

**THE REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG HIGH COURT DIVISION, PRETORIA**

Case no: **95282/2016**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: **30 JUNE 2024**

SIGNATURE

In the matter between:

THE EDITOR-IN-CHIEF OF THE
STAR NEWSPAPER

First Applicant/Defendant

INDEPENDENT MEDIA LIMITED

Second Applicant/Defendant

ALLIED PUBLISHING LIMITED

Third Applicant/Defendant

CAXTON LIMITED

Fourth Applicant/Defendant

and

PROPHET SAMUEL RADEBE MBIZA

Respondent/Plaintiff

J U D G M E N T

MAKHOB A J

- [1] This is an application in terms of Rule 35 (7) of the Uniform Rules of Court. The applicant seeks an order that the respondent be compelled to make documents, and recordings available for inspection.

- [2] If the respondent fails to do so he must state under oath that such documents or recordings are not in his possession and must state their whereabouts if known. I will refer to the parties as they are referred to in the main action.
- [3] In the main action the plaintiff claims damages from the defendant arising out of a newspapers article that was published on 30 June 2016 in the edition of the Star newspaper. The defendant is claiming an amount of R400 000.00. (FOUR HUNDRED THOUSAND RAND).
- [4] After receipt of the discovery affidavit, the defendant called for further discovery of certain document from the plaintiff. The plaintiff responded as follows” *All the information requested has no bearing to neither plaintiff nor defendants’ case*”.¹
- [5] The defendants contend that the plaintiff’s response does not comply with the rules and it must be rejected by the court.
- [6] The gist of the plaintiff’s claim is that the newspaper article is wrongfully in the following manner:
- 6.1 Forces members of his congregation to gather earth from the graves of their relatives.
- 6.2 Forces member of his congregation to worship carrying spears.
- [7] Counsel for the defendant argued that no documents have been discovered to show that the plaintiff’s reputation has been damaged in the sum of R400 000. Further, that the defendant believe that the plaintiff is in possession of documents that are relevant to the issue of the alleged reputational damage.

¹ CaseLines 017 – 24.

- [8] The court has a discretion whether to or not to order discovery.² In *Democratic Alliance and others v Mkhwebane and another*³ at par 32 the court said “A document which has no relevance whatsoever to the issue between the parties would obviously, by necessary implication be excluded from the operation of the Rule.”
- [9] In *Gorfinkel v Gross, Hendler and Frank*⁴ the court said the following “A party served with 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 inquiry which may have either of these consequences. Documents which tend merely to advance the case of the party making discovery need not be disclosed.”
- [10] In defamation cases a defendant is entitled to discovery and production of documents in order to prepare for the defence especially on the grounds of trust, public benefit and fair comment.⁵
- [11] Rule 35 (3) provides 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 such party to make the same available for inspection in accordance with subrule (6), or to state on oath within ten days that such documents or tape recordings are not in such party’s possession, in which event the party making the disclosure shall state their whereabouts, if known to him.’

² Continental ORE Construction v Highveld Steel and Vanadium Corporation Ltd 1971 (4) SA 589 (W) at 4594 H.

³ 2021 (3) SA 403 SCA.

⁴ 1987 (3) SA 766 (C) at 774D – 774E see also *Reliams (Pty) Ltd v James Brown and Hammer Ltd* 1983 (1) SA 556 at 564A.

⁵ *Democratic Alliance and others* Para 35.

[12] The respondent does not state unequivocally that he does not have all the documents requested, all what he states is that they are not relevant.

[13] The nature of the claim against the defendant is such that, the defendants are entitled to full discovery in order to properly prepare themselves against the claim.

[14] I am of the view that the documents requested by the defendants are relevant and relate directly to the issues of the matter. The plaintiff can simply state under oath that he does not have in his possession such documents.

[15] I make the following order.

15.1 The Plaintiff is ordered to comply with the Defendants' Notice to Discover in terms of Rule 35(3) served on 4 November 2019 within 10 days of the date of service of this order by:

15.1.1. Making available for inspection the documents and recordings set out in the Rule 35(3) Notice in accordance with Rule 35(6); and/or

15.1.2. Stating under oath why such documents or tape recordings as set out in the Rule 35(3) Notice are not in the Plaintiff's possession, in which event the Plaintiff shall state their whereabouts, if known.

15. 2. The Defendant's attorney is authorised to serve this order on the Plaintiff's attorneys.

15. 3. Should the Plaintiff fail to comply with the terms of this order the Defendants are granted leave to apply on notice to the Plaintiff on the same papers duly supplemented for an order that the Plaintiff's claim be dismissed.

15.4. The costs of the application be paid by the Plaintiff.

MAKHOB A J

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

MATTER HEARD AND RESERVED ON: 23 MAY 2023

JUDGMENT HANDED DOWN ON: 30 JUNE 2023

APPEARANCES:

For the Applicant: Adv F Storm (instructed by) Instructed by Lionel Murray
Schwormstedt & Louw Attorneys

For the Respondent: Ms L Mbanjwa (from) L. Mbanjwa Incorporated