REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: NO ~~/ YES~~

(2) OF INTEREST TO OTHER JUDGES: NO /~~YES~~

(3) REVISED. NO

SIGNATURE 25/10/2019 DATE

Case No: 44725/2016

In the matter between:

DR MAUREEN ALLEM INC **APPLICANT**

and

DR ELSA SUSANNA CECELIA BAARD **RESPONDENT**

JUDGMENT

MTATI AJ

Introduction

[1] This is an interlocutory application wherein applicant seeks an order compelling the respondent to deliver a full and complete response to the applicant's notice in terms

of Rule 35(3) and (6) of the Uniform Rules of Court (Rule(s)) dated 15 November 2018, and to make the documents listed in the notice available for inspection within ten days of the granting of an order herein. The applicant further seeks an order directing that, in the event of failure by the respondent to deliver a full and complete response as sought above, then in that event, applicant be authorised to approach the court on the same papers, as duly supplemented, to struck out the respondents plea and for judgment to be entered in favour of the applicant.

[2] The respondent is opposing this application and has, on the other hand, filed an application in terms of Rule 33(4) for the separation of issues.

Background

[3] On 15 November 2018, the applicant served a notice on the respondent, requiring the respondent to make available for inspection the documents sought therein in accordance with Rule 35(6) or state under oath within ten days that the documents sought are not in her possession, in which event the whereabouts of the documents are to be stated, if known.

[4] The applicant sought the following documents from the respondent:

> 4.1. a full schedule of the respondent's client list whilst in the employment of, or carrying on business with, or associated with Slender Wonder Medical Weight Loss (Pty) Ltd for the period 31 July 2016 to 31 July 2017;
>
> 4.2. a full schedule of the respondent's client list whilst employed by, or carrying on business with, or associated with Aquasculpt (Pty) Ltd for the period 31 July 2016 to 31 July 2017;

4.3. a full schedule of the respondent's client list whilst employed by, or carrying on business with, or associated with B-Med (Pty) Ltd for the period 31 July 2016 to 31 July 2017;

4.4. a full schedule of the respondent's client list whilst employed by, or carrying on business with, or associated with Rejuvenation (Pty) Ltd for the period 31 July 2016 to 31 July 2017;

4.5. a full schedule of Dr. Cecile Baard Aesthetics'(Pty) Ltd's client list for the period 31 July 2016 to 31 July 2017;

5.6. a full schedule of the respondent's client list whilst working in her personal capacity for the period 31 July 2016 to 31 July 2017;

5.7. all documentation pertaining to the respondent's employment and/or association with Slender Wonder Medical Weight Loss (Pty) Ltd;

5.8. all documentation pertaining to the respondent's employment and/or association with Aquasculpt (Pty) Ltd;

5.9. all documentation pertaining to the respondent's employment and/or association with B-Med (Pty) Ltd;

5.10. all documentation pertaining to the respondent's employment and/or association with Dr. Cecile Baard Aesthetics (Pty) Ltd;

5.11. the respondent's pay slips for the period 31 July 2016 to 31 July 2017;

5.12. the respondent's bank statements for the period 31 July 2016 to 31 July 2017;

5.13. Dr. Cecile Baard Aesthetics (Pty) Ltd's financial statements for the period 31 July 2016 to 31 July 2017;

5.14. Dr. Cecile Baard Aesthetics (Pty) Ltd's management accounts for the period 31 July 2016 to 31 July 2017;

5.15. all invoices issued by the respondent during the period 31 July 2016 to 31 July 2017; and

5.16. all invoices issued by Dr. Cecile Baard (Pty) Ltd for the period 31 July 2016 to 31 July 2017.

[6] After several reminders and on or about 22 May 2019, the respondent served and filed a response to the Rule 35(3) and (6) notices referred to above. The respondent refused to comply with the notices requiring the documents set out fully above and contended that:

6.1. she does not have in her possession or power or under her control the documents requested, alternatively, that the documents requested are confidential and privileged due to doctor-patient relationship;

6.2. she was never employed by, or carried on business with, or was associated with the entities referred to in the notices;

6.3. the information/documents does not exist, alternatively, is not relevant to the matter at hand; and

6.4. she does not have in her possession or power or under her control the documents as she was not employed by certain entities during the period 31 July 2016 to 31 July 2017.

[7] It is the case of the applicant that the respondent does not comply, in her response, with the applicable Rules of this court and that the response by the respondent is bad in law. It is now opportune to look at the legal framework governing discovery, in particular Rule 35(3) and (6).

The legal framework

[8] The provisions of Rule 35(3) and (6) state as follows:

> *"(3) If any party believes that there are, in addition to documents or tape 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 subrule (6), or to state on oath within ten days that such documents are not in his possession, in which event he shall state their whereabouts, if known to him.*
>
> ...
>
> *(6) Any party may at any time by notice as near as may be in accordance with Form 13 of the First Schedule require any party who has made discovery to make available for inspection any documents or tape recordings disclosed in terms of subrules (2) and (3). Such notice shall require the party to whom notice is given to deliver to him within five days a notice as near as may be in accordance with Form 14 of the First Schedule, stating a time within five days from the delivery of such latter notice when documents or tape recordings may be inspected at the office of his attorney or, if he is not represented by an attorney, at some convenient place mentioned in the notice, or in the case of bankers' books or other books of account or books in constant use for the*

purposes of any trade, business or undertaking, at their usual place of custody. The party receiving such last-named notice shall be entitled at the time therein stated, and for a period of five days thereafter, during normal business hours and on any one or more of such days, to inspect such documents or tape recordings and to take copies or transcriptions thereof. A party's failure to produce any such document or tape recording for inspection shall preclude him from using it at the trial, save where the court on good cause shown allows otherwise." (emphasis added).

[9] It is the applicant's case that the respondent was in the employ of the applicant from around May 2010 when a written employment agreement was entered into between the two parties. Pursuant to the conclusion of the employment agreement, the respondent acknowledged and agreed to be bound by a restraint of trade clause(s). The restraint of trade provisions were imposed for a period of six months from the date of termination of the employment agreement, subject to a further twelve months in the event of a breach. The applicant contends that a breach of the restraint of trade was committed by the respondents.

[10] The respondent terminated her employment with the applicant on 31 July 2016 and it is after this date of termination that the respondent allegedly breached the provisions of the restraint of trade clauses. As a consequence of the breach, the applicant seeks a statement and debatement of account in order to determine the full extent of the amounts that would ordinarily have been paid by the respondent to the applicant.

[11] It is on the basis of the restraint of trade provisions that the applicant considers it imperative and therefore relevant that she is placed in possession of all the information

pertaining to the respondent's employment at various entities during the subsistence of the 'restraint period'. The applicant also seeks certain information pertaining patients that were assessed by the respondent during the subsistence of her employment with the applicant and subsequent to her termination of employment with the applicant, during the 'restraint period'. Lastly, the applicant seeks information pertaining to remuneration received by the respondent during the 'restraint period' which would have been paid to the applicant.

[12] A further response of the respondent is that the information is not in her possession or under her control. A proper reading of Rule 35(3) goes further than the response furnished by the respondent. The respondent should further state on oath if she is not in such possession, the whereabouts of the documents if known to her. The whereabouts of the documents sought are not dealt with by the respondent in her response to the notice by the applicant.

[13] Rule 35(7) provides relief to any party who successfully persuades the court that the request made in terms of Rule 35 has not been complied with. The court has a discretion to enforce discovery and the guiding principle is relevance. Rule 35(7) provides that:

> *"(7) If any party fails to give discovery as aforesaid or, having been served with a notice under subrule (6), omits to give notice of a time for inspection as aforesaid or fails to give inspection as required by that subrule, the party desiring discovery or inspection may apply to a court, which may order compliance with this rule and, failing such compliance, may dismiss the claim or strike out the defence.*

[14] Mr Guldenpfennig for the respondent, contended that the documents/information sought to be discovered was correctly refused based on various grounds. He argued that the doctor-patient privilege was applicable to the documents sought and the respondent had to apply her Hippocratic Oath by keeping the information sought, secret. The court was also referred to section 14 of our Constitution which provides that everyone has the right to privacy, which includes the right not to have the privacy of their communications infringed. The National Health Act, 61 of 2003 also makes specific provision of protection of confidential information. It should, however, be noted that section 14(2)(b) thereof specifically permits disclosure of confidential information through a court order or if required by law.

[15] The court agrees with all the provisions relating to confidentiality of information or the application of the doctor-patient privilege as submitted by Mr Guldenpfennig. However, the information sought has nothing to do with matters that can be construed to interfere with the doctor-patient privilege. The applicant seeks records which should be in possession of the respondent for a certain period or to state under oath that such information is not in the possession of the respondent, in which event, she should state the whereabouts of such information if known.

[16] In the matter of ***Botha v Botha 1972 (2) SA 559 N***, Leon J considered the extent to which a claim to a privilege between a doctor and a patient can be raised. This case concerned two doctors who were subpoenaed to give evidence for the defendant. After being sworn, the doctors refused to give evidence of what the plaintiff and the defendant revealed to them during consultations which they had with the parties. The refusal was based on their ethical rules which prevented them from disclosing confidential information. Revealing such confidential information would have amounted to the breach of their Hippocratic Oath, so they testified. The court in

dismissing their reliance to the Hippocratic Oath had the following to say at page 560 para A-C:

> *"I am disposed to think that once the evidence is material and relevant it ought to be admitted without further ado. But if it is correct to hold that there exists a residual discretion in a court to refuse to allow such evidence to be given, even in circumstances such as those with which I am concerned, I am firmly of the opinion that such discretion should in this case be exercised in holding that the evidence must be given. It is in the public interest that justice must be done. The confidential relationship between doctor and patient must yield to the requirement of public policy that justice must be done and must be seen to be done..."* As already indicated above, this position has been clarified by section 14 of the National Health Act, 61 of 2003.

[17] Counsel for the respondent also relied on the Protection of Personal Information Act, 4 of 2013 (POPI) in refusing to divulge the information/documents sought. This argument was quickly disposed of by Mr Nowitz, appearing for the applicant by stating that the sections relied upon by the respondent do not find application in the matter at hand. There are only a limited number of POPI provisions that currently find application. Proclamation R25, 2014 declared section 1; Part A of Chapter 5; section 112; and section 3 of POPI to be operational with effect from 11 April 2014.

[18] The court was lastly referred to the provisions of the Promotion of Access to Information Act, 2 of 2000 (PAIA) as a justification to refuse to divulge the information/documents sought. I was referred to a number of sections in PAIA but in particular section 61, which deals with access to health records. The court enquired if

PAIA finds application at all in these provisions in the light of section 7 thereof. Section 7 of PAIA reads:

> *"7 **Act not applying to records requested for criminal or civil proceedings after commencement of proceedings***
>
> *(1) This Act does not apply to a record of a public body or a private body if -*
>
> *(a) that record is requested for the purpose of criminal or civil proceedings;*
>
> *(b) so requested after the commencement of such criminal or civil proceedings, as the case may be; and*
>
> *(c) the production of or access to that record for the purpose referred to in paragraph (a) is provided for in any other law.*
>
> *(2) Any record obtained in a manner that contravenes subsection (1) is not admissible as evidence in the criminal or civil proceedings referred to in that subsection unless the exclusion of such record by the court in question would, in its opinion, be detrimental to the interests of justice.*

[18] Counsel for the respondent conceded, correctly so in my view, that PAIA does not find application in these proceedings by virtue of section 7 as referred to above.

[19] The issue for determination is whether the information/documents sought in the notices for discovery served by the applicant on the defendant are relevant to these proceedings. If so, then the next question is whether the response by the respondent meets the required criteria as set out in Rule 35(3) and (6). It is common cause that the respondent refused to furnish the documents sought on various grounds as dealt with above.

[20] It is not in dispute that the respondent was at some period in the employ of the applicant where a written agreement was entered into which included a restraint of trade clause. This application does not concern the validity or otherwise of the restraint of trade clause. The purpose of the detailed information/documents sought by the applicant is for purposes of statement and debate of accounts in order to determine the extent of liability of the respondent. In my view, the information/documents sought are relevant to the main issues for determination. The argument raised on behalf of the respondent that they proposed a pre-trial conference in order to limit some of the issues cannot be sustainable. This is so because the pre-trial conference is held after closure of pleadings and when the matter is ripe for trial. I am not persuaded that the pre-trial conference would have been to any benefit to the applicant. I have already dealt with the other grounds for refusal and these do not find application for purposes of the information/documents sought.

[22] I have also demonstrated that the respondent has not fully complied with the provisions of Rule 35(3) in her response. It is not a sufficient response to allege that 'the documents do not exist, alternatively, are confidential and privileged due to doctor-patient relationship'. This statement is clearly contradictory since it creates a confusion on whether the documents are in existence but for the doctor-patient privilege or they are not in existence at all. This pattern runs through a number of responses provided by the respondent and these, are not responses as contemplated by the discovery process.

[21] The last issue for determination is the counter-application to separate the issues in terms of Rule 33(4). In her affidavit in support for the separation of issues, the respondent states the basis for the order sought as:

23.1. that an issue, or issues can conveniently be decided separately;

23.2. that the separation of the issues will materially shorten the litigation;

23.3. that same may be dispositive of the matter;

23.4. that an advantage of such an order outweigh the disadvantages; and

23.5. that there is no prejudice to the opposing party.

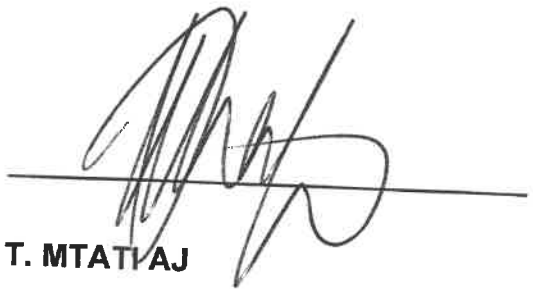
[24] The respondent does not, in my view, deal with each of the requirements set out above to motivate why it is in the interest of the parties to grant the order sought. Convenience is not just a formality but an appropriate case has to be made on the reasons why the court should grant the order. Sufficient information must be placed before the court to enable me to exercise my discretion in a proper and meaningful way. I am unfortunately not persuaded that a separation will be of any convenience to either of the parties.

[25] As a result, I make the following order:

Order

1. *The respondent is ordered to deliver a full and complete response to the applicant's notice in terms of Rule 35(3) and (6) dated 15 November 2018 and to make the documents listed in the notice available for inspection within ten days from the date of granting of this order;*
2. *It is ordered that, in the event of the respondent failing to comply with order 1 above, the applicant is authorised, on papers duly supplemented, to apply for the respondent's plea to be struck out and for judgment to be entered in favour of the applicant;*
3. *The respondent is directed to pay the costs of this application; and*

4. *The counter-application in terms of Rule 33(4) is dismissed with costs*



T. MTATI AJ

Acting Judge of the High Court of South Africa, South Gauteng Division,

Johannesburg

APPEARANCES

ON BEHALF OF THE APPLICANT: ADV M NOWITZ

INSTRUCTED BY: SCHINDLERS ATTORNEYS

ON BEHALF OF THE RESPONDENT: ADV GULDENPFENNIG SC

INSTRUCTED BY: CORNE GULDENPFENNIG ATTORNEYS

DATE OF HEARING: 11 OCTOBER 2019

DATE OF JUDGMENT: 30 OCTOBER 2019