judicial case manager I would preside over interlocutory applications. However, since I made prima facie findings against the applicant in the suspension application in relation to allegations that constitute one of the respondents'

cause of action in the main action, I would not preside over any issue that is dispositive of the main action.

[5] The respondents instituted the main action against the applicant in the Tribunal on 15 November 2021. In the main action, the respondents seek to recover approximately R27 million from the applicant for damages the State suffered as a result of the alleged corrupt and collusive relationship between the erstwhile head of the office of the State Attorney, Johannesburg, Mr Gustav Lekabe (Mr Lekabe) and the applicant. Mr Lekabe is alleged to have briefed the applicant as counsel for the State in a plethora of matters in which the applicant charged for legal fees not actually rendered, doubled-charged for similar work done in a specific matter and/ or double invoiced the Office of the State Attorney, Johannesburg or overreached in his accounts delivered to the Office of the State Attorney, Johannesburg. Thereafter, Mr Lekabe unlawfully authorised payments to the applicant.

[6] The applicant is defending the action. He is yet to file his plea.

[7] On 4 February 2022, he caused a notice in terms of Uniform Rule 35(14) to be served on the respondents, calling on them to make available for inspection documents and recordings in their possession detailed in annexure A of the Uniform Rule 35(14) notice within five days of service of the notice. He contends that he requires these items for the purpose of pleading.

[8] The respondents only replied to the applicant's notice on 2 August 2022, refusing to make the items available to the applicant for inspection because they are not required for pleading. The respondents further replied that the items form part of general discovery having regard to the voluminous nature thereof. They undertook to avail the items to the applicant upon the consolidation of the main action with the action instituted under Tribunal case no. GP 09/2019 against Mr Lekabe.

[9] On 18 August 2022, I convened the first judicial case management meeting with the parties. There, the applicant's attorney expressed the applicant's dissatisfaction with the respondent's reply to his Uniform Rule 35(14) and his intention to bring an application to compel. The respondents undertook to further reply to the applicant's Uniform Rule 35(14) notice. The applicant indicated that he would still bring an application to compel if the further reply remains unsatisfactory. I then issued directives for the service of the further reply and if the application becomes necessary, the conduct of the present application. I enrolled the application for hearing on 14 September 2022.

[10] As directed, on 26 August 2022, the respondent's further replied to the applicant's Uniform Rule 35(14) notice, furnishing the applicant with a flash disk containing approximately 11,192 pages of documents and 6 recordings in compliance with the applicant's request in terms of Uniform Rule 35(14). The applicant is persisting with the application. He complains that the respondents' reply to his notice in terms of Uniform Rule 35(14) remains unsatisfactory in respect of documents listed as items 1, 3 and 7 in the annexure to the Rule 35(14) notice. This prompted the respondents to file an answering affidavit, to which the applicant has replied. Both parties have filed heads of argument from which I derived immense benefit when adjudicating this application. I am indebted to the parties' legal representatives for their assistance.

[11] What stands to be determined is whether the applicant has made out a proper case for the respondents to be compelled to make available to him for inspection in terms of Rule 35(14), items 1, 3 and 7. These items are:

11.1 the brief covers the State Attorney, Johannesburg issued to the applicant in respect of matters that constitute claims A to F (Item 1);

11.2 any and all documents proving a collusive and corrupt relationship between the applicant and Mr Lekabe (Item 3);

11.3 all the respondents' various bank statements reflecting payments to the defendant (item 7).

[12] I first consider the applicable legal principles. Then, I consider the issues that arise in respect of each item sought to be made available for inspection.

THE APPLICABLE LEGAL PRINCIPLES

[13] In terms of Tribunal Rule 17(4), subject to Tribunal Rule 19, Uniform Rule 35 may apply mutatis mutandis in Tribunal proceedings. Tribunal Rule 19(6) makes provision for a timetable for the discovery of documents to be determined at the first judicial case management meeting. In terms of Tribunal Rule 17 (2), where parties cannot reach agreement on the discovery of documents and tape recordings, either party may apply to the Tribunal for an appropriate order, including an order as to costs.

- [14] Therefore, to succeed in the present application, the applicant must make out a case to compel the respondents to make the requested documents and recordings available to him for inspection in Uniform Rule 35(14) read with Tribunal Rule 17(2).
- [15] In terms of Uniform Rule 35(14), when requested, a party is required to 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 and to allow a copy or transcription to be made thereof;[2] or 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;[3] or 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.
- [4]
- [16] The rule that the Court will not make an order against a party to produce a document that cannot be produced or is privileged or irrelevant, although applied in *Hoerskool Fochville*[5] in the context of Uniform Rule 35(12), equally applies here as it is a general principle applicable to the discovery of documents and recordings.

THE MERITS

Ad Item 1

- [17] It is common cause that the respondents' claim in the main action, comprises 6 claims styled claims A to F. The applicant wants the respondent to be compelled to make available to him for inspection, all the briefs and instructions (approximately 253 in number) he is alleged to have received from the State of Attorney that make up these claims.
- [18] The applicant alleges that as is the practice, these briefs are given in writing. They remain the property of the State Attorney. He would have returned them to the office of the State Attorney when he finished working on each brief. He did not retain hard copies.
- [19] According to the respondents, the office of the State Attorney, Johannesburg may not have kept copies of these briefs, confirming instructions to the defendant, in their office files. After a diligent search, the briefs have not been found. The respondents have filed an affidavit as required in terms of Rule 35(14) (c) stating under oath that the briefs are not in their possession and if they do exist, they do not know their whereabouts.
- [20] The issues counsel for the applicant raise in his written submissions, that on what basis do the applicants contend that the State Attorney did brief the applicant, how would the respondents, and in turn him and the Tribunal know identity of the parties involved, the scope of the instructions and execution thereof and fees charged; and his contention that the particulars of claim would be excipiable as the applicant would not be in a position to plead to them, resulting in an impasse are irrelevant for the purpose of this application.

[21] The applicant does not dispute that under these circumstances, by filing an affidavit in terms of Uniform Rule 35(14), the applicants have complied with their obligation in terms of Uniform Rule 35(14) (c).

Ad Item 3

[22] The respondents intend using the documents listed in paragraph 23 of this judgment to prove the allegation that Mr Lekabe and the applicant were involved in a corrupt and collusive relationship. In respect of this item, as pointed out by the respondents, the applicant's request is inconsistent with Rule 35(14) (a) as he has failed to specify the documents and recordings that pertain to his request.

Ad Item 7

[23] The respondents objected to furnishing the applicant with their bank statements on the ground that they furnished the applicant with payment bundles comprising:

23.1 the sundry payment advice, confirming that the applicant was briefed;

23.2 the applicant's relevant invoices for the matter in which he claimed payment for the alleged professional legal services rendered by him;

23.3 the letter from the relevant department (representing the second and third respondent) to the State Attorney, Johannesburg, confirming that the appointment of counsel may be made;

23.4 the control sheet by the State Attorney, Johannesburg, confirming the appointment of counsel as the "Office head's choice" (Mr Lekabe) and authorising payment to the applicant; and

23.5 the relevant BAS reports reflecting that payments were indeed made by National Treasury to the applicant into his personal bank accounts in respect of his corresponding invoices for the legal services allegedly rendered by the applicant in each matter;

23.6 the applicant's bank statements reflecting that the applicant did in fact receive payment from National Treasury in respect of each invoice he submitted to the Office of the State Attorney, Johannesburg in respect of briefs and instructions comprising claims A to F.

[24] On the authority in Hoerskool Fochville, the documents in item 7 are irrelevant for the purpose of pleading. The respondents intend using the above documents at the trial. The documents contain more information than is reflected in the National Treasury Bank statements. The applicant has not clarified why he insists on inspecting the National Treasury Bank statements notwithstanding that the respondents have furnished him with the above documents.

CONCLUSION

[25] The applicant has failed to make out a proper case for the respondents to be compelled to comply with his notice in terms of Uniform Rule 35(14) in respect of Items 1, 3 and 7.

[26] Caxton and CTP Publishers and Printers

[6] on which the applicant seeks to rely is of no assistance to the applicant because the principle applied in that case applies explicitly to a request in terms of Uniform Rule 35(12) in respect of documents specifically referenced in pleadings. None of the documents the applicant seeks are referenced in the respondents' particulars of claim. This probably explains why the applicant sought the documents and recordings in terms of Uniform Rule 35(14) and not 35(12).

COSTS

[27] The applicants seek the costs of the application. Save for the costs incurred after 26 August 2022 when they furnished the applicant with a further reply to the Uniform Rule 35(14) notice, the respondents are appropriately, not opposing the request. The respondents rather seek punitive costs against the applicant in respect of these costs because it was frivolous and vexatious of him to persist with the application under circumstances where the respondents have complied with the requirements of Rule 35(14) in respect of Item 1 and the request in respect of Items 3 and 7 is legally incompetent.

[27] I agree that the applicant's persistence with the application under these circumstance was frivolous and vexatious more so that as an Advocate, although suspended from practice, he remains an officer of this court and ought to conduct himself in a fit and proper manner.

[28] In the premises, the following order is made:

ORDER

1. By 23 September 2022, the applicant shall deliver the indexed and paginated papers in this application to the Tribunal Registrar in terms of Tribunal Rule 7(3).

2. The application is dismissed.

3. The respondents shall pay the applicants costs incurred until 26 August 2022.

4. The applicant shall pay the costs of the application the respondents

incurred after 26 August 2022 on the attorney and client scale. Such costs shall include the costs of two counsel where so employed.

5. The applicant shall file his plea and/ or counterclaim or exception

by 30 September 2022 failing which, in terms of Tribunal Rule 13(3), he shall be ipso facto barred from doing so.

6. In the event that the applicant files a plea and/ or counterclaim,

within ten days after he files the plea, the respondents shall, where necessary, deliver a replication to the plea and a plea to the counter claim in terms of Tribunal Rule 13(5).

JUDGE L. T. MODIBA

PRESIDENT OF THE SPECIAL TRIBUNAL

APPEARENCES

Counsel for the applicant: Mr. A Minilal

Attorney for the applicant: Mr H Patel, HSP Attorneys

Counsel for the 1st – 4th respondent: Adv. DJ Joubert SC assisted by Adv. GVR Fouche

Attorney for the 1st -4th respondent: Mr JR Pearton, Gildenhuys Malatji

Date of hearing:

14 September 2022

Date of judgment:

16 September 2022

Mode of delivery: this judgment was handed down electronically by transmission to the parties' legal representatives by email, uploading on Caselines and releasing to SAFLII. The time for handing down the judgment is deemed to be 10am.

[1] Johannesburg Society of Advocates v Kajee (35095/2018) [2018] ZAGPJHC 606 (24 October 2018).

[2] Uniform Rule 35(14) (a)

[3] Uniform Rule 35(14) (b)

[4] Uniform Rule 35(14) (c)

[5] Centre for Child Law v Hoërskool Fochville and Another 2016

(2) SA 121 (SCA) at 133 D – E

[6] Caxton and CTP Publishers and Printers Limited v Novus Holdings Limited (219/2021) [2022] ZASCA 24; [2022] 2 All SA 299 (SCA) (9 March 2022)

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