



Reportable:	YES / ☒ NO
Circulate to Judges:	YES / ☒ NO
Circulate to Magistrates:	YES / ☒ NO
Circulate to Regional Magistrates:	YES / ☒ NO

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case number: 1743/2015

Date heard: 15.03.2019

Date delivered: 29.03.2019

In the matter between:-

DISCOVERY HEALTH (PTY) LTD

First Applicant/ First Defendant

J. E CHATZKELOWITZ

Second Applicant/ Second Defendant

and

RAJAENTHERAN PILLAY

Respondent/ Plaintiff

JUDGMENT

Tlaletsi JP

1. The applicants who are the defendants in a claim for damages instituted by the respondent, brought an application to be heard on urgent basis on 15 March 2019. They seek orders, *inter alia*, in the following terms:

"1.

2. *It is directed that the plaintiff is to make available for inspection all the documents listed and/or described in the defendant's notice under rule 35(3), a copy of which is attached to the founding affidavit as 'A' (excluding items 83-91 in the index to the trial bundle dated 19 February 2019), within five days of the date of this order or within such time as this court may deem fit;*
3. *It is directed that, if the plaintiff fails to comply with the order in prayer 2 above, defendants are granted leave to apply for an order for the plaintiff's claim to be dismissed, with costs."*

2. The application, which is opposed by the respondent, is predicated on the following facts deposed to by the applicants' attorney, Mr Mahmood Mia. On 15 January 2019 the respondents served a notice under Rule 35(3)¹ on the respondent's attorneys of record in which he was required to make available for inspection in terms of Rule 35(6) the documents listed in annexure 'A' to the notice. On 18 January 2019 the respondent's attorneys wrote to the deponent acknowledging receipt of the notice but failed to comply as required within the *dies* provided for in Rule 35(6)².

¹ **35 Discovery, Inspection and Production of Documents:** (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 him to make the same available for inspection in accordance with subrule (6), or to state an oath within ten days that such documents are not in his possession, in which event he shall state their whereabouts, if known to him.

² (6) Any party may at any time by notice as near as may be in accordance with Form 13 of the First Schedule require any party who has made discovery to make available for inspection any documents or tape recordings disclosed in terms of subrules (2) and (3). Such notice shall require the party to whom notice is given to deliver to him within five days a notice as near as may be in accordance with Form 14 of the First Schedule, stating a

3. It was only on 5 February 2019, that the respondent's attorneys sent an email message to the applicant's attorneys in which they, *inter alia*, mentioned that they had prepared a supplementary discovery affidavit which contains some of the documents which have been requested which they hoped to serve in due course; that they were busy preparing the trial bundle which will consist of the documents listed in both the respondent's first discovery affidavit and the supplementary discovery affidavit which they hoped to finalise in due course; that taking into account that some of the documents requested in the Rule 35(3) notice are included in the supplementary discovery affidavit and would also be paginated in the trial bundle to be served in due course, they propose that they should not separately reply to the Rule 35(3) notice at this stage since some of the requested documents would be furnished to the applicants in the trial bundle and; that the applicants should confirm via return e-mail that they are agreeable to the proposal.

4. On 6 February 2019 the applicant's attorney responded by e-mail as requested, indicating *,inter alia*, that if in their response there is "*proper clarity regarding your reply to our client's Rule 35(3) notice then we will have no objection thereto*"; that "*we simply do not wish for the matters to become*

time within five days from the delivery of such latter notice when documents or tape recordings may be inspected at the office of his attorney or, if he is not represented by an attorney, at some convenient place mentioned in the notice, or in the case of bankers' books or other books of account or books in constant use for the purposes of any trade, business or undertaking, at their usual place of custody. The party receiving such last-named notice shall be entitled at the time therein stated, and for a period of five days thereafter, during normal business hours and on any one or more of such days, to inspect such documents or tape recordings and to take copies or transcriptions thereof. A party's failure to produce any such document or tape recording for inspection shall preclude him from using it at the trial, save where the court on good cause shown allows otherwise.

convoluted and cause unnecessary complication”, and that “Accordingly in so far as your response to our Rule 35(3) notice is clear we will have no objection to receiving part of the documents as part of your bundle.” The letter concluded by stating that they will revert shortly regarding the request for the items in the applicants’ discovery affidavits.

5. On 27 February 2019 the respondent’s trial bundle was served on the applicants as promised. It consisted of ten volumes. Upon perusal of the documents in the bundle the applicants’ attorney was not satisfied that the respondent had fully complied with its Rule 35(3) notice in that *inter alia*; not all VAT returns had been furnished and that there is no explanation under oath about the missing ones; and the annual financial statements for the years ended February 2017/2018 had not been provided. According to the applicants’ attorney the missing documents are necessary to enable the applicants to quantify the plaintiff’s claim and to effectively prepare for the trial which is set down for 23 April 2019.

6. The applicants further allege that the respondent’s conduct is dilatory, obstructive and prejudicial to the applicants in their preparation for trial; that the documents requested are those that, in the ordinary course, a medical practice like that of the respondent would have on record and obliged to retain. For these reasons, the applicants contended, they urgently prepared this application with the assistance of counsel and served it on the respondent’s attorney on 5 March 2019 to be heard, as indicated, on 15 March 2019.

7. It is common cause that the respondent served its formal reply to the Rule 35(3) notice on 7 March 2019. In the affidavit replying of 15 January 2019, the respondent addressed the queries raised by the applicants' in annexure "A" to the Rule 35 Notice. He mentioned among others, that some of the specified documents had already been made available as part of the trial bundle; some were in the process of being prepared by his accountant; that the whereabouts of some were unknown and that some were irrelevant to the applicant's pleaded claim.
8. Despite the respondent's endeavour to show that it discovered the documents the applicants persist with their application to compel. The basis of respondent's opposition is that the application is not urgent and that any urgency if it exists, is self-created. He further argues the applicants have other alternative remedies if dissatisfied with the respondent's reply to their Rule 35(3) notice.
9. On 11 March 2019 the applicants served and filed "Supplementary Founding Affidavit", also disposed to by their attorney Mr Mahmood Mia. They seek leave for the admission of this affidavit in order *"to update the application on the most recent developments and to bring to the court's attention new facts that have emerged."* In the affidavit an attempt is made to address the issues raised in the respondent's affidavit in response to the Rule 35(3) notice as well as the letter written by the respondent's attorney to the applicants' attorney in which it is suggested, *inter alia*, that the urgent application to compel not be proceeded with on the 15th March 2019 and that costs be reserved. In the said letter it is contended that the respondent

has fully complied with the Rule 35(3) notice and there is no need to persist with the application to compel compliance.

10. In my view, there is merit in the contention that the application is not urgent and that the urgency, if established, is self-created. The following uncontroverted facts which have been disclosed by the respondent in the answering affidavit are fundamental as they cast some light on the conduct of the parties in processing the main action.
11. The respondent instituted an action against the application on 26 August 2015. The action is premised on the second defendant's alleged fraudulent conduct which allegedly caused the respondent financial loss and *iniuria*. On 14 November 2016 the respondent amended particulars of claim were filed. On 30 November 2016 the applicants filed their plea which according to the respondent consisted of a bare denial.
12. On or about 24 August 2017, after the close of pleadings, the respondent served and filed his discovery affidavit. On 6 November 2017 the applicants filed their respective discovery affidavits. This step was preceded by a pre-trial conference. At the conference a proposal was made on behalf of the respondent that the merits and quantum be separated. The applicants undertook to revert to the respondent within two weeks to convey their response to the proposal. The pre-trial minute was signed on 30 October 2017 by the defendants' legal representatives. On 6 November 2017 the applicants served and filed their respective discovery affidavit.

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13. On 24 January 2019, about two years after pleadings had closed, the applicants amended their plea which had the effect of replacing the original plea in *toto*. In this plea the applicants admit that the second applicant acted on behalf of the first applicant in undertaking forensic investigative work into allegations of fraudulent conduct on the part of medical practitioners lodging medical aid claims against the first applicant. It is further admitted that named persons were sent to the respondent's medical practice as undercover agents to investigate any alleged fraudulent conduct on the part of the respondent.
14. On 29 May 2018 the applicants' attorney wrote a letter to the respondent's attorney indicating *inter alia*, that they were canvassing the issues whether there should be a separation between the merits and quantum with their clients and that they will revert to them within a week. It is worth noting that this undertaking was made about seven months after the initial undertaking and in response to an enquiry by the respondent's attorney. The applicant's attorney reverted on the issue of the separation on 21 June 2018 by refusing to accede to the request. In view of the applicant's objection to the request for separation of the issues, the matter is to be decided by the Judge either on the day of the trial or any other day to be determined by the Registrar, should such an arrangement be made, by the parties.
15. It is significant to note that the dispute regarding the documents to be discovered started as far back as January 2018 initiated by the first Rule 35(3) notice served by the applicants on 22 November 2017. In the letter dated 18 January 2018 the applicants complained that the respondent's

reply did not adequately address their request and placed the respondent on terms to address their further enquiries by 12 pm on Friday 19 January 2018, failing which they would proceed with an application to compel compliance.

16. On 19 January 2018 the respondent replied by stating that in his view he has dealt with the applicant's Rule 35(3) notice in full and had furnished them with the documents they were entitled to. It was further indicated that the applicants were free to act in *"the manner they contemplates should they not content with our client's reply."*
17. The applicants were therefore aware from 19 January 2018 that their request was not acceded to and that they could proceed to launch their application to compel compliance, and did not do so. They have not provided any reason why this application could not have been launched earlier. The certificate of trial readiness was issued on 2 May 2018. On 31 July 2018 the Registrar provided the parties with tentative dates to choose for the trial of the matter. They preferred the 23rd to 26th of April 2019. Despite their preference, there is no indication that any of the parties set the matter for trial on the dates specified, which puts to doubt whether the matter is enrolled for that week to warrant the launching of an urgent application.
18. As already alluded to, the relief sought in the application is to compel the respondent to make available for inspection the documents referred to in annexure "A" to the founding affidavit. The applicants agreed to the proposal

by the respondent not to formally respond to the Rule 33(5) notice but that the documents will be provided as part of the trial bundle. On 5 March 2019 the applicants attorneys communicated their dissatisfaction with the documents provided and the respondent undertook to file a formal notice on Wednesday. However, the applicants did not even wait for the formal notice to be served, but instead issued this application on the same day. By this time there had been, on the applicants' version, at least partial compliance with their request.

19. The circumstances were further changed when the respondent served and filed his formal response to the Rule 33(5) notice on 7 March 2019. The relief sought by the applicants in this application required an amendment as there had been compliance. The applicants must have been aware of this fact and that explains why a Supplementary Founding Affidavit was filed with a request that it be admitted as part of the application.
20. For the reasons set out above the urgency that the applicants are claiming is self-created, and the matter falls to be struck off the roll. However, such an order will not resolve the current dispute between the parties in respect of the discovery of certain documents. On the respondent's version there are documents which are still being prepared by his accountant which have not been provided. It has not been indicated when these documents will be discovered. The amendment of the applicants' (defendant in the action) plea to the action also intervened and it is not clear whether some of the documents in dispute may have only come to light after the amendment.

21. It is necessary that these issues be resolved first before the trial. This includes the dispute regarding the separation of the merits from quantum. Having said this, it is clear that this matter is not ripe for trial. An appropriate solution is, in my view, to direct that the parties attend a pre-trial conference before a Judge. Costs of this application should be costs in the action of the matter since none of the parties is without blame.
22. **In the result the following order is made:**
1. The application is struck off the roll.
 2. The parties are directed to attend at the Registrar's Office to arrange a pre-trial conference before a Judge.
 3. Costs of this application are to be costs in the course of action.



L.P. TLALETSI

JUDGE PRESIDENT

Northern Cape Division, Kimberley

On behalf of Applicants/Defendants:

Adv. T Tyuthuza (Roux Welgemoed and Du Plooy)

On behalf of Respondent/Plaintiff:

Adv Fisher (Justin Pillay and Associates)