

SOUTH AFRICA / JUDGMENT

Ndala v Baloyi and Another [2023] ZAGPPHC 203; 5834/2022 (9 March 2023)

[2023] ZAGPPHC 203

COURT

North Gauteng High Court, Pretoria

BEFORE

Mncube

CASE / FILE NUMBER

5834/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NUMBER: 5834/2022

(1)

REPORTABLE: YES / NO

(2)

OF INTEREST TO OTHER JUDGES: YES / NO

(3)

REVISED

DATE:

9 March 2023

In

the matter between:

NOLUTHANDO

DORAH NDALA APPLICANT

and

AARON

BALOYI.

1st

RESPONDENT

BOLT

SERVICES ZA (PTY) LTD 2nd

RESPONDENT

SUMMARY:

Notice of Motion- Interlocutory application to compel in terms of Rule 35(7) of the Uniform Rules- The exercise of discretion by the court to grant or dismiss the application to compel- The second respondent raises defences of relevance and non- existence of requested documents- The applicant has failed to make out a case .
ORDER

HELD:

The application is dismissed with costs including costs of Counsel.

JUDGMENT

MNCUBE, AJ:

INTRODUCTION:

[1] This is an opposed application made in terms of Rule 35(7) of the Uniform Rules in which the applicant is seeking the following relief-

1. An order directing the second respondent to deliver its proper discovery affidavit to the applicant complying with the applicant's

notice in terms of Rule 35(1) of the Uniform Rules of Court served on the 22 February 2022;

2. An order directing the second respondent to deliver the following documents as requested in the Rule 35(3) notice-

2.1 Contract entered into between the first and second defendant which clearly describes the first and second defendant's relationship.

2.2 Contract describing the relationship between the Plaintiff, the first defendant and second defendant.

2.3 Proof that the first defendant's profile was blocked.

2.4 Video/Audio recording of the disciplinary hearing between the first and second Defendants.

2.5 Minutes recorded at the disciplinary hearing.

2.6 Documents pertaining to how the Plaintiff's trip was monitored.

2.7 Financial Statement/ invoice indicating how much the Plaintiff was charged and the second Defendant's profit for the trip and how much the first Defendant gained for the trip.

2.8 Proof of the first and second Defendants Vehicle Inspection Report.

2.9 Proof that the first Defendant has a clean criminal record and a proper background was conducted.

2.10 Proof of professional driving permit[1].

2.11 Proof that the first and second Defendants comply with all the requirements of National Land Transport Act 5 of 2009.

3. An order directing the second respondent to furnish the applicant with what the second respondent calls its trip insurance;
4. An order directing the second respondent to furnish the applicant with all communication between the applicant and second respondent,

be it on the second respondent's App or telephonic. All recordings, transcripts are required;

5. An order directing the second respondent to furnish to the applicant with the electronic details / information connecting the applicant's request for transportation with the first respondent through the second respondent on the App;
6. An order directing the second respondent to furnish the applicant with the details of the contract (oral or written) between the second respondent and the passengers using its App.
7. An order directing the second respondent to furnish the applicant with the details of the contract (oral or written) between the second respondent and the passengers using its App.
8. An order directing the second respondent to furnish the applicant with its discovery affidavit by no later than ten (10) days of the order.
9. An order directing the second respondent's defence be struck out should it fail to comply as ordered.
10. Costs.
11. Further and / or alternative relief as the court may deem fit.

[2] The applicant, Ms Noluthando Dorah Ndala who is the plaintiff in the main action is represented by Adv. Motsusi. The first respondent, Aaron Baloyi and the second respondent, Bolt Services ZA (Pty) Ltd a juristic person are Defendants in the main action. The second respondent is represented by Adv. Nxumalo. This application is only opposed by the second respondent.

FACTUAL

BACKGROUND:

[3] The applicant issued summons in this court against the respondents for damages in the amount of R2 041 000 in which she alleges that on 26 August 2019 the first respondent while in the employment of the second respondent without provocation assaulted her. The action was initially instituted in the Regional Court under case 2655/2019 and withdrawn. The

second respondent was served with Rule 35(1) Notice which required the discovery within twenty days of all documents and tape recordings relating to the matter which are in the possession of the respondents. In response to the Notice, on 25 March 2022 Mr Takura Malaba in his capacity as the manager deposed to a discovery affidavit on behalf of the second respondent denying that it was ever in possession of any documents relating to the matter save for the documents set out in the schedules.

- [4] The applicant issued the notice in terms of Rule 35(3) of the Uniform Rules on the second respondent's attorney of record on 1 April 2022 and 13 April 2022 as she believed that there are other documents or tape recordings which are relevant to the matter. On 19 April 2022 in response to the Rule 35(3) Notice, Mr Takura Malaba deposed to a discovery affidavit on behalf of the second respondent in essence alleging that none of the requested documents will assist the applicant in proving vicarious liability. The applicant then lodged the current application in terms of Rule 35(7) of the Uniform Rules to compel the second respondent to discover the requested documents.

ISSUES

FOR DETERMINATION:

- [5] The issues for determination are the following-

5.1 Whether or not the applicant has made out a case to compel the second respondent to discover documents listed in the Rule 35(3) Notice;

5.2 Whether or not the application is fatally flawed by the failure of the applicant to utilize Rule 35(3) of the Uniform Rules.

SUMMARY OF THE EVIDENCE:

- (a) Applicant's case:

- [6] The applicant in her founding affidavit in this application makes the following relevant averments-

- (a) That on 22 February 2022 the second respondent was served with Rule 35(1) Notice and furnished the requested discovery affidavit on 25 March 2022.
- (b) That on 31 March 2022 she served Rule 35(3) Notice as she believes that there are other documents or tape recordings relevant to the matter. On 19 April 2022 the (second) respondent replied in terms of Rule 35(3) and reaffirmed its refusal to provide the documents specified in the Rule 35(3) Notice.
- (c) The documents are imperative for the applicant to prepare for trial and will assist the court to determine whether there is any vicarious liability.

- (d) That the second respondent's affidavit does not comply with the Rule 35(3) Notice and has not provided a valid defence for objecting to discover the documents.
- (e) The contract reflecting the relationship between her, the first respondent and the second respondent is essential as she intends to ask the court to develop the common law using sections 39(1) and 173 of the Constitution by declaring e-hailing drivers employees.
- [7] In her replying affidavit, the applicant states that the second respondent pleaded apportionment of damages in the Regional Court under case 2655/2019. The further averment is that the second respondent has confirmed under oath that Mr Baloyi (first respondent) uses its e-hailing application to find passengers.
- (b) Second respondent's case:
- [8] The second respondent states in the answering affidavit deposed to by Mr Malaba that the first respondent was ever in its employment and the first respondent could not have acted in the course and scope of employment with the second respondent. The averment is that the documents sought by the applicant in terms of Rule 35(3) are speculative and lack any particularity and amounts to a fishing expedition which constitutes an abuse of process. The second applicant avers that the applicant has not made out a case that the second respondent has not discovered and in respect of prayers 1 and 8 there is no cause of action. In respect of prayers 3 to 7, the averment is that the applicant did not request those documents in her Rule 35(3) notice and is not entitled to the documents in this application.
- [9] The second respondent denies that it refused to discover the documents listed in the Rule 35(3) Notice. The averment is that the required documents are irrelevant to the matter as pleaded by the applicant and the second respondent. The second respondent avers that the first respondent did not enter into a contract of employment with it. The averment is that most of the documents that the applicant requested in Rule 35(3) Notice do not relate to a contract of employment between the first respondent and the second respondent. The second respondent denies that it owns the App. The averment further is that the applicant did not request a trip of insurance in the Rule 35(3) Notice and the second respondent does not have the trip of insurance document. The averment is that the applicant fails to provide details why she believes the second respondent's discovery affidavit does not comply with notice in terms of Rule 35(1). The second respondent avers that it has provided all the documentation in its possession that relates to the pleaded issues that it has in its possession. It denies that it has not complied with Rule 35. The second respondent seeks for the dismissal of the application with costs on attorney and client scale.

SUBMISSIONS

MADE:

[10] Counsel for the applicant submits that there is merit to the application where else Counsel for the second respondent argues that Rule 35(3) must be fully exhausted before the provisions of Rule 35(7) can be utilized and prays for the dismissal of the application with costs on a punitive attorney and client scale.

APPLICABLE LEGAL PRINCIPLES:

[11] This current application to compel discovery is preceded by Rule 35(3) Notice which is premised on the applicant's belief that the second respondent has the required documents. Rule 35(3) Notice reflects that the applicant believes that there are other documents which may be relevant to the matter in possession of the respondent (presumably the second respondent).

[12] Rule 35(3) of the Uniform Rules provides 'if any party believes that there are, in addition to documents or tapes recordings disclosed as aforesaid, other documents (including copies thereof) or tape recordings which may be relevant to any matter in question in the possession of any party thereto, the former may give notice to the latter requiring him to make the same available for inspection in accordance with sub-rule (6) or to state on oath within 10 days that such document are not in his possession, in which event he shall state their whereabouts, if known to him.' Rule 35 (3) does not authorise or sanction a fishing expedition. See *MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd* 1999 (3) SA 500 (W) at 515 where it was held 'Rules 35(3) and (14) do not afford a litigant a licence to fish in the hope of catching something useful'.

[13] The object of discovery is to ensure that before the trial both parties are made aware of all the documentary evidence at the disposal of the parties which in turn assist not only the litigating parties but the court to discover the truth[2]. Discovery affidavits are regarded as prima facie conclusive save where it can be shown that there are reasonable grounds for believing

that the other party has the relevant documents or that the other party is false in his or her assertions. See *Federal Wine and Brandy Co Ltd v Kantor* 1958 (4) SA 735 (E) at 749H.

[14] In *Swissborough Diamond Mines and Others v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 320F-H it was held 'Accepting that the onus is on the party seeking to go behind the discovery affidavit, the court, in determining whether to go behind the discovery affidavit, will only have regard to the following-

- (i) The discovery affidavit itself; or
- (ii) The documents referred to in the discovery affidavit; or
- (iii) The pleadings in the action; or
- (iv) Any admissions made by the party making the discovery affidavit; or
- (v) The nature of the case or the documents in issue.'

- [15] A party seeking discovery of documents and recordings in terms of Rule 35(3) of the Uniform Rules must show that there are reasonable grounds for believing that the requested documents are in the possession of the opposing party. This means that the court must be satisfied despite the averments in the discovery affidavit that reasonable grounds exist to enable the court to make an order for the production of the documents.
- [16] Where there is failure by the other party to discover despite the request and notice, the provisions of Rule 35(7) may be utilized. Rule 35(7) provides 'If any party fails to give discovery as aforesaid or, having been served with a notice under sub-rule (6), omits to give notice of a time for inspection as aforesaid or fails to give inspection as required by that sub-rule, the party desiring discovery or inspection may apply to court, which may order compliance, may dismiss the claim or strike out the defence.'
- [17] The purpose of Rule 35(7) of the Uniform Rules is to assist a party that is dissatisfied with the discovery made after exhausting remedies under Rule 35(3). In *MV Alina II Transnet Ltd v MV Alina II* 2013 (6) SA 556 (WCC) para19 it was held 'Rule 35(7) is designed to assist a party that is dissatisfied with the discovery or supplementary discovery that has been made and remedies under Rule 35(3) have been exhausted.'
- [18] Rule 35(7) must be interpreted in accordance with the guidelines established in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para
- [18] where it was stated 'Interpretation is the process of attributing meaning to the words used in a document be it

legislation, some other statutory instrument, or contract, having regard to the context provided by reading, the particular provision

or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.' At para [25] it was further held 'An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.'

- [19] There is no absolute right to discovery. The court has discretion whether or not to order compliance with the Rule 35.[3] The words “If any party fails to give discovery’ must be interpreted to mean that Rule 35(7) applies in circumstances where the party that is required to make discovery but fails to do so. Discovery is for the court to decide and does not depend on the parties’ views on the matter.[4] Discovery allows for the proper ventilation of issues and any document that is relevant to the issue is discoverable[5].
- [20] In the present application to compel, the second respondent relies upon two grounds for objecting to the discovery of the documents –(i) relevance and(ii) legal professional privilege. For the court to determine relevance requires that issues that are raised in the pleadings be considered.[6] See *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N) at 564A. The right to legal professional privilege is protected provided all the requirements are met. See *Thint (Pty) Ltd v National Director of Public Prosecutions and Others , Zuma and Another v National Director of Public Prosecutions and Others* [2008] ZACC 13; 2008 (2) SACR 421 (CC) para [183].

EVALUATION:

- [21] The applicant avers in her founding affidavit for this application to compel discovery that the requested documents are evidential material crucial to the trial. The second respondent’s defence to the application is based on two grounds- (i) that the requested documents on this application to compel is contrary to the Notice in terms of Rule 35(3) and (ii) that the second respondent does not have the requested documents in its possession. Following Rule 35 (1) Notice, the second respondent filed a discovery affidavit in response thereto and it avers that it has in its possession the documents as set out in the first and second schedule. In addition, the second respondent raised its objection to the production of the documents set out in the second schedule on the ground of legal professional privilege.
- [22] Following Rule 35(3) Notice wherein the applicant specifies the documents she is requesting, in response the second respondent makes averments in its affidavit that it is only obliged to discover documents that it has in its possession relating to the pleaded matter. The second respondent’s allegation is that none of the requested documents by the applicant will assist her in proving that an employment relationship existed between the first respondent and the second respondent and amounts to a fishing expedition. At all relevant times, the second respondent has attested positively that it has in its possession the documents set out in the first and second schedules.
- [23] I deem it important to remark on one worrying aspect. In terms of the Rule 35(1) Notice, the applicant requires ‘all documents and tape recordings relating to any matter in question in this action which are or have at any time been in the possession or control of the Defendant’. The Rule 35 (1) Notice does not specify which defendant is alleged to be in possession of the requested documents. Similarly, in terms of Rule 35 (3) Notice, the notice states ‘the Plaintiff believes that there are in addition to documents discovered/disclosed, other documents

which may be relevant to her

matter in question, in possession of the Defendant. ' For expediency the second respondent responded to both requests despite the lack of clarity. It cannot be overemphasised

that care must be taken by legal practitioners when drafting documents in anticipation of litigation. This concern was already

raised by this court in *Re Confirmation of three Surrogate Motherhood Agreements 2011 (6) SA 22 (GJ)* para 5 where the Court cautioned for care when drafting papers.

[24] Adjudicating on the merit of the current application, the applicant in her founding affidavit concedes that the second respondent complied with the Rule 35(1) Notice and states 'On 25th March 2022 the respondent furnished the requested discovery affidavit. A copy of the discovery affidavit is attached hereto marked as annexure "N3".' This brings about an important question- if the second respondent did comply with the Rule 35 (3) Notice then what is the basis for this application to compel. The purpose of Rule 35(7) in my view is to ensure compliance to a request for discovery made in terms of Rule 35(3) where there is none. In this matter, even on the applicant's version there was compliance. It appears to me that what the applicant truly seeks is further and better discovery which can be achieved by invoking Rule 35(3). Rule 35(3) clearly provides' if any party believes that there are, in addition to documents or tapes recordings disclosed as aforesaid, other documents (including copies thereof) or tape recordings which may be relevant to any matter in question ' Under those circumstances, in my view the usage of Rule 35(7) to achieve further and better discovery is incorrect. It follows that the contention by the second respondent's Counsel that the applicant ought to make use of Rule 35 (3) is correct. It follows that the applicant has failed to make out a case for the relief she is seeking. Simply put, my finding is that there is no merit to the present application.

[25] In the event that the view expressed above is incorrect, exercising my discretion judiciously, the application must fail for the following reasons-

[25.1] In the Notice in terms of Rule 35 (3) the applicant specifies the documents she is requesting. The second respondent duly filed a discovery affidavit raising the defences of relevance and the non-existence of such requested documents and states –

'3.5.1. None of these documents sought to be produced by the Plaintiff in the Rule 35(3) notice seek to assist proving that the First Defendant was employed by the Second Defendant.

3.5.2 The documents sought by the Plaintiff, in light of the denial of any employment relationship that the Plaintiff has asserted, are accordingly irrelevant.'

'4. Existence of Documents:

In addition to the foregoing, and in the circumstances where the First Defendant is not employed, nor ever employed by the Second Defendant, the Second Defendant has none of the requested documents as listed, or at all.'

Taking into consideration that Rule 35 (7) is to be utilized once a party has exhausted the provisions of Rule 35(3) with particular reference that there is a failure to adhere to the notice. On the facts of this matter, the second respondent did adhere to the notice. In other words there is no a failure by the second respondent to discover.

[25.2] This assertion in clause 4 that the first respondent was never employed by the second respondent is consistent to the plea that the second respondent filed in the main action. The second respondent has consistently raised the same defence in the discovery affidavit filed in terms of Rule 35(3) Notice.[7] In the absence of falsehood of this averment, it follows that the application must fail.

[25.3] The applicant makes assertions without providing proof of the existence of the documents. She states in her replying affidavit in terms of the Rule 35(7) - 'It is imperative for the 2nd respondent to disclose any contractual relations with the employer of the 1st respondent, if the 2nd respondent is not such employer. The onus of disproving vicarious liability rests upon the 2nd respondent if it denies that the 1st respondent is it's employee.' The discovery affidavit deposed to by Mr Malaba on behalf of the second respondent positively asserts that no employment relationship existed between the first respondent and the second respondent. I am unable to go beyond this averment made on behalf of the second respondent on the discovery affidavit that there was no an employment relationship in the absence of evidence showing falsehood of the averment. At the very least, whether or not there exists an employment relationship between the respondents is in my view a matter for the trial court to determine using the trite legal principles on vicarious liabilities[8]. It follows that there is the uncertainty of the existence of the document applicant seeks to wit a contract of employment between the first respondent and the second respondent.

[25.4] The applicant lists the requested documents in terms of Rule 35(3) Notice, however, when she makes the application to compel in terms of Rule 35(7) she then adds other documents which was never part of the required documents in the Rule 35(3) Notice. For example, in this application to compel she now requests the following additional documents-

- (a) On trip insurance.
- (b) Electronic details or information connecting the applicant's request for transportation with the first respondent through the second respondent on the App.
- (c) Details of the contract (oral or written) between the second respondent and the passengers using its App. In my view this is

improper and renders the application to be fatally flawed.

[25.5] The door is not shut on the applicant as she can still utilise the provision of Rule 35(11) during the trial if the evidence proves on a balance of probabilities the existence of the requested documents.

[25.6] Lastly, it does not appear that the applicant utilized Rule 30A prior to lodging this application to compel. In the constitutional dispensation, in my view, it should be standard procedure to first utilize Rule 30A where there is non-compliance by a party. By so doing, it affords the defaulting party an opportunity to remedy the non-compliance. This may have the desired effect of making litigation cost-effective. In addition thereto, it may alleviate the congestion of the court rolls.

CONCLUSION:

[26] In conclusion, applying the law to the facts, on the issue whether or not the applicant has made out a case to compel the second respondent to discover documents, I find that the applicant has failed to make out a case for the relief she is seeking. On the second issue whether or not the application is fatally flawed by the failure of the applicant to utilize the provisions of Rule 35(3), I find that the application is indeed fatally flawed. After the assessment of all the evidence, I am not satisfied that the application to compel using my discretion must be granted.

COSTS:

[27] The last aspect to be addressed is the issue of costs. Costs are awarded at the discretion of the court. Counsel for the second respondent argues for punitive costs on attorney and client scale on the basis that this application should not have been lodged. The purpose of punitive costs is to indicate the court's disapproval of a party's conduct.[9] I am not persuaded on the facts that a proper case has been made out for punitive costs. The costs must follow the course. It is just and equitable that the applicant pays costs on party and party scale including costs of Counsel.

Order:

[28] In the circumstances the following order is made:

1. The application to compel is dismissed with costs including costs of Counsel.

MNCUBE AJ

ACTING JUDGE OF THE HIGH COURT

Appearances:

On behalf of the Applicant: Adv.

L. Motsusi

Instructed by : Ramapuputla

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On behalf of the 2nd Respondent : Adv. N.S. Nxumalo

Instructed by : Rossouws

Lesie Inc.

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Date of Judgment: 9

March 2023

- [1] On the applicant's Rule 35(3) Notice, there is a typographical error on the numbering.
- [2] See *Durbach v Fairway Hotel Ltd* 1949 (3) SA 1081 (SR) at 1083.
- [3] See *Continental Ore Construction v Highveld Steel & Vanadium Corporation Ltd* 1971 (4) SA 589 (W) at 594H.
- [4] See *Swissborough* on para [18].
- [5] See *Quintessence Co-Ordinators (Pty) Ltd v Government of the Republic of Transkei* 1991(4) SA 214 (Tk) at 216B-F.
- [6] See *Schlesinger v Donaldson and Another* 1929 WLD 54 at 57.
- [7] See Case Lines 007.
- [8] See *Messina Association Carriers v Kleinhaus* 2001(3) SA 868 (SCA) at 872.
- [9] See *Mkhatshwa and Others v Mkhatshwa and Others* 2021 (5) SA 447 (CC) paras [20] to [21].

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