IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 28153/2009

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

[redacted] 9/1/23

In the matter between:

MOGOBU ENOS MORENA **APPLICANT**

and

MINISTER OF SAFETY AND SECURITY **FIRST RESPONDENT**

INSPECTOR ERWEE **SECOND RESPONDENT**

JUDGMENT

MANAMELA AJ

INTRODUCTION

[1] This is an opposed application in terms of Rule 35(7) of the Uniform Rules of Court. The applicant seeks an order compelling the respondents to comply with the applicant's notice in terms of Rule 35(3), within 10 days of the order, as well as costs on an attorney and own client scale.

[2] The applicant is the plaintiff in the main action between the parties, and the respondents are the first and the second defendants, respectively. Pleadings in the main action have closed. The Applicants did not file any records relating to the main action in order to assist the court to establish the nature of the main action and purposefully the relevance of the docket to the main action.

[3] In opposition, the respondent seeks that the applicant's application to compel in terms of Rule 35(3) be dismissed, the applicant's Replying Affidavit be rejected, and costs hereof, on the basis that the records cannot be found

FACTUAL BACKGROUND

[4] On 13 May 2019, the applicant served a Rule 35(3) notice requesting the respondents to make Case Docket Number 141/09/2001 ("docket") available for inspection within 10 days in accordance with Rule 35(6) or to state under oath that such docket are not in its possession, or if not in its possession, to disclose its whereabouts, if known.

[5] Upon receipt of the notice, the respondent addressed a letter to the applicant's attorneys, confirming that the docket is available for inspection at the respondents' attorneys' offices.

[6] On the basis of this confirmation, the applicant's attorneys made an attendance at the respondents' attorneys' offices on 5 December 2019, for purposes of inspecting the docket. The docket made available for inspection was found to be an incorrect docket, albeit an undertaking was made by the respondents' attorneys to provide the correct docket at a later stage.

[7] On 5 February 2020, the applicants' attorneys addressed a letter to the respondents' attorneys, in an attempt to follow-up on the correct docket. Further correspondence was addressed in this regard on 11 March 2020, 26 June 2020, and 13 October 2020, respectively. In the last correspondence preceding this application, the applicant's attorneys stated that the matter had to be removed from the trial roll, as a result of the failure to discover the docket as well as the fact that the matter could not proceed to pre-trial conference stage. The respondents tendered no reply to any of these mentioned correspondences.

[8] Following service of the applicant's application to compel in terms of Rule 35(7), the respondents filed a notice of intention to oppose on 3 August 2021, after the matter was enrolled on the unopposed role. By agreement, the respondents had to deliver its Answering Affidavit within 15 days of the notice of intention to oppose. The respondent delivered an incomplete Answering Affidavit on 24 August 2021, by email, and a complete copy of was hand delivered on 31 August 2021, however, pages 3,5,6 and 7 of this hand delivered Answering Affidavit were missing. This is disputed by the respondents.

[9] The Respondents, in its answering affidavit pointed out that the request for docket was not accompanied with the further information to enable its officials to locate the docket. The Respondents states that the relevant further information, includes, the details of the police station where the docket was held, the names of the complainant, the nature of the complaint, the names of the suspects, if any and the details of the investigating officer. From the Respondent's perspective the luck of these information delayed in obtaining the correct docket. Furthermore, the fact that the docket was opened some 20 years back, also exacerbated the lack of progress in tracing the correct docket. The Respondent provided a copy of the tracing record of the last entry relating to the requested docket, which shows that it was last booked out to certain Captain Makopo at Atteridgeville Police station on 1 September 2005, and whose whereabouts are also unknown.

[10] The main ground for opposing the applicant's application is that the records cannot be found despite diligent search and that, if granted, the order will simply be academic.

ISSUES OF DETERMINATION

[11] The court is charged with the determination of whether the respondent has complied with the applicant's Rule 35(3) notice.

LEGAL PRINCIPLES

[12] Rule 35(1) and (2) requires from a party to an action, that has been requested thereto, to make discovery on oath within 20 days of all documents and tape recordings relating to any matter in question in such action which are or have at any time been in the possession or control of such party.

[13] If a party is not satisfied with the other party's discovery, it may make use of the procedure provided for in Rule 35(3) to obtain inspection of documents which that party believes are in the possession of the other party and which are relevant to any matter in question. Rule 35(3) provides that:

> "(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 such party to make same available for inspection in accordance with subrule (6), or to state on oath within 10 days that such documents or tape recordings are not in such's party's possession, in which event the party making the disclosure shall state their whereabouts, if known."

[14] The purpose of discovery is to narrow down the issues and to eliminate points that are indisputable. Discovery of such documents are intended to assist the parties and the court to discover the trust and, in doing so, to contribute to a just

determination of the case. In *Durbach v Fairway Hotel Ltd*[1] Tredgold, J said the following:

> "The whole object of discovery is to ensure that before trial both parties are made aware of all the documentary evidence that is available. By this means the issues are narrowed and the debate of points which are incontrovertible is eliminated. It is easy to envisage circumstances in which a party might possess a document which utterly destroyed his opponent's case, and which might yet be withheld from discovery on the interpretation which it is sought to place upon the rules. To withhold a document under such circumstances would be contrary to the spirit of modern practice, which encourages frankness and the avoidance of unnecessary litigation."

[15] In *Breitenbach v Breitenbach*[2] Ledwaba, J states that subrule (3) is an instrument to assist a party that is dissatisfied with the inadequate discovery of another party. Subrule (3) cannot be relied upon before the provisions of subrule (1) are invoked and following compliance with subrule (2). Subrule (7) should be utilised where a party is dissatisfied with the discovery or supplementary discovery that has been made and remedies under subrule (3) have been exhausted.[3]

[16] In Herbstein & Van Winsen[4] it was stated that:

> "Our law ... recognizes that proper mutual discovery in litigation and arbitration is in the public interest in that it promotes settlements; it reduces [the chances of] a party being taken by surprise; and enables the Judge to decide the case in the light of contemporary documentary material which is often more valuable than the oral testimony."

---

[1] 1949 (3) SA 1081 (SR) at 1083.
[2] [2008] JOL 21646 (T).
[3] See *Tractor & Excavator Spares (Pty) Ltd v Groenedijk* 1976 (4) SA 359 (W).
[4] Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa 4ed (1997) by the late Louis de Villiers van Winsen, Andries Charl Cilliers and Cheryl Loots and edited by Mervyn Dendy 582.

And furthermore, that:

"...the scope of discovery ...is wide. It extends to documents having only a minor or peripheral bearing on the issues, and to documents which may not constitute evidence but which may fairly lead to an enquiry relevant to the issues."

[17] Rule 35(7) describes the court's discretion to compel or not to compel discovery or inspection. This discretion is clear from the wording of the subrule which provides that:

> "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 subrule and, failing such compliance, may dismiss a claim or strike out the defence". (Emphasis added)

[18] It is trite that the court deciding an application in terms of Rule 35(7) exercises a discretion whether or not to grant the relief sought. The relevance of the documents sought will be one of the factors which will have an influence on the exercise of that discretion. Relevance is determined having regard to the issues between the parties.[5]

ANALYSIS

[19] An application to compel discovery in terms of Rule 35(7) is usually made before the trial as in the present case, but it has been held that such an application can be made during the trial, even after evidence has been led when the need arises.[6]

---

[5] *Haupt tla* Soft *Copy v Brewers Marketing Intelligence (Pty) Ltd* 2005 (1) SA 398 (C) at 404; *MV Alina 11 Transnet .Med v MVAlina 11* 2013 (6) SA 556 (WCC) para 24 to 25.

[6] *Jacobs v Minister van Landbou* 1975 (1) SA 946 (T) at 952F-H.

[20] The process of is intended to assist the court in the main action in the determination of a fair trial. Rule 35(1) and (2) require a party to any action who has been requested thereto, to make discovery of all documents and tape recordings 'relating to any matter in question in such action'. The discovery is done on affidavit 'as near as may be in accordance with Form 11 of the First Schedule.

[21] There is nothing preventing the trial court from exercising its discretion whether or not it grants an order compelling discovery of the required documents and further particulars relevant to the issues between the parties. The trial court, in the premise, can alter the judgment by granting a fresh application for an order compelling discovery of the required documents and further particulars relevant to the issues between the parties.

[22] Neither party has an absolute right to discovery and further particulars. The court has a discretion whether or not to order compliance with the Rule.[7]

[23] It is the applicant's case that a date was set for the inspection of the docket sought under discovery notice. Upon inspection it was an incorrect docket presented by the respondents' attorneys. The respondents have failed to reply to the numerous letters addressed to the respondents in regard to the correct docket nor stated why the docket it not in their possession.

[24] The party who is not satisfied with the discovery bears the onus of proving its existence or relevance. From the respondent's answering affidavit, it is apparent that the existence of the records is uncertain, at least at the time an attempt was made to allow discovery of the docket at the respondent's attorney's offices, the period that has lapsed since the docket was opened raises further concerns. *Rellams (Pty) Ltd v James Brown and Hamer Ltd* 1983 (1) All SA 47 (N) it was held that each application of this nature must be considered on its own facts and

[7] *Continental Ore Construction v Highveld Steel and Vanadium Corporation Ltd* 1971 (4) SA 589 (W) at 594E-595D.

circumstances and whether on the totality thereof an applicant has shown on that there as documents which require production.

[25] The applicant had a duty to illustrate the relevance and the and the importance and relevance of the docket. See also *Haupt tla Soft Copy v Brewers Marketing Intelligence (Pty) Ltd* 2005 (1) SA 398 (C) at 404 and *MV Alina 11 Transnet.Med v MVA/ina 11* 2013 (6) SA 556 (WCC) para 24 to 25 regarding relevance and the influence thereof on the court's discretion. The docket is relevant to the determination of the main action.

[26] I have a measure of sympathy for the applicant as the respondents have failed to comply with the rules as they should have done, and the dismissal of the applications should in no way be construed as a finding that the respondents are not required to respond to the requests or notices served upon them by the applicants. This judgment should therefore not be seen as an inducement to practitioners to be lax and ignore the time limits imposed by the rules which are there to ensure that litigation is expeditiously brought before court, and it may well be that if these applications had been properly motivated and the relevant facts properly laid before me, I would have had no difficulty in granting relief. But the terse allegations that were made were insufficient to allow me to exercise a discretion.

COSTS

[27] The Applicant argues for a punitive cost order to be awarded against the Respondent stating that there were no convincing reasons for the failure to comply with rule 35(3) notice. I am of the view that the cost sought by the applicant is inappropriate.

[28] I therefore make the following order: -

(a) The application is dismissed with costs.

P N MANAMELA

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Date of hearing: 22 August 2022

Judgment delivered: 09 January 2023

APPEARANCES:

Counsel for the Applicant:	Adv. RC Netshianda
Attorneys for the Applicant:	MB Mokoena Attorneys
Counsels for the Respondents:	Adv. BK Hlangwane
Attorneys for the Respondents:	The State Attorney, Pretoria