



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

CASE NO.: 3635/2022

Reportable	Yes / No

In the matter between:

NGCATU KUNSANI

Plaintiff

and

MINISTER OF POLICE

First Defendant

NATIONAL COMMISSIONER OF POLICE

Second Defendant

PROVINCIAL COMMISSIONER OF POLICE

Third Defendant

JUDGMENT

Cengani-Mbakaza AJ

[1] Pursuant to Rule 35 (3) of the Uniform Rules of Court, if any party believes that there are, in addition to documents or tape recordings as disclosed other documents including copies thereof or tape recordings which may be relevant to any matter in question in the possession of the party thereto, the former may give notice to the latter requiring such party to make the same available for inspection

in accordance with Rule 35 (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 such disclosure shall state their whereabouts if known.

[2] Before me is an interlocutory application launched by the plaintiff seeking to compel the defendants to discover an inquest docket relevant to the allegations of unlawful assault by the members of the South African Police Service (SAPS) at Ngqeleni police station. For convenience, the parties will be referred to as they appear in the main action.

[3] The defendants oppose the application, stating that the documents are in possession of the Independent Police Investigative Directorate (IPID), an independent body that falls outside the defendants' control. Allied to that, the defendants state that the documents that are required by the plaintiff are irrelevant for purposes of the trial proceedings. Furthermore, the defendants raised two points of law, which are misjoinder or non-joinder of IPID as well as lack of cause of action. These are issues of determination by this court.

[4] Before assessing the issues, a brief background is necessary. On 22 July 2022, the plaintiff instituted an action against the defendants, seeking damages for alleged assault by SAPS members. The plaintiff claims that the SAPS members visited his home, accusing him of possessing unlicensed firearms and dagga, and subsequently assaulted him.

[5] On 28 September 2022, the defendants filed a plea and denied the allegations as stated. On 23 August 2023, pleadings were closed. The plaintiff served a Rule 35(1) notice requesting the documents' discovery within 20 days. Although the defendants complied on 4 September 2023, the plaintiff believed that other relevant documents, specifically an inquest docket, were withheld. Despite reminders and additional opportunities, including a notice on 18 October 2023, the defendants failed to disclose the documents. The 10-day period for

discovery elapsed on 1 November 2023. In his founding affidavit, the plaintiff avers that the discovery is necessary for the determination of the defendants' case.

[6] The defendants further assert that since the plaintiff acknowledges that the inquest docket is in IPID's possession, the defendants have been improperly joined in the proceedings, or alternatively, IPID's non-joinder in the main proceedings is an issue. The defendants further assert that pursuant to section 206 (6) of the Constitution¹ and the IPID Act², IPID is an independent body mandated to investigate complaints of police misconduct. Section 3(1) of the IPID Act establishes IPID's independence both nationally and provincially from the SAPS and Municipal Police Services.

[7] In oral arguments, Mr Matoti, counsel for the plaintiff, reaffirmed that IPID lacks a substantial and direct interest in the proceedings. He argued that IPID falls under the Minister of Police, to whom it is accountable as per section 206 (1) of the Constitution, which assigns policing responsibility to the Minister of Police. Counsel referenced *McBride v Minister of Police*, arguing that IPID's independence does not insulate it from political accountability. IPID submits activity reports to the Minister of Police, who tables them in Parliament, demonstrating ongoing accountability.

[8] Conversely, Mr Sambudla, counsel for the defendants, argued that SAPS does not investigate its own members, highlighting IPID's independence from SAPS. IPID, so he argued, is specifically mandated to investigate complaints against police members. Counsel further argued that per the principle of subsidiarity, a litigant must first seek recourse within a specific statutory framework, in this instance, the IPID Act, before approaching the Constitution.

¹ Act 108 of 1996.

² Act 1 of 2011.

Therefore, the plaintiff's allegations about IPID's accountability to the Minister of Police are misplaced and potentially contrived.

[9] The legal position is that the intention of Rule 35(3) is to provide for a procedure to supplement discovery which has already taken place, but which is alleged to have been inadequate.³ The sub-rule requires that a party must discover the documents in their possession or in their control. In the context of Rule 35(3), “*in control of*” means that the party has: possession of the documents, access to the documents so required to be obtained and the power to produce or obtain the documents. This interpretation is to ensure that parties cannot avoid discovery by claiming that the documents are held by others if they have control or access.

[10] In *Alf's Tippers CC v Martha Sussana Steyn*⁴, the court reiterated that the purpose of discovery is to ensure that, before trial, both parties are made aware of all the available documentary evidence. This is to ascertain that the issues are narrowed and the debate on incontrovertible points is eliminated. The Rule allows the parties to an action to discover the documents that are or may be relevant to the issues in the matter and which the litigant is expected to be in possession thereof. It further provides for the mechanism to enforce compliance should a party fail to comply thereto. In addition, the court explained, it is every party's right to be given a fair trial as enshrined in the Bill of Rights in the Constitution of the Republic of South Africa.

[11] Generally, courts favour the granting of access to documents or information necessary for a litigant to assert or protect a right, advance a claim, or fully present their case. This ensures a fair trial by providing adequate

³ The MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd 1999 (3) SA 500 (C) at 515D.

⁴ Case No: (11407/2019) [2023] ZA GPJH 527 (19 May 2023) at para 5.

opportunity to prepare and present one's case, aligning with the interests of justice.⁵

[12] The defendants' shift from initial compliance to claiming a lack of control over further discovery documents raises suspicions about the sincerity of their argument. This inconsistency suggests potential technical manoeuvring, which courts ordinarily discourage. To provide clarity, I shall address the points of law raised. The roles played by SAPS and IPID must not be conflated. IPID plays an investigative role in addressing crimes committed by SAPS Members, while SAPS, under the Minister's oversight, is mandated to combat crime generally. The Minister of Police is vicariously liable for an unlawful act committed by SAPS members while in the course and scope of their duties. In this instance, given the strict liability principle, suing the Minister of Police as the head of the executive authority of the Department of Police is appropriate. Therefore, the defendants' argument regarding misjoinder lacks merit, as the conduct in question relates to police members' actions within their duties.

[13] Moreover, the defendants' non-joinder argument, citing IPID's role in investigating police conduct, is misplaced. Police members are employees of SAPS under the Minister's control and not IPID. IPID's independent investigative role does not imply membership or control. Furthermore, it does not imply that SAPS are employees of IPID. The investigative role and the employer's role are two separate and distinct concepts.

[14] Given IPID's independent investigative role regarding police conduct, the defendants' non-joinder argument lacks merit. IPID does not have a direct and substantial interest in these proceedings. Instead, concerns arise about potential conflict of interest, where IPID's independence might be compromised by being both investigator and litigation party. I therefore conclude that the cause of action

⁵ Independent Newspaper (Pty) Ltd v Minister for Intelligence Service and Another: in re Billy Masethla v President of the Republic of South Africa; (Case No: CCT /38/07) [2008] ZACC 6 at para 25.

has been established. The assessment of the relevance of the documents to be discovered lies with the plaintiff and not the defendants.⁶ Consequently, the preliminary points must fail. As properly cited litigants, the defendants are obligated to discover the documents that are accessible to them, fulfilling their legal responsibilities in the proceedings.

Order

[15] In the result I make the following order:

1. The points of law are dismissed.
2. The defendants shall serve their reply to the plaintiff's notice in terms of Rule 35(3) of the Uniform Rules of Court dated 02 October 2023 within 10 days from the date of the delivery of this order.
3. The defendants shall pay the costs of this application, jointly and severally, the one paying the other to be absolved on Scale 'B' as contemplated under Rule 67A read with Rule 69 of the Uniform Rules of Court.

N CENGANI-MBAKAZA
ACTING JUDGE OF THE HIGH COURT

⁶ In *Visser and Others v Vardakos Attorneys and Others* at para 10, the court held:

‘I have no reason to reject the Plaintiff's contentions in this regard. In any event the relevancy of the document can more efficiently be addressed at the hearing of the trial and more particularly when the documents are sought to be introduced into the evidence. There is, relevancy being the only issue, no reason why the Plaintiffs are not entitled to inspect the documents in order to satisfy themselves whether or not the documents are indeed relevant.’

APPEARANCES:

Counsel for the Plaintiff : Adv Matoti
Instructed by : Mngqunyana and Co., Inc.
Mthatha

Counsel for the Defendants : Adv L L Sambudla
Instructed by : State Attorney
Mthatha

Date Heard : 06 February 2025
Date Delivered : 06 May 2025