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FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. 3600/2010

In the matter between:

TAKANE JEANETT MONETHI Applicant/Plaintiff

and

MINISTER OF SAFETY & SECURITY Respondent/Defendant

HEARD ON: 17 MAY 2012

CORAM: MURRAY, AJ

JUDGEMENT BY: MURRAY, AJ

DELIVERED ON: 5 JUNE 2012

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[1] This is an application to compel the Respondent to reply to the Applicant's request for further particulars for purposes of trial, as well as to its notice in terms of Rule 35(3) read with 35(6). Both were filed when the trial was already partly heard and had been postponed to a later date.

[2] The Respondent did make general discovery in terms of Rule 35(2) before the trial started on 24 January 2012 without the

Applicant having requested further particulars or further discovery. The Court heard evidence on 24, 25 and 27 January, when the trial was postponed to 25, 26 and 27 June 2012.

[3] Two months into the postponement, on 30 March 2012, Applicant filed a request for further particulars as well as a Rule 35(3) notice read with Rule 35(6). In response, on 16 April 2012, the Respondent merely filed two notices in terms of Rule 30 in which it objected to the requests as being irregular proceedings because the Applicant had failed to bring them during the pre-trial period.

[4] The Applicant refused to withdraw its requests pursuant to the Rule 30 notices and when the Respondent failed to institute Rule 30 applications, the Applicant on 7 May 2012 brought this application to compel the Respondent to reply to its requests.

[5] In issue, therefore, is the Applicant's right to file the said notice and request after commencement of the trial. Since, strictly speaking, both Rule 21 and Rule 35(3) are indeed pre-trial tools, the question now before the Court is whether they could

validly have been filed after the trial had already commenced and evidence had already been led and whether the Court has a discretion to enforce compliance at this stage of the proceedings.

[6] To answer this question the Court needs to examine, *inter alia* the nature of the relief sought as well as the purpose and the wording of the relevant rules in the context of this case.

[7] Mr Reynders appeared for the Applicant and Mr Williams for the Respondent.

THE REQUEST FOR FURTHER PARTICULARS:

[8] As correctly stated in Respondent's Rule 30 Notice further particulars may only be requested in terms of Rule 21(2) to (4) of the Uniform Rules of Court.

[9] Rule 21(2) expressly stipulates that such further particulars may only be requested after the close of pleadings and no later than 20 days before commencement of a trial. The wording makes it clear, therefore, that the rule is intended for use before the trial.

[10] The reason for restricting its application to the pre-trial proceedings lies in its function which is defined in **<u>SWISSBOROUGH DIAMOND MINES v GOVERNMENT OF THE RSA</u>**, 1999 (2) SA 279 (TPD) at 317C – D as *"to prevent surprise, to inform the other party what is going to be proved to enable the other party to prepare his case."* It has been found that the request *"would therefore relate to the pleaded issues and would not 'raise further or new issues between the parties'."*

[11] It is clear, then, that Rule 21 is applied in order to determine with greater precision what the other party is going to prove at the trial. Its purpose, in other words, is to clarify issues already defined in the pleadings in order to facilitate better preparation.

[12] Applicant failed to comply with Rule 21 by not filing its request for further particulars at the time when the parties were still defining the issues to be adjudicated during the trial and has advanced no cogent reason why it should be allowed to file such a request now.

[13] In fact, Mr Reynders conceded, in my view correctly so given the explicit wording and accepted purpose of Rule 21, that the Applicant's request for further particulars in the middle of the trial, when evidence has already been led on the agreed issues, is not consistent with Rule 21(2) and that the Respondent cannot be compelled to reply thereto at this stage of the proceedings.

[14] The application to compel the Respondent to reply to the Applicant's request for further particulars must therefore fail.

<u>THE REQUEST FOR FURTHER DISCOVERY:</u>

[15] On 30 March 2012, Applicant also delivered a notice in terms of Rule 35(3), read with 35(6) in which it required from Respondent:

15.1 *"to produce within five (5) days for Applicant's inspection ... documents which allegedly exist but which were not discovered by the Respondent and 'which are relevant to the dispute between the parties'; and*

15.2 *‘to deliver within five (5) days a notice ‘stating the time within five (5) days from delivery of the notice when the documents may be inspected at the office of the Plaintiff’s attorney’; and, furthermore,*

15.3 *‘to state on oath within ten (10) days which documents were not in his possession, and if so, to disclose their whereabouts’.”*

[16] It is this notice that the Applicant now seeks to have enforced in the face of Respondent’s Rule 30 objection to the request for further and better discovery as a pre-trial mechanism, which cannot be applied after commencement of the trial.

[17] During argument Mr Reynders, in my view wisely so, abandoned the Rule 35(6) request for the production of the documents and stated that, at this stage, the Applicant only wants the Respondent to be compelled to reply to the Rule 35(3) Notice.

[18] In such reply the Respondent would have to state under oath

which, of the requested documents are not in its possession and to disclose their whereabouts. However, as stated in **COPALCOR MANUFACTURING (PTY) LTD v GDC HAULIERS (PTY) LTD,** 2000 (3) SA 181 at 193H – J the same principles of discovery that apply to Rule35(1) and the same proper method of discovery of documents that applies to Rule 35(2) replies are *mutatis mutandis* applicable to discovery pursuant to a Rule 35(3) Notice. The Respondent will therefore by implication also be obliged to indicate which of the documents that are in its possession, it objects to producing, either because they are irrelevant or because they are privileged since the Rule 35(3) Notice is a request for further discovery, and since a party is obliged to give access to the documents that it does discover free of any lawful objection.

[19] The Applicant offers no explanation in its founding affidavit for its failure to request further and better discovery in terms of Rule 35(3) during the pre-trial period as is the normal procedure.

[20] Mr Reynders submitted, however, that no party should be

precluded from asking for further and better discovery merely because the request was filed after the trial had already started. He pointed out that the Rule 35(3) procedure was one which could only be used after initial discovery had already been made in terms of Rule 35(1) and (2). He averred that the Rule 35(3) and 35(6) mechanism to obtain further discovery could never have been intended to benefit a party who fails to make proper discovery by virtually guaranteeing that after the commencement of the trial nobody would ever be able to obtain any of those documents, regardless of their relevancy.

[21] He also pointed out that the wording of neither of the two sub-rules imposed explicit time constraints on their use since neither refers to "*before trial*" or *"during trial".* Rule 35(6) explicitly reads *"at any time".* He therefore proposed that sub-rules (3) and (6) be read together and interpreted so as not to restrict their use to the pre-trial period.

[22] It is trite law that Rule 35(3) is indeed part of the pre-trial discovery procedure. In my view, however, that does not necessarily mean that it can never be used during the trial

itself. As indicated in **<u>HERBSTEIN & VAN WINSEN: CIVIL PRACTICE IN THE HIGH COURTS</u>, 5th Ed, Volume 1,** at **824,** the Court does have a discretion to allow its use even after evidence had already been given. In this respect the authors referred to **<u>JACOBS v MINISTER VAN LANDBOU</u>,** 1975 (1) 946 (TPD) where Bekker, J, at 952G found that *"there is nothing in the Rules of Court which makes it imperative for an application for further discovery to be made before the commencement of evidence."*

[23] The courts have a general discretion to condone irregularities and imperfections in procedural steps taken by litigants. I respectfully agree with what Schreiner, J said in **<u>TRANS-AFRICAN INSURANCE CO LTD v MALULEKA</u>** 1956 (2) SA 273 at 278F – G, namely that "*technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits."*

[24] Of course such a discretion needs to be exercised sparingly and only in appropriate circumstances, in the absence of prejudice to the other party, where it would help to curtail costs

and to expedite proceedings.

[25] That the time periods for the application of the Rules of Discovery are not iron-clad is also apparent from the explicit discretion granted to the Court in Rule 35(1) to allow discovery before the close of pleadings and the equally explicit discretion granted to the Court in Rule 35(10) to order production of the originals of discovered documents during the trial, even though the wording of these two sub-rules makes it clear that they were actually designed for pre-trial application.

[26] Mr Williams relied on **KAKUWA v MINISTER VAN POLISIE,** 1983 (4) SA 787 (TPD) in which Rule 35(11) was described as "*supplementary to other provisions of Rule 35"* and in which the Court referred to *"the pre-trial discovery proceedings created by Rule 35(3) and (7)"* as authority for his contention that Rule 35(3) read with Rule 35(6) cannot be used once the trial has commenced.

[27] As Mr Reynders correctly pointed out, however, the **KAKUWA**-case is distinguishable from the instant matter in that in the former case no discovery whatsoever was made or

requested prior to the trial, either in terms of Rules 35(1) and (2), or in terms of Rule 35(3). An application for the production of certain documents in terms of Rule 35(11) was then lodged on the second day of the trial and as the Court stated *"a great deal of the 2nd and 3rd day of the trial was then used to argue the Rule 35(11) application regarding documents which could have been obtained with a Rule 35(3) application"* if discovery had been made earlier, or as the Court called it *"in good time".*

[28] The difference between Rule 35(6) and Rule 35(11) appears to be that the former can be used to obtain production of previously discovered documents *"at any time",* in other words before or after further and better discovery had been made, whereas Rule 35(11) appears to have been explicitly designed to enable the Court *"during any proceeding",* in other words during the trial, to order a party to produce under oath such documents "*in his power or control 'relating to any matter in question in such proceeding as the court may think meet'",* and presumably therefore also to such issues as may have arisen during the trial and such documents as may consequently have become relevant from the evidence led and

the arguments raised.

[29] As stated in **<u>FEDERAL WINE & BRANDY CO. LTD v KANTOR</u>**, 1958 (4) SA 735 (ECD) at 745A – C *"A discovery or disclosure order is a very different matter from the order of a court during trial to a witness or to a party to produce documents upon which there is cross-examination. "*

[30] I agree with Mr Reynders that the **<u>KAKUWA</u>**-case does not provide authority for a contention that the Court has no discretion to allow the use of a Rule 35(3) request, in limited appropriate circumstances, after the commencement of a trial. In fact, as remarked and done in **<u>KAKUWA</u>**, *supra,* at 790A a Court should in appropriate circumstances be willing to help those who had failed to exercise their procedural rights to obtain all relevant documentation timeously.

[31] In **<u>JACOBS</u>,** *supra,* the Court referred to **<u>CONTINENTAL ORE CONSTRUCTION v HIGHVELD STEEL & VALADIUM CORPORATION LTD</u>** 1971(4) SA 589 (W) in which Margo, J, stated *inter alia* that a Court would only go behind a discovery affidavit *"if it is satisfied: (1) from the discovery affidavit itself;*

or (2) "from the documents referred to in the discovery affidavit; or (3) from the pleadings; or (4) from an admission made by the party making the discovery affidavit; or (5) from the nature of the case or the documents in issue that there is a probability that the party making the affidavit has or had relevant documents in his possession".

[32] Bekker, J, referred, furthermore, to a remark by Buckley, LJ, in **SEABROOKE v BRITISH TRANSPORT COMMISSION (1959) 2 All E.R. 15** at 26: *"An affidavit of documents is sworn testimony which stands in a position which in certain respects is unique. The opposite party cannot cross-examine upon it and cannot read a contentious affidavit to contradict it. He is entitled to ask the Court to look at the affidavit and all the documents produced under the affidavit and from those materials to reach the conclusion that the affidavit does not disclose all that it ought to disclose."*

[33] In order to determine whether it would be appropriate to exercise my discretion to allow the Rule 35(3) request at this stage of the proceedings, I need to consider the purpose of discovery and the nature of the issues between the instant

parties as appears from the pleadings in the context of the specific circumstances of this case.

[34] Discovery was called in **STT SALES (PTY) LTD v FOURIE,** 2010 (6) SA 272 (GSJ) at 276C – D *"a tool used to identify factual issues once legal issues are established."* In **FEDERAL WINE,** *supra,* it was stated that the "*discovery order …. is part of the preparation and not part of the trial of the case."*

[35] The purpose of discovery therefore is to assist the parties as well as the Court in determining the truth and by doing so, not only helps to discover the truth and make a just determination of the case, but also saves costs as stated in **AIR CANADA v SECRETARY OF STATE FOR TRADE**, [1983] 2 AC 394 at 445 – 446 and **SANTAM LTD v SEGAL**, 2010 (2) SA 160 (N) at 162I – F.

[36] In **REPLICATION TECHNOLOGY GROUP v GALLO AFRICA LTD**, 2009 (5) SA 531 (GSJ) at 535C – I and in **DURBACH v FAIRWAY HOTEL LTD** 1949(3) SA 1081 (SR) at 1083 it was stated that the object of discovery was "*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.'

[37] Though in **COPALCOR MANUFACTURING (PTY) LTD v GDC HAULIERS (PTY) LTD**, 2000 (3) SA 181 (W) at 194i, it was made clear that the party in possession or custody of relevant documents carries the duty to make those documents available for both the benefit of his adversary and the Court *"in anticipation of the trial action",* in my view a party's failure to discover all of those documents prior to the trial and his opponent's failure to request them before commencement of the trial, does not *per se* deprive the Court of its discretion to allow such a request after the trial had started provided that neither party is prejudiced by such an order. Even at such a late stage, discovery could conceivably serve to further narrow the issues.

[38] In **INDEPENDENT NEWSPAPERS (PTY) LTD v MINISTER FOR INTELLIGENCE SERVICES: In re MASETHLA v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA**, 2008

(5) SA 31 (CC) at 41J – 42B it was stated that *"ordinarily Courts would look favourably on a claim of a litigant to gain access to documents ... reasonably required to ... advance a cause of action. This is so because Courts take seriously the valid interest of a litigant to be placed in a position to present its case fully during the course of litigation. Whilst weighing meticulously where the interests of justice lie, Courts strive to afford a party a reasonable opportunity to achieve its purpose in advancing its case. After all, an adequate opportunity to prepare and present one's case is a time-honoured part of a litigating party's right to a fair trial."*

[39] In **MLAMLA v MARINE & TRADE INSURANCE COMPANY** 1978(1) SA 401 (E) at 402 it was found that *"the right of a party to an action to resist discovery is a limited right existing only in certain well-defined circumstances"* for instance, where the document *"is covered by legal professional privilege"* or "*if it would disclose the party's evidence"* or "*if it would be injurious to the public interest if it were to be disclosed."*

[40] In **DURBACH,** *supra,* it was stated, furthermore, that *"a party is required to discover every document relating to the matters*

in question, and that means relevant to any aspect of the case. This obligation to discover is in very wide terms. Even if a party may lawfully object to producing a document, he must still discover it."

[41] The discovery of relevant documents is after all, obligatory in all trials, even though the production thereof is in the discretion of the Court and as repeated in **NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v KING**, 2010 (2) SA CR 146 (SCA) at 160, it is trite that if documents are admittedly relevant they have to be discovered unless the refusal to discover can be justified.

[42] In the instant matter, however, the Respondent did not attempt to object to the relevancy of the requested documents or to justify its refusal to discover such documents with anything but a technical objection to the filing of the request for further discovery after the commencement of the trial.

[43] It is trite that formalism in the application of the rules is not encouraged by the courts as stated in **FEDERATED TRUST LTD v BOTHA,** 1978(3) SA 645 (A) at 654.

[44] The object of the Uniform Rules of Court was held in **<u>DIE BESTUURSRAAD van SEBOKENG v TLELIMA</u>** 1968(1) SA 680 (A) to be to secure the inexpensive and expeditious completion of litigation before the courts and are not an end in themselves. In **<u>NCOWENI v BEZUIDENHOUT</u>** 1927 CPD 130 it was held that the Rules should be therefore be interpreted and applied in a spirit which will facilitate the work of the courts and enable litigants to resolve their dispute in as speedy and inexpensive a manner as possible.

[45] In the instant matter, the issues in dispute on the pleadings were defined at the Rule 37 proceedings on 9 January 2012 as:

45.1 whether or not the Plaintiff was assaulted by a member of the Defendant on 13 June 2009 as alleged; and if Plaintiff succeeds in proving the above

45.2 whether there were any circumstances which absolves the Defendant from liability stemming from the assault.

[46] From the Rule 35(3) Notice it appears that the documents requested are, *inter alia*, ballistic reports, reports regarding weapons fired by the Police and weapons confiscated from civilians at the scene. And in its Rule 30 Notice the Respondent itself stated that the requested documents *"emanate from documents already discovered"* by the Respondent.

[47] It appears from the pleadings, furthermore, that the Applicant is an unemployed individual living in either a township or an informal settlement who has instituted a delictual claim against the State for injuries allegedly inflicted by the Police. She carries the onus of proving her case against the State in an instance where the Respondent *prima facie* appears to be in possession of all the necessary documents to assist the Applicant in either discharging her onus or in realising that she has no claim.

[48] The Respondent did not deny that the requested documents were in its possession. If they are indeed in its possession, the Respondent had an obligation to discover them and should

have done so when first making discovery in terms of Rule 35(2).

[49] It is trite that, as set out in **FEDERAL WINE & BRANDY CO LTD v KANTOR**, 1958 (4) SA 735 (ECD) at 745A – C and in **RELLAMS (PTY) LTD v JAMES BROWN & HAMER LTD** 1983(1) SA 556 (N) at 560F – H, after examination of the recognized sources as well as the pleadings and the nature of the case, a court might come to the conclusion that the party requested to make discovery in all probability has other relevant disclosable documents in its possession or power and may then order further and better discovery.

[50] In view of the Respondent's averment in its Rule 30 Notice that *"the documents requested emanate from documentation which was discovered prior to trial"* and having had regard to the issues as defined in the Rule 37 Minutes and the pleadings and to the type of documents for which discovery is requested in the Rule 35(3) Notice, my *prima facie* impression is that at least some of the requested documents may conceivably assist the Applicant's case and should therefore have been discovered by the Respondent in the absence of a lawful

objection to their discovery.

[51] In the circumstances of this specific matter and in the absence of any allegation of possible prejudice by the Respondent, I fail to see any such prejudice should the Respondent be ordered to respond by way of affidavit to the Rule 35(3) Notice to state on oath which of the requested documents are not in its possession and of the documents in its possession which are either privileged or irrelevant.

[52] The Applicant, to the contrary, might indeed be prejudiced in the conduct of her the case if she is forced to wait untill the trial commences on 25 June 2012 for discovery of whatever relevant documents the Respondent might still have in its possession. If full discovery takes place now, the Applicant could still bring a substantive application for the production of such relevant documents as she is able to prove before the Trial Court. That would certainly serve to limit needless postponements and extra costs.

[53] I agree with the statement in **ERASMUS, Superior Court Practice, Service 35, 2010,** at **B1-6,** that *"although parties and*

legal practitioners should not be encouraged to become slack in the observance of the rules, technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and if possible inexpensive decision of cases on their merits".

[54] I fully realise that, as stated in **STT SALES (PTY) LTD v FOURIE & OTHERS**, 2010 (6) SA 272 (GSJ) at par [20], *"the inherent power I have to regulate proceedings otherwise than in accordance with the rule should be sparingly used".*

[55] As stated in **INGLEDEW v FINANCIAL SERVICES BOARD: In re FINANCIAL SERVICES BOARD v VAN DER MERWE & ANOTHER,** 2003 (4) SA 584 (CC) at 594 para [30] a consideration of what is in the interests of justice involves the evaluation of all the circumstances of a particular case and the weighing up of a number of factors, *inter alia* the nature of the application, the effect that its refusal may have on the trial proceedings, in particular whether the Applicant will be prejudiced in the conduct of the trial if she does not get access to the documents sought at this stage, and the stage of the trial proceedings, therefore I have carefully considered all the

relevant factors in the context of this particular case.

[56] In view of the nature of the case, namely a delictual action against the State by an unemployed individual and in which *prima facie* the State is in exclusive possession of the documents with which to either prove or disprove the claim, as well as all the other considerations set out above, it would to my mind be in the interests of justice to allow the late Rule 35(3) Notice and to compel compliance therewith.

[57] Since no evidence has been placed before this Court to enable it to order compliance with the Rule 35(6) part of the application, it was, in my view, wisely abandoned on behalf of the Applicant.

[58] In **WEBSTER v WEBSTER** 1992 (3) SA 729 (E) at 733 E-H it was held that if a party seeking discovery has failed to take timeous steps to compel it, each party may be ordered to pay its own costs ... for it is unreasonable for a party to wait until the last moment to stand upon his rights under the rule.

[59] Since *in casu* the Applicant failed to timeously exercise the

discovery rights extended to her in terms of the Court Rules and has offered no explanation whatsoever in the founding affidavit for her tardiness in this regard, no order as to costs in her favour will be made.

[60] Wherefore, the following order is made:

60.1 The Respondent is ordered to state under oath within five (5) days from date of this order:

60.1.1 whether it has the documents requested in terms of the Rule 35(3) Notice dated 30 March 2012 in its possession; and

60.1.2 if not, to indicate the whereabouts of such documents; and

60.1.3 regarding those documents which are in its possession to indicate whether it would object to the production of such documents on the basis of irrelevance or privilege.

60.2 Each party is to pay its own costs.

H. MURRAY, AJ

On behalf of applicant: Adv. S Reynders
Instructed by:
Honey Attorneys Inc
BLOEMFONTEIN

On behalf of respondent: Adv. A Williams
Instructed by:
The State Attorney
BLOEMFONTEIN