



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

**CASE NO: 29116/2022**

|                   |                                        |
|-------------------|----------------------------------------|
| (1)               | REPORTABLE: <b>No</b>                  |
| (2)               | OF INTEREST TO OTHER JUDGES: <b>No</b> |
| (3)               | REVISED.                               |
| <b>31/10/2024</b> |                                        |
| DATE              | SIGNATURE                              |

In the matter between:

**LEON ALBERT ROPER**

First Applicant

**BROOKLYN PSYCHOLOGICAL SERVICES CC**

Second Applicant

**SIZA MEDICO LEGAL CENTRE (PTY) LTD**

Third Applicant

And

**GERT NEL INCORPORATED**

Respondent

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**JUDGMENT**

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**MBONGWE J**

## INTRODUCTION

- [1] The applicant's attorneys served a notice in terms of Rule 35(3) on the respondent's attorneys on 23 May 2023 requesting that certain documents listed in the notice and which the applicants believe may, in addition to the documents discovered, be relevant in the matter and are in the possession of the respondent, be made available for inspection and copying. The notice further requests the respondent, in the event that it is not in possession of such documents, to depose to an affidavit stating same and disclosing where such documents may be located, if that is known.

## NON-COMPLIANCE

- [2] The main *lis* between the parties in this application appears to stem from the respondent's contention that, having filed a discovery affidavit and disclosing the documents and material in its possession, it is not necessary for it to depose to a further affidavit as requested by the applicant. It is consequent to the stalemate that has ensued that the applicant has brought this application for an order compelling the respondent to formally respond to the notice in terms of Rule 35(3) in the manner contemplated in the rule, that is, by deposing to an affidavit either confirming possession of the requested documents and availing same or stating that the Respondent is not in possession of such documents and, if it be within the Respondent's knowledge, to disclose the location of such documents.

## OPPOSITION

- [3] The respondent has filed an answering affidavit in opposition to the application. The respondent has raised two points *in limine*; first, a challenge to the legibility of the applicants' legal representative to depose to the founding affidavit in support of the application and, second, a disputation of the need for it to depose to an affidavit.
- [4] In respect of the merits of the application, the respondent contends that the applicant has not made out a case for the relief sought. In this regard, the respondent contends that by their failure to establish relevance of the documents sought to be made available, the applicants are not entitled to the order sought in this application.

## THE LAW

- [5] It is trite that a deponent to a founding affidavit can be anyone with intimate knowledge of the relevant facts in the matter.<sup>1</sup> That the deponent to the founding affidavit in casu is a candidate attorney who is in charge of the applicants' case presupposes, in addition to this application being a procedural step, that she has sufficient knowledge of the matter to know what is required for her to prepare for the applicants' case. The deponent relies on the enabling rule 35(3) to request documentation she believes to be relevant in the action proceedings. Her legibility to depose to the founding affidavit in these circumstances is beyond reproach.

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<sup>1</sup> *Ganes and Another v Telecom Namibia Ltd* [2003] ZASCA 123; [2004] 2 All SA 609 (SCA) at para [19]

- [6] Whichever response the respondent proffers, be it availing the documentation requested or disputing the applicants' entitlement to the documents for valid reason such as privilege, or simply not being in possession and having no knowledge of the location of the documents, the rule requires that the respondent's response be by way of an affidavit. The relevant portion of Rule 35(3) reads:

"(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 10 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."

## CONCLUSION

- [7] The applicant is entitled to the relief sought herein and the respondent's opposition is rejected.

## ORDER

- [8] I make the following order:

1. The Respondent is ordered to deliver and/or upload its response to the Applicants' Rule 35(3) within 3 (three) days from the date of service of the order;

2. In the event of the Respondent failing to comply with paragraph 1 above, the Respondent's defense in the action instituted under case number 29116/2022 be struck out.
3. The Respondent is ordered to pay the costs of this application.

  
MPN MBONGWE  
JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA

**Appearances:**

|                     |                                         |
|---------------------|-----------------------------------------|
| For the Applicants: | Adv SG Maritz, Adv J van der Merwe      |
| Instructed by:      | Van Der Merwe & Associates Incorporated |
| For the Respondent: | Adv C van Jaarsveld                     |
| Instructed by:      | Rob Laubscher Attorneys                 |

|                   |                 |
|-------------------|-----------------|
| Date of hearing:  | 13 March 2024   |
| Date of delivery: | 31 October 2024 |

**THIS JUDGMENT WAS ELECTRONICALLY TRANSMITTED TO THE PARTIES' LEGAL REPRESENTATIVES AND UPLOADED ONTO CASELINES ON 31 OCTOBER 2024.**