

FORM A
FILING SHEET FOR EASTERN CAPE, PORT ELIZABETH

PARTIES: **PATRICK FONDLING v MIN OF CORRECTIONAL SERVICES**
NOT REPORTABLE

Case Number: **584/08**

- High Court: **EASTERN CAPE, PORT ELIZABETH**
- DATE HEARD: **9 JUNE 2009**
- DATE DELIVERED: **11 JUNE 2009**

JUDGE(S): **JANSEN J**

LEGAL REPRESENTATIVES –

Appearances:

- for the Applicant(s): **ADV HARTLE**
- for the Respondent(s): **ADV DALA**

Instructing attorneys:

- Applicant(s): **JAMES PHILLIPSON ATT**
- Respondent(s): **STATE ATTORNEY**

CASE INFORMATION -

- ***Nature of proceedings:***
- ***Key Words:***
- ***Summary:***

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, PORT ELIZABETH

NOT REPORTABLE

Case No.: 584/08

Date delivered: 11 June 2009

In the matter between:

PATRICK FONDLING

Plaintiff/Applicant

and

THE MINISTER OF CORRECTIONAL SERVICES

Defendant/Respondent

JUDGMENT

JANSEN, J:

The plaintiff instituted an action against the defendant claiming damages and further relief. The cause of action is an alleged assault committed on the plaintiff on 25 November 2005 whilst the plaintiff was detained as a prisoner at St Albans Prison in the district of Port Elizabeth. The alleged assault was committed according to the Particulars of Claim by one Zeelie, one Rockman, one Williams, one Simon and another person known to the plaintiff as "Psycho". It is alleged in the Particulars of Claim that the said persons were all employees under charge of the defendant in the Department of Correctional Services.

A conference in terms of the provisions of the Rule of Court 37 was held at the chambers of defendant's counsel on 14 May 2009. Mr **Dala**, counsel for the defendant, was present. Paragraphs 14 and 15 of the Minutes of the Conferences reads as follows:

“14. The Plaintiff requested the Defendant to admit that members ZEELIE, ROCKMAN, WILLIAMS, SIMONS and another known to the Plaintiff only as “PSYCHO” were investigated by the Department of Correctional Services arising from the assault on the Plaintiff on 25 November 2005 and the Defendant indicated in response that the Plaintiff was not entitled to the particularities sought as it is privileged. The Plaintiff thereupon requested the Defendant to indicate on what basis privilege is claimed and the Defendant responded by indicating that the privilege is legal privilege.

15. The Plaintiff requested the Defendant to make the investigation dossiers pertaining to the investigations as referred to in the previous paragraph available to the Plaintiff for immediate inspection and the Defendant refused to do so indicating that the documents are privileged and the nature of the privilege is legal privilege.”

Plaintiff filed a notice in terms of Rule 35(3). The plaintiff requires discovery (paragraph 3 of the notice) of “investigation dossier(s) in respect of the assault on plaintiff pertaining to members Rockman, Zeelie, Williams and Simons including reports, minutes, witness statements, photographs, correspondent and memoranda etc.” The defendant’s response to paragraph 3 of the notice

is that the plaintiff is not entitled to the information sought. The defendant's stance in the matter caused the plaintiff to apply to this Court by way of Notice of Motion for an order in the following terms:

"Directing that the Respondent make available to the Applicant the original investigation dossiers in respect of the assault on the applicant pertaining to Department of Correctional Services members Rockman, Zeelie, Williams and Simons including reports, minutes, witness statements, photographs, correspondence and memoranda."

In his founding affidavit the plaintiff's attorney refers to the Rule 35(3) Notice and the defendant's reply thereto as well as to the contents of paragraphs 14 and 15 of the Rule 37 Minute. He emphasises that the defendant has placed on record that his refusal to make available the investigation dossiers is based on the belief that the dossiers are legally privileged. He further submitted that respondent has no basis upon which he can refuse to make the dossiers available.

The defendant opposes the application. On his behalf a legal officer employed by the defendant, Cecil Xola Peyi states under oath that the investigation dossiers are privileged. He does not state on what ground privilege is claimed. With reference to the plaintiff's attorney's submission that a defendant has no basis upon which he can refuse to make the investigation dossiers available to the plaintiff, Peyi submits that the plaintiff has failed to

lay a proper and complete foundation in the founding affidavit for the exercise of the right that the plaintiff seeks to enforce in adjudication of the application. He further submits that this Court cannot “permit this application to succeed where the manner of the validity of such invocation cannot properly be considered, as the instant application” (*sic*). It was never denied on behalf of the defendant that an enquiry in terms of the Department’s Standing Orders had been held. It was also not in dispute that the minutes of such an enquiry are in possession of the defendant.

Mr **Dala**, on behalf on the defendant, in actual fact only opposed the application on the basis that the plaintiff failed to lay a sufficient foundation for the relief sought. He specifically emphasised the fact that nowhere in the founding affidavit is it detailed as to why the plaintiff required the documentation. For his submission that the proper foundation had not been laid he firstly relied on the decision of ***Clutchco (Pty) Ltd v Davis*** 2005 (3) SA 486 (SCA) where it was held by the Supreme Court of Appeal that the respondent in that matter had failed to lay a proper foundation as to why the companies records were required. That case can clearly be distinguished from the present one as the application in that matter was in terms of the provision of section 50(1)(a) of the Promotion of Access to Information Act No. 2 of 2000. Mr **Dala** further relied on a *dictum* by Cameron J in ***Van Niekerk v Pretoria City Council*** 1997 (3) SA 839 (T) where he quoted from the head note “that an applicant had to lay a proper foundation for why the document is reasonably required for the exercise or protection of his/her rights”. This principle was laid down in a matter where an order in terms of section 23 of

the Interim Constitution was made for a report in possession of the respondent to be made available to the applicant. Discovery in terms of the Rules of Court was not in issue. Rule 35 relied upon by the plaintiff requires 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”.

It was never the defendant’s case that the minutes of the enquiry are not relevant to the issue in question in the action between the parties. The defendant refused to discover the minutes because he claims it to be privileged. When it was enquired from the defendant’s legal representative on what basis privilege is claimed the reply came that “the privilege is legal privilege”. In his heads of argument Mr **Dala** made the submission that “it is a trite legal principle that statements of witnesses taken for purposes of the proceedings ... shall be omitted from the schedules.” That statement is correct, but that is not what the plaintiff seeks. The plaintiff is clearly not entitled to statements taken of witnesses for the purposes of the proceedings. Ms **Hartle**, appearing on behalf of the plaintiff, referred me to *Schwikkard & Van der Merwe **Principles of Evidence*** 2nd Edition at 134 where legal professional privilege is discussed. It is specifically stated that before legal professional privilege can be claimed the communication in question must have been made to a legal adviser acting in a professional capacity, in confidence, for the purpose of pending litigation or for the purpose of obtaining professional advice. The client may claim the privilege and the lawyer can claim the privilege on behalf of his client once the client has made

an informed decision. Nothing was placed before me that the communications in question have been made to a legal adviser acting in a professional capacity in confidence for the purpose of pending litigation.

It was submitted on behalf of the defendant that the plaintiff in essence seeks a trial advantage. That statement loses sight of the fact that that is precisely what the defendant has at the moment. It is inevitable that at the enquiry conducted the plaintiff would have testified. His evidence is available to the defendant. His evidence is part of the information the defendant is withholding from the plaintiff.

Mr **Dala** furthermore relied upon the decision of ***Msimang v Durban City Council and Others*** 1972 (4) SA 333 (DCLD) where it was held that where the defendant had convened a fact-finding tribunal in contemplation of legal proceedings to determine relevant issues, the plaintiff in that case would not be entitled to witness statements made before the trial. In the instant case it was not alleged by Peyi that when the investigation by the Department was held litigation by the plaintiff had been contemplated. It was only on that basis that the documents in ***Msimang***'s case were ruled to be protected by legal professional privilege.

In the result the following order is made:

1. The defendant is directed to make available to the plaintiff the original departmental investigation dossiers in respect of the assault of the

plaintiff pertaining to Department of Correctional Services members Rockman, Zeelie, Williams and Simons, including reports, minutes, witness statements, photographs, correspondence and memoranda.

2. The defendant is directed to make payment of the costs of this application.

J C H JANSEN

JUDGE OF THE HIGH COURT