IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION.PRETORIA

28/5/14

CASE NO: 16980/2011

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

28/05/2014 .....

DATE SIGNATURE

In the matter between

TECMED (PTY) LTD	**First Plaintiff / Respondent**
TECMED AFRICA (PTY) LTD	**Second Plaintiff / Respondent**

and

MINISTER OF HEALTH	**First Defendant/Applicant**
DEPARTMENT OF HEALTH	**Second Defendant/Applicant**
DIRECTOR-GENERAL OF NATIONAL HEALTH	**Third Defendant / Applicant**
MR KAREL EL.JO SMIT	**Fourth Defendant/Applicant**

JUDGMENT

Ismail J:

[1] The applicants in this application are the defendants in the main action and the respondents in this application are the plaintiffs in the main action. The parties will be referred to as the applicants and respondents in the course of this judgment. The applicants seek an order as follows:

1. Striking out the respondent's claim;
2. Directing the respondents to pay the costs of this application and the main action.

[2] The applicant served a notice in terms of Rule 35 (12) and 35 (14) of the Uniform Rules wherein they require the respondents to:

1. The first respondent (plaintiff) to produce for the inspection the following documents referred to in their particulars of claim and/or for purposes of pleading:

1.1 The licences to import refurbished or sell electro medical equipment issued to it from 1992 until the present;

1.2 The application forms for the aforesaid licences issued to it from 1992 until the present;

1.3 A copy of the contract to supply an electro-medical machine to Klerksdorp Oncology;

1.4 Copies of agreements concluded between the first respondent/plaintiff and Cancare (Proprietary) Limited for the

sale and delivery of *"certain electro-medical devices"*

1.5 Invoice (s) for the procurement of a new machine for the Durban Oncology;

1.6 Invoice(s) for the transport, airfreight and installation costs of a new machine for the Durban Oncology;

1.7 Proof of payment of the sum of R4 500 00.00 (four million five hundred thousand) allegedly paid to Durban Oncology by the respondents/ plaintiffs; and

1.8 Document(s) emanating from Durban Oncology threatening respondents with litigation to recover damages allegedly suffered by it.

2. The second respondent / plaintiff to produce for the inspection the following documents referred to in the particulars of claim and/or for purposes of pleading:-

2.1 The licences to import refurbished or sell electro medical equipment issued to it from 1992 until the present;

2.2 The application forms for the aforesaid licences issued to It from 1992 until the present;

2.3 A copy of the contract to supply an electro-medical machine to Klerksdorp Oncology;

2.4 Copies of agreements concluded between the second plaintiff and Cancare (Proprietary) Limited for the sale and delivery of "certain electro-medical devices";

2.5 Invoice(s) for the procurement of a new machine for the Durban Oncology;

2.6 Invoice(s) for the transport, airfreight and installation costs of a new machine for the Durban Oncology;

2.7 Proof payment of the sum of R4 500 000.00 (four million five hundred thousand) allegedly paid to Durban Oncology by the plaintiff; and

2.8 Document(s) emanating from Durban Oncology threatening respondents / plaintiffs with litigation to recover damages allegedly suffered by it.

[3] This application concerns the provisions of Rule 35(12) and Rule 35(14). It would be prudent to mention what these rules stipulate.

Rule 35(12):

Any party to any proceeding may at any time before the hearing thereof deliver a notice as near as may be 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 produce such document or tape recording for his inspection and to permit him to make a copy or transcription thereof. Any party failing to comply with such notice 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.

Rule 35(14)

After appearance to defend has been entered, any party to any action may, for purposes of pleading, require any other party to make available for inspection within five days a clearly specified document or tape recording in his possession which is relevant to a reasonably anticipated issue in the action and to allow a copy or transcription to be made thereof.

[4] Mr Nothshe SC, acting on behalf of the applicants, in his address in court submitted that the provisions of Rule 35 (14) empowered a pleader who is not permitted to request further particulars to ask for a specific document in order to allow him to plead. The opposite party must show that the document is either available or not available to it. The document sought must relate to an anticipated issue. The party from whom such a document is sought cannot be heard to say that the document is irrelevant and that it should not be given.

[5] Regarding the issue concerning para 1.1 of the request *"the licences to import refurbished or sell electro medical equipment issued to it from 1992 until the present",* the respondents stated "the first plaintiff and/or.. " referred to collectively and singularly as the plaintiff.

[6] He submitted as far as the request in para 1.1 is concerned the respondent (first plaintiff) was obliged to answer this. The deponent on behalf of the plaintiff stated that "the licences contemplated in this paragraph are not relevant to the reasonably anticipated issues in dispute in this action. The relevant licence,

issued to the first respondent / plaintiff, dated 11 October 2005, is however available for inspection and copying. To the extent that the respondents/ plaintiffs are still in possession of certain of the other licences herein, referred to, same are available for inspection at the offices of the plaintiffs' attorney of record.

[7] From the response mentioned above, it is clear that the respondent/ plaintiff informed the applicant that the 2005 licence was available for inspection and copying. Since the response the applicants / defendants failed to accept the invitation to examine the documents or to make copies thereof.

[8] Mr Nowits on behalf of the respondents in his response submitted that the only relevant licence was the 2005 licence and that the request seeking licences preceding 2005 was therefore irrelevant and illogical to the dispute between the parties.

[9] The same question was asked in respect of the second respondent by the applicant in its request at para 2.1. A similar response was given at para [13]. I will not for the purposes of this judgment repeat it as it is similar to the request in para 1.1.

The request in terms of para 1.4 being *"Copies of agreements concluded between the first plaintiff and Cancare (Proprietary) Limited for the sale and delivery of "certain electro-medical devices".*

Mr Novits in his response to the request referred the court to para

[15] of the pleadings at page 10.

[10] Mr M L Ledwaba deposed to the affidavit as follows at para 12.1 and 12.2

"12.1 In paragraph 15 of the particulars of claim, the respondents avers that they sold a machine to CanCare (Pty) Limited to be used for the treatment of cancer patients.

12.2 There must be copies somewhere in the agreement concluded between the first plaintiff and Chemcare (Pty) Limited for such sale."

[11] *Herbstein and Van Winsen* 5th edition at page 209 mention that Rule 35 (12) applies to and that it can be exercised at any time even

before the pleadings are closed. The authors are of the view that there is some conflict in the reported judgments regarding whether a party who received a notice in terms of Rule 35 (12) may object to them as not being relevant .

In Magnum Aviation Operations v Chairman, National Transport Commission, and Another 1984 (2) SA 398 (Vermooten,

J expressed the view that Rule 35 (12) is not qualified by a requirement of the relevance and that once the document has been referred to it must be produced.

In *Universal City Studios v Movie Time* 1983 (4) 736 (D) at 747 A to 747D where Booysen J stated the following:

"Mr *Gordon* submitted that the literal meaning of Rule 35 (12) was that a party who has referred to a document in his pleadings or affidavits is obliged to produce such document in compliance with the notice; that there cannot exist any grounds which may justify him refusing to produce it. It seems to me though that it must be implied that the document should be relevant to the issues between the parties and therefore reasonably required by the opposing party before it can be said to be hit by the provisions of this Rule. So, for example, if a wife seeking an interdict to prevent her husband from assaulting her were to allege that he assaulted her shortly after she had read the evening newspaper, there being no relevance alleged of the paper, one could hardly imagine that her husband, the respondent, would be entitled to production of that newspaper.

Mr *Gordon* submitted further that, if relevance were to be a requirement, the *onus* of justifying non-production must be on the recipient of the notice. In support of this proposition he relied on *Quilter v Heatley* [1883] 23 ChD 42 at 51. That case was concerned with the provisions of Order XXXI Rule 15, which read as follows:

"Every party to a cause or matter shall be entitled at any time, by notice in writing, to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such cause or matter, unless he shall satisfy the Court or a Judge that such document relates only to his own title, he being a defendant to the cause or matter, or that he had some other cause or excuse which the Court or Judge shall deem sufficient for not complying with such notice, in which case the Court or Judge may allow the same to be put in evidence on such terms as to costs and otherwise as the Court or Judge shall think fit."

F At 51 BOWEN LJ stated that:

"Order XXXI, Rule 4, provides for immediate production of any documents which a party has referred to in his pleadings or affidavits. The party against whom application is made must produce them unless he can show good cause why he should not. If he refuses, the party applying can go to the Judge, who may refuse the application if he sees good reason for so doing. What is the case here? I not only see no reason why it should be refused, but every reason why it should be granted. In my opinion the *onus* is on the refusing party, but if the *onus* were on the applicant, I think he has discharged himself from it."

[12] Mr Nowits on the other hand submitted during his address in court that the ambits of Rule 35(12) and 35 (14) were limited. He referred to *Gorfinkel v Gross, Hendler & Frank* 1987 (3) SA 766 Friedman J dealt with the limitations of Rule 35(12) and specifically dealt with the aspect of privilege and relevance and said the following:

"With regard to relevance there must also, in my view, be some limitation read into Rule 35(12). To construe the Rule as having no limitation with regard to relevance could lead to absurdity. It would be absurd to suggest that the Rule should be so construed that reference to a document would compel its production despite the fact that the document has no relevance to any of the issues in the case. It is not difficult to conceive of examples of documents which are totally irrelevant. Booysen J in the *Universal City Studios* case gave one such example. What is more difficult to decide is where the line should be drawn. A document which has no relevance whatsoever to the issues between the parties would obviously, by necessary implication, be excluded from the operation of the Rule. But would the fact that a document is not subject to discovery under Rules 35(1), 35(3) or 35(11) render it immune from production in terms of Rule 35(12)?

In my view the parameters governing discovery under Rules 35(1), 35(3) and 35(11) are not the same as those applicable to the question whether a document is irrelevant for the purposes of compliance with Rule 35(12). A party served with a notice in terms of Rule 35(1) is obliged to make discovery of documents which may directly or indirectly enable the party requiring discovery either to advance his own case or to damage that of his opponent or which may fairly lead him to a train of enquiry which may have either of these consequences. Documents which tend merely to advance the case of the party making discovery need not be disclosed. As Rule 35(12) can be applied at any time, ie before the close of pleadings or before affidavits in a motion have been finalised, it is not difficult to conceive of instances where the test for determining relevance for the purposes of Rule 35(1) cannot be applied to

documents which a party is called upon to produce under Rule 35(12), as for example where the issues have not yet become crystallised

Further on the learned Judge stated:

"Having regard to the wide terms in which Rule 35(12) is framed, the manifest difference in wording between this subrule and the other subrules, ie subrules (1), (3) and (11) and the fact that a notice under Rule 35(12) may be served at any time, ie not necessarily only after the close of pleadings or the filing of affidavits by both sides, the Rule should, to my mind, be interpreted as follows: *prima facie* there is an obligation on a party who refers to a document in a pleading or affidavit to produce it for inspection if called upon to do so in terms of Rule 35(12). That obligation is, however, subject to certain limitations, for example, if the document is not in his possession and he cannot produce it, the Court will not compel him to do so. (See the *Moulded Components* case *supra* at 461D - E.) Similarly, a privileged document will not be subject to production. A document which is irrelevant will also not be subject to production. As it would not necessarily be within the knowledge of the person serving the notice whether the document is one which falls within the limitations which I have mentioned, the *onus* would be on the recipient of the notice to set up facts relieving him of the obligation to produce the document. Cf *Quilter v Heatly* (1883) 23 ChD 42 at 51.

[13] Regarding Rule 35 (14), referred to above, Mr Notshe SC submitted that the plaintiff had failed to deliver the document and therefore made it difficult for the applicants to plead. In view of the plaintiff's refusal to provide these documents the plaintiff's particulars of claim should be struck off with costs.

[14] I do not subscribe to counsel's submission that the plaintiff refused to produce the document, as the plaintiff in several instances, more particularly in respect of para 1.1; 1.3; 1.5; 1.6 and 1.7 stated that the documents were available for inspection at their offices. To date of the hearing this application, the applicants have not inspected the documents which were available. In respect of the

first plaintiff the only documents which were not acceded to was in respect of para 1.2 and 1.4.

In respect of para 1.2 the plaintiff stated that the documents sought by the defendant were not referred to in the particulars of claim and therefore the defendant was not entitled to same.

Regarding para 1.4 the plaintiff stated that the request is couched in such a manner that it is unable to respond thereto...(unable to properly respond thereof) ****

Mr Nowits did not address the court in terms of para 2.1 to 2.8 and the defendant's counsel submitted that they were entitled to the documents, Mr Nowits submitted that the argument relating to the first plaintiff was identical to the request in respect of the second plaintiff. The request in 2.1 to 2.8 will be a mere duplication .He referred the court to two cases regarding Rule 35 (14) namely the *Cullinan Holdings v Mamelodi* 1992 (1) SA 645 (T) at 645I. The head note reads as follows:-

"Rule 35 (14) of the Uniform Rules of Court does not create a method whereby a litigant, by making use of a generic description can cast a net with which to fish for semi-known documents. It is a remedy which has been created for particular circumstances. It requires the calling for a specific document of which the applicant has knowledge and which he can describe precisely. On then can he, by utilising rule 35(14) , anticipate the normal discovery provided by Rule 35 (1)"

[15] From Mr Ledwaba's affidavits, paragraph [10] supra, referred to above, he seemed to be of the view that there must be a document. This is sheer speculation on his part. The documents

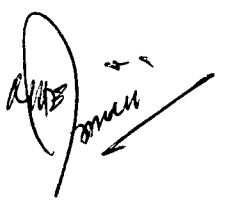
[16] Having heard both counsel and inparticular the arguments advanced by the parties, I am of the view that the documents that are available for inspection should have been inspected and therefore the order sought by the defendant cannot be sustained.

[17] Mr Nowits submitted that the court should make an order on attorney and own client scale in view of the fact that the defendant, has adopted a dilatory approach which is frustrating the proceedings. That an exception was previously taken which was dismissed, and further that summons was issued in this matter on 15 March 2011 and to date the defendant has not pleaded.

[18] I do not agree with Mr Nowits submissions regarding making an order for costs on a punitive scale. I am not convinced that the applicant should be mulcted with cost on punitive scale.

[19] Accordingly I make the following order:

The application is dismissed with costs.



APPEARANCES:

For the applicants / defendants : Adv Notshe SC assisted Adv Adv instructed by Mponya Ledwaba Inc, Pretoria

For the respondents/plaintiff: Adv M Nowitz instructed by Schindler Attorneys c/o Friedman Hart Solomon & Nicolson , Pretoria.

Date of Hearing: 3 March 2014.

Judgment delivered on: April 2014