HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

(1) REPORTABLE: Electronic publishing only.
(2) OF INTEREST TO OTHER JUDGES: No.
(3) REVISED.

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DATE SIGNATURE

Case No: 38426/14

In the matter between:

N M Applicant

and

THE MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH OF THE GAUTENG PROVINCIAL GOVERNMENT Respondent

Case summary: **Superior Court Practice – Discovery and the production of documents – Rule 35(3) of the Uniform Rules of Court – opposition to production of documents is not a challenge to entitlement to the production thereof, but rather to excuse the non-production thereof on the grounds that they cannot be found - a probability has not been shown to exist that the deponents to the respondents' affidavits are either mistaken or false in their assertions that the required documents cannot be found - to order the production of the required documents would amount to a *brutum fulmen*. Application dismissed.**

JUDGMENT

MEYER J

[1] Having instituted an action against the defendant for damages arising out of medical negligence, the applicant in this interlocutory application seeks an order to

compel the production of certain documents, which she had requested in terms of a notice under r 35(3) of the Uniform Rules of Court. It is common cause that the applicant was admitted to the Chris Hani Baragwanath Hospital on 11 November 2010, and that the minor child, on whose behalf she instituted the action to which this application is interlocutory, was born on […] November 2010.

[2] It is not disputed that the documents requested 'may be relevant to any matter in question'. The opposition to the relief sought is not to challenge the applicant's entitlement to the production of the required documents, but rather to excuse the non-production thereof on the grounds that they cannot be found.

[3] The senior legal administrative officer (legal services) for the department of health, Gauteng, in an affidavit in response to the applicant's r 35(3) notice, states that the respondent is 'currently not in possession' of the required documents and 'does not know whether such documents exist'. She further states that the respondent-

'. . . is diligently searching through all available records for such documents but has been unable to find them thus far. However, should the said records become available the defendants will make them available to the plaintiff.'

The acting chief executive officer of the Chris Hani Baragwanath Hospital, Dr Sifiso Maseko, who is the person in charge of that health establishment, also deposed to an affidavit in which he states that all areas had been searched without success and that the appointed officials 'are diligently searching through all available records for such documents but have been unable thus far' to find them. The documents will, so he states, be made available to the applicant if they are found.

[4] The applicant contends that the person in charge of a health establishment is statutorily obliged to ensure that a health record is created and maintained at that establishment for every user of its health services and that control measures be set up to ensure the safekeeping of those records. (See the National Health Act 61 of 2003.) In her founding affidavit the applicant concludes thus:

'17. In the light of the provisions contained in section 13 of the Act, the employees of the Respondent were, by reason of the Applicant's admission to the aforesaid hospital and the subsequent birth of her minor child at the hospital, *obliged* to ensure that a health record pertaining to the Applicant's labour and the birth of the minor child is created and maintained.

18. The Respondent is therefore, in terms of the above provisions, required to be able to state whether such records were ever created, to confirm its current whereabouts and to grant the Applicant access to such records.'

[5] Recently Sutherland J had occasioned to consider a similar situation in this division in *Dube v Member of the Executive Council* (Case no: 6279/17). Therein he held as follows:

'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.

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.

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 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.

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.

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.'

[6] I respectfully agree with the sentiments expressed and the findings made by Sutherland J in the above-quoted passage. *In casu* a probability has not been shown to exist that the deponents to the respondents' affidavits are either mistaken or false in their assertions that the required documents cannot be found. (See

Richardson's Woolwasheries v Minister of Agriculture 1971 (4) SA 62 (ECD) at 67 D – F.) It would, therefore, amount to a *brutum fulmen* to grant to the applicant the relief she seeks in this interlocutory application.

[7] In the result the following order is made:

The application is dismissed with costs.

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P.A. MEYER
JUDGE OF THE HIGH COURT

Date of hearing: 14 August 2018

Date of judgment:	15 August 2018
Counsel for Applicant:	Adv D Coetzee
Instructed by:	Wim Krynauw Attorneys, Johannesburg
Counsel for Respondent:	Adv N Makopo
Instructed by:	State Attorney, Johannesburg