

(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 4338/2006

In the case between:

AGRITRANS CC

1st Applicant

ANDRIES SWART

2nd Applicant

WILLEM ROBERTS 3rd Applicant

and

MAFUBE LOCAL MUNICIPALITY

1st Respondent

W K MAHLANGU

2nd Respondent

MEC FOR HEALTH, FREE STATE N.O.

3rd Respondent

**MEC FOR LOCAL GOVERNMENT AND
HOUSING, FREE STATE N.O.**

4th Respondent

JUDGEMENT:

MOLEMELA, AJ

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HEARD ON:

9 NOVEMBER 2006

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DELIVERED ON:

7 DECEMBER 2006

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[1] The applicants had approached this Court for a mandatory

interdict compelling the first and second respondents (hereinafter jointly referred to as “the respondents”) to take certain steps. The respondents had then filed an opposing affidavit. The applicants had subsequently filed a “Notice in terms of Rule 35(11) read with Rule 13”. The respondents did not respond to this notice. The applicants have now approached this Court in terms of Rule 30A of the Uniform Rules of Court and are seeking an order in the following terms:

“1. The First and Second Respondents be compelled to respond to the Applicant’s Notice in terms of Rule 35(11) read together with Rule 35(13) dated the 27th of February 2006 under Case Number 5349/2005 within FIVE (5) days from date of service of this Court Order;

2. The Applicants be granted leave to approach this Honourable Court on the same papers, duly amended where necessary, for an Order in terms whereof the First and Second Respondents’ Opposing papers be struck out and Judgment be granted in favour of the Applicants under Case No 5349/2005 with costs as claimed in the Applicants’ Notice of Motion, should First and Second Respondents fail to comply with the provisions as contained in paragraph 1 hereof;

3. The First and Second Respondents be ordered to pay the costs occasioned by this Application;
4. That such further and/or alternative relief be granted to the Applicant as the above Honourable Court may deem fit.”

[2] As the interpretation of some of the sub-rules to Rule 35 are central to this application it is apposite to, at this stage, refer to the relevant sub-rules. Rule 35(1) provides as follows:

“35 (1) Any party to any action may require any other party thereto, by notice in writing, to make **discovery** on oath within 20 days of all documents and tape recordings relating to any matter in question **in such action** (whether such matter is one arising between the party requiring discovery or not) **which are or have at any time** been in the possession or control of such other party. Such notice shall not, **save with the leave of a judge**, be given **before the close of pleadings**” (my emphasis).

Rule 35(11) provides as follows:

“35 (11) The court may, during the course of **any proceeding**, order the **production** by any party thereto under oath of such documents or tape

recordings ***in his power or control*** relating to any matter in question in such proceeding as the court may think meet, and the court may deal with such documents or tape recordings, when produced, as it thinks meet.”

Rule 35(12) provides as follows:

“35(12) Any party to any proceeding may at any time before the hearing thereof deliver a notice as near as may be in accordance with Form 15 in the First Schedule to any other party ***in whose pleadings or affidavits reference is made*** to any document or tape recording to produce such document or tape recording ***for his inspection and to permit him to make a copy or transcription thereof.*** Any party failing to comply with such notice shall not, save with the leave of the court, use such document or tape recording in such proceeding, provided that any other party may use such document or tape recording” (my emphasis).

Rule 35(13) provides as follows:

“35(13) The provisions of this rule relating to discovery shall
mutatis mutandis apply, ***in so far as the court may
direct***, to applications” (my emphasis).

[3] The applicants’ counsel has contended that reference to Rule 35(13) in the applicant’s Notice was a typographical error. She applied from the bar that the number 13 be replaced with the number 12 in the Notice, such that the heading of the applicant’s notice should become “Notice in terms of Rule 35(11) read together with Rule 35(12)”. Counsel for the applicants further applied for the words “paragraph 16(c)” in the body of the notice to be substituted with the words “paragraph 116(c)”. Counsel for the respondents argued that the proposed amendments were not in accordance with the rules and would prejudice the respondents.

[4] Counsel for the applicants argued that the correct approach in considering the Notice filed by the applicants was to have regard to its substance and not to its form. I am inclined to agree with this contention. I believe that rules are made for the court and not the court for rules. A court should therefore not be so pedantic as to demand a formal application for an amendment if the error that is sought to be rectified is a minor one like a typographical error or is what is commonly referred to as an “obvious error”, especially if such an amendment would not prejudice any party. Under such circumstances, an application for an amendment from the bar or side-bar should suffice.

[5] In *casu* the applicants have filed two Notices that are embodied in one document. The first part of the applicants’ notice relates to what the applicants regard as a Notice in

terms of rule 35(11), while the second part of the notice relates to Rule 35(12). The respondents have, since the service of the notice, been aware of the incorporation of Rule 35(12) in the notice that was filed. They have even responded to the request in terms of Rule 35(12) in their opposing affidavit by furnishing reasons as to why the required documents should not be made available for inspection or for copying. I therefore do not see what prejudice the respondents can suffer if the heading of the notice is amended as afore-mentioned. Neither can the respondents suffer any prejudice if the words “paragraph (16c)” are substituted with “paragraph 116(c)”. I accordingly grant the amendment.

[6] Now that the amendment has been taken care of, I now turn to deal with the applicant’s amended notice. As stated above, this notice has two parts, paragraph 1 thereof being the Notice in terms of Rule 35(11) while paragraph 2 thereof is the Notice in terms of Rule 35(12). I will first deal with part 1 thereof.

[7] Counsel for the respondents has argued that the applicant’s Notice in terms of Rule 35(11) is a disguised Notice in terms of Rule 35(1). He further argued that since Rule 35(1) is not automatically

applicable to applications, there was no obligation on the part of the respondents to respond to such a notice prior to the applicants obtaining a directive as contemplated in Rule 35(13). I agree that in application proceedings a party can only require discovery of documents in terms of Rule 35(1) if a court has previously directed so.

[8] Given the robust nature of this sub-rule I am inclined to agree with the contention of the respondents' counsel that a court can only give such a direction if a substantive application has been made. This means that if I find that the first part of the applicants' notice in essence relates to sub-rule 35(1) and not sub-rule 35(11), I will not be in a position to grant the order currently being sought by the applicants as they have not filed a substantive application requesting leave to be granted as envisaged in the provisions of sub-rule 35(13).

[9] I have scrutinized the relevant part of the applicants' notice that relates to rule 35(11). Whereas Rule 35(11) deals with **production** of documents, the applicants' notice refers to "**discovery**" of documents relating to any matter in question; whereas the notice in terms of Rule 35(11) refers to production

of documents or tape recording that are in a party's power or control, the applicants are seeking documents "**which are or have at any time been in the possession or control of the respondents.**" When I consider the wording used in the applicant's notice, it is clear that this notice is in essence a notice in terms of Rule 35(1) even though its heading refers to Rule 35(11). I will accordingly treat it as a Notice in terms of rule 35(1).

- [10] The applicants have not sought leave of the court for the provisions of sub-rule 35(1) to be applied to application proceedings as contemplated in Rule 35(13), (see **LORETZ v MACKENZIE** 1999 (2) SA 72 and **AFRICAN BANK LTD v BUFFALO CITY MUNICIPALITY** 2006 (2) SA 130 (CKH)). They have also not acquired leave for the filing of their notice in terms of sub-rule 35(1) before the close of pleadings, which in this instance would be the filing of a replying affidavit. (See **RAIL COMMUTER ACTION GROUP TRANSNET LTD t/a**

METRORAIL AND OTHERS (1), 2003 (5) SA 518 (C)). This means that the applicant's notice in terms of Rule 35(1) is fatally defective and the respondents were justified in ignoring it. I therefore cannot compel compliance therewith.

- [11] What is then left for me to consider is whether to compel compliance with the second part of the applicant's notice, which pertains to Rule 35(12). The wording of this sub-rule is clear as it refers to "pleadings or affidavits". I am therefore of the view that sub-rule 35(12) is automatically applicable to application proceedings and does not warrant the granting of a directive as contemplated in Rule 35(13). See **KAKUVA AND ANOTHER v MINISTER VAN POLISIE & 'N ANDER** 1983(4) SA 787 (SWA) at 790 D – F and **AFRICAN BANK LTD v BUFFALO CITY MUNICIPALITY**, 2006 (2) SA 130 (CK) and **PIETERS v ADMINISTRATEUR SWA & 'N ANDER**, 1972 (2) SA 220 (SWA). The words "at any time before the hearing" have also led me to believe that the rights

under this sub-rule can be exercised at any stage of the proceedings and thus even before the filing of a replying affidavit. See **UNILEVER v POLAGRIC (PTY) LTD**, 2001 (2) SA 329 (C).

[12] In *casu* the documents that the respondents are required to produce for inspection and copying are the following:

12.1 Copies of the test results as detailed in paragraph 55 of the answering affidavit.

12.2 Test results in respect of tests conducted by the CSIR as detailed in paragraph 109 of the answering affidavit.

12.3 Test results as detailed in paragraph 116C of the answering affidavit.

12.4 Business plans as referred to in paragraph 7 of the affidavit deposed to by Nel for the years 2006, 2005, 2004, 2003 and 2002.

[13] The respondents' response with regards to the inspection and

copying of test results has been a general one stating that the respondents have, in their opposing affidavit filed in the main application, only made reference to tests that were done and not to test results. They have pointed out that no such results are in their power or control. They have suggested that the applicants should obtain the results from the organisations that were referred to in their afore-mentioned opposing affidavit.

[14] The context of paragraph 55 suggests that the test-results were documented. I am not persuaded to think that paragraph 55 of such context allows for any other interpretation. The same applies to the contexts of paragraph 109 and 116C of the said opposing affidavit. As far as business plans are concerned, it is clear from the relevant paragraph of the opposing affidavit that reference is being made to written documents.

[15] I now have to exercise the discretion whether or not to order production of the aforesaid documents for inspection or copying. In exercising this discretion, there are factors that a court is expected to take into consideration. See **PREMIER FREIGHT** (supra) and **AFRICAN BANK LTD** (supra). The applicant's founding affidavit filed in the application under

consideration has not canvassed these factors in any way. They were raised for the first time in the heads of argument and were elaborated upon during the hearing of the application. The respondents' counsel has argued that these aspects ought to have been raised as evidence and not as arguments. Having considered the affidavits filed in the main application, I am persuaded that this is indeed a public interest matter and the documents required by the applicants for inspection and copying are indeed important for its consideration. Despite the respondents' averments pertaining to the acquisition of the test results, it is clear that it would be relatively easier for them rather than for the applicants to obtain the said results as they are the ones that know the details of the different organisations or institutions that performed the tests. As for the business plans, it should be an easy task for the respondents to produce these documents. Under these circumstances, it is only fair that the respondents be ordered to produce the aforesaid documents for inspection and for copying.

[16] However, in all fairness to the respondents, they should be granted a reasonable time to enable them to obtain the results from the respective organizations / institutions prior to making them available for inspection. The five days suggested by the applicants is therefore too short. I am of the opinion that twenty days suffices as a reasonable time under the circumstances.

[17] With regards to costs, the applicants' application is successful only in respect of the second part of its notice, the first part having been found to be fatally defective. I am satisfied that under the present circumstances, it will not be fair to order the respondents to pay the costs of this application.

[18] I therefore make the following order:

18.1 The respondents are hereby compelled to, within 20

(twenty) days from date of this order, produce the

following documents for the applicants' inspection and

copying:

18.1.1 Test results referred to in paragraph 55 of the

answering affidavit filed under case number

5349/2005.

18.1.2 Test results referred to in paragraph 109 of the
answering affidavits filed under case number 5349/2005.

18.1.3 Test results referred to in paragraph 116(c) of the
answering affidavits filed under case number 5349/2005.

18.1.4 Business plans referred to in paragraph 7 of the affidavit
deposed to by Nel under case number 5349/2005, for the period
2002 – 2006.

18.2. The applicants are granted leave to approach this honourable court on the same papers, duly amended where necessary, for an order in terms whereof the respondents' opposing papers are struck out and that judgment be granted in favour of the applicants' Notice of Motion, should the respondents fail to comply with the provisions as contained in paragraph 18.1 above.

18.3 No order is made as to costs.

M. B. MOLEMELA, AJ

On behalf of the applicants: Adv. H. Murray
Instructed by:
Israel Sackstein Matsepe Inc.
BLOEMFONTEIN

On behalf of the respondents: Adv. N. Snellenburg
Instructed by
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