

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)**

CASE N0:35083/2008

DATE: 12 FEBRUARY 2010

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

E G[...]

Applicant

and

J[...] C[...] G[...]

Respondent

JUDGMENT

MAKGOKA. J:

[1] The central question in this application is whether or not the respondent has complied with a notice served by the applicant in terms of rule 35 (3) on the respondent.

[2] The brief factual background is the following: the respondent delivered her discovery affidavit on 10 December 2008. On 28 May 2009, the applicant served a notice in terms of rule 35 (3) asserting that there are in addition to the documents discovered by the respondent, certain specified documents, set out in the notice, not discovered. There was no response to this notice, and on 3 October 2009, the applicant served an application to compel the respondent's compliance with the said notice. That application was inadvertently set down for 10 January 2010, being a Sunday.

[3] Meanwhile, on 18 December 2009, the respondent delivered an answer in terms of rule 35 (3), in the form of an affidavit, dealing *seriatim*, and comprehensively with the documents mentioned in the applicant's rule

35 (3) notice. In my view, that should have been the end of the matter, as far as compliance with rule 35 (3) notice was concerned, bar costs.

[4] On 3 February 2010, the applicant delivered a “replying affidavit”, wherein the applicant mainly deals with the question whether the respondent’s physiotherapist practice falls within the accrual (the parties are married out of community of property, their divorce action pending before this court on 15 March 2010). As would become clear later, I view this so-called replying affidavit totally irrelevant and ill-advised at this stage. As indicated in the introduction to this judgement, the question to be decided is whether the respondent has complied with the rule 35 (3) notice served on her.

[5] Rule 35 (3) of the Uniform Rules of Court reads as follows:

“If a party believes that there are, in addition to documents or tape recordings disclosed... 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 ten days that such documents are not in his possession, in which event he shall state their whereabouts, if known to him. ” (my emphasis)

[6] In my view, the above provisions are unambiguous. All what the party receiving a rule 35(3) notice has to do, is first, to make the documents listed in rule 35 (3) notice available for inspection and /or secondly, in the event he does not have the documents, to depose to an affidavit stating the whereabouts of such documents.

[7] In the present case, it is my view that the respondent has more than complied with the sub-rule. She has deposed to an affidavit, dealing with each document or a bundle of documents, listed in the rule 35 (3) notice, and where the documents were available, tendering the inspection thereof, at the office of her attorneys. This is what rule 35 (3) provides for.

[8] Mr. *Bofilatos*, for the applicant, argued that this is not in compliance with the rule 35 (3) notice, contending that the respondent had to deliver a document along the same format of a discovery affidavit, with the schedules normally accompanying a discovering affidavit. I do not agree. Rule 35 (3) does not require that, as is clear from its provisions set out above.

[9] Mr. *Bofilatos*, also sought to argue the adequacy of the respondent’s answer to the rule 35 (3) notice. On the other hand, Mrs *Cilliers*, for the respondent, argued that this court is not competent, at this stage and on these papers, to go beyond the answer. If the applicant is not satisfied with the adequacy of the answer, it is upon the applicant to bring a separate application in terms of rule 35 (7), to compel “further and better discovery”. I agree with Mrs *Cilliers*’ argument, in view of the provisions of rule 35 (3), read with rule 35

(6), in terms of which provision is made for production and inspection of documents discovered.

[10] I am therefore satisfied that the respondent has complied with the applicant's notice in terms of rule 35 (3).

[11] In my view, this application should never have been on the opposed roll. The respondent had already, on 18 December 2009, complied with the applicant's rule 35 (3) notice, albeit late. The applicant was then entitled to costs on the unopposed scale. I therefore fully agree with Mrs *Cilliers* that the applicant did not follow the correct procedure in attempting to force "further and better discovery".

Costs

[12] Mrs. *Cilliers* in her heads of argument, pressed for costs on attorney and client scale, in the light of the applicant's persistence with this application, despite fore-warning that this application was not necessary in view of the respondent's compliance. It is my view that this application was ill-considered, but not *mala fide*. As a result I do not think a punitive costs order is warranted.

[13] Given the view I take that this application should not have been persisted with after the respondent had delivered her answer to the applicant's notice in term of rule 35 (3), I think a proper order would be to remove the matter from the roll, as there is presently no *lis* between the parties, except the issue of costs. With regard to costs, I think it is fair that the respondent bear the costs occasioned by the application to compel compliance with the rule 35 (3) notice, on an unopposed scale. The applicant, on the other hand, should be ordered to pay the costs occasioned after 18 December 2009, to date of argument of this application.

[14] As a result I make the following order:

1. The application is removed from the roll.
2. The respondent is ordered to pay the costs of the application up to and including 18 December 2009. on an unopposed scale:
3. The applicant is ordered to pay the costs of the application from 18 December 2009 to date of argument of the application, on an opposed scale.

T.M. MAKGOKA

DATE HEARD: 10 FEBRUARY 2010

JUDGEMENT HEARD : 12 FEBRUARY 2010

FOR THE APPLICANT: ADV G BOFILATOS

INSTRUCTED BY : *R N B ATTORNEYS,*

PRETORIA

FOR THE RESPONDENT: ADV S. CILLIERS

INSRTUCTED BY: *JOHAN VAN DE VYVER*

ATTORNEYS, PRETORIA