

IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN DURBAN

Case no. D324/97

In the matter between:

South African Typographical Union & 4 Others

Applicant

AND

Republican Press (PTY) Ltd

Respondent

JUDGMENT

MLAMBO J.

[1] This is an application in terms of Rule 6(a) and (b) of the Rules of this court. The applicants seek an order compelling the respondent to discover the following documents:

(a) any internal or other memoranda concerning the operation undertaken by the undercover agents;

(b) a copy of any writing embodying any contractual arrangements between the undercover agents and the respondent;

(c) copies of the records of all other disciplinary proceedings in which any of the undercover witnesses gave evidence - regardless of whether the employees were found guilty or not.

[2] The applicants had also required discovery of an arbitration award of the Commission for Conciliation Mediation and Arbitration ("the CCMA") relating to one R Moonsammy. This request was abandoned at the hearing of the matter, the applicants having obtained the award in question. The respondent has refused to discover the other documents referred to above on the basis that they are either privileged or are otherwise not discoverable.

[3] It is prudent to briefly relate the background to this application. The respondent instituted disciplinary steps against the second to fifth applicants (“the individual applicants”). The respondent charged the individual applicants with the offence of removing certain items from its premises without authority. In the ensuing disciplinary enquiries the respondent relied exclusively on the evidence of two undercover agents which was given in camera.

[4] It appears that the undercover agents gave their evidence by way of statements and answers to questions through an intercom system. In the case of the 3rd applicant questions were relayed to the undercover agents by a certain Mr Raath who was in charge of the undercover operation. The individual applicants were found guilty of the alleged offences and their subsequent appeals were unsuccessful.

[5] The applicants articulate the basis for seeking discovery of the documents specified above as follows:

“5.1 The documents relate to various legal issues in the dispute, and are or have been in the respondent’s possession or control. Some examples of the issues to which the documents relate are as follows:

5.1.1 The legitimacy of the undercover agents, more specifically, their identity and whether they were in fact employed by the respondent and were not persons who were arbitrarily called upon to give evidence against the second to fifth applicants at their disciplinary enquiries;

5.1.2 The accuracy and truthfulness of the evidence which was given by the undercover agents and relied upon in dismissing the second to fifth applicants.

5.2 There is no legal reason why the documents should not be discovered and furnished to the applicants, as they are not privileged;

5.3 The discovery of the documents and making them available to the applicants will advance the applicants’ case, while damaging that of the respondent. Accordingly, this will place the above honourable court in a better position to adjudicate the matter;

5.4 Should the documents not be discovered and furnished to the applicants, the applicants will be prejudiced in putting their version to the above honourable court.”

[6] The respondent resisted the application on the premise that discovery of the documents would reveal the identity of the agents and would therefore render nugatory an intended application for leave to lead their evidence in camera at the trial. Another premise is that the documents:

“(a) form part of the evidence supporting the respondent’s case;

(b) do not support or tend to support the applicants’ case;

(c) contain nothing impeaching the respondent’s case.”

[7] The approach to discovery in this court should be similar to that of the High Court which is regulated by Rule 35 of the uniform rules of court. This is more so due to the absence of a similar provision in the rules of this court regulating the discovery of documents for trial purposes.

[8] The prevailing principle governing discovery in the High court is that the documents are not discoverable if:

8.1 they form part of the evidence supporting the case of the party
objecting to discovery.

8.2 do not support or tend to support the case of the party objecting to discovery, and

8.3 contain nothing impeaching the case of the party objecting to

discovery. See in this regard **Lenz Township Co. (Pty) Ltd v Munnick &**

Others 1959 (4) SA 567 (T).

[9] To determine if the requested documents are discoverable a closer examination of the pleadings and pre-trial minutes is called for. The primary basis of the attack on the respondent's case is that: (1) the evidence on which the individual applicants were convicted was untrustworthy; and that (2) the manner in which the internal disciplinary enquiries were conducted was prejudicial to the individual applicants.

[10] In paragraph 6.3.1, of the applicants' statement of case the following is stated regarding the evidence led during the disciplinary enquiries:

"In the background of such inconsistency, it is arguable that the statements were not written on a regular basis and that the witnesses were simply created and given statements to read."

Further in paragraph 6.2.2 & 6.2.3 of the applicants' statement of case the following is stated:

"The respondent's witnesses, one Patrick and one Farook, who were agents of a security company which was employed to infiltrate the workplace and obtain evidence to incriminate the respondent's employees, gave their statements and answers to questions through an intercom system.

The procedure was problematic in that the informants' answers were often distorted and barely intelligible. The result of this was that the members of the trade union and their representatives, were unable to fully question and put their version to the respondent's witnesses, thereby

testing the reliability of their evidence. Further, it created uncertainty as to the identity of the witnesses and therefore the legitimacy of such witnesses.

This procedure was however permitted by the respondent on the ground that the informants were in danger of intimidation and harm. This allegation is totally unfounded and is made against a background of a record of almost 40 years without a single allegation of this nature ever being levelled against any member of the trade union.

The court's guidance in balancing the right of the employer to employ undercover agents to infiltrate the workplace, against the rights of employees to know about the presence of such agents and their identities as well as employees rights to privacy.

One member of the union, namely Ms Mkhize, was prevented from questioning the respondent's witness directly. The member's questions were relayed to the witness by one Mr Raath, who was from the security company and was in charge of the respondent's witnesses. When relaying a question, Mr Raath would lead the witness.

This further prevented the member of the union from testing the statement of the respondent's witness by putting her version to him. Further, it was a direct contravention of the member's right to challenge her accuser, as provided in the list of rights given to her by the respondent."

[11] In my view the challenge by the applicants' case of that part of the respondent's case involving the undercover agents relate to no more than procedural unfairness. It is a challenge to the effect that the individual applicants were prejudiced by their inability to hear and test the evidence of the agents directly or face to face. They allege that they were prejudiced by the respondent's reliance on the agents' evidence because it was unreliable. It is clear therefore that the documents sought by the applicants relate to the evidence used to convict them.

[12] It is trite that a court will not normally go behind a party's affidavit to the effect that documents are either not relevant or are privileged. Such affidavit is, as far as the court is concerned not conclusive. The court is entitled to examine and consider the pleadings and case made out to make a ruling. See **Rellams (Pty) Ltd v James Brown & Hamer Ltd** 1983 (1) SA 556 (NPD). The respondent's main objection to the discovery of the documents

requested is that they are either privileged or not discoverable. A court will not readily compel a party to discover privileged documents. However a party claiming privilege must set out in sufficient details the grounds on which privilege is claimed. **Herbstein & Van Winsen**: “**The Civil Practice of the Supreme Court of South Africa 4th edition** at 594. In **Ferreira v Endley 1966 (3) SA 618 (E) at 620H** Eksteen J said:

“The form of discovery required by the Rules is one which should indicate in the affidavit the existence of documents in respect of which privilege is claimed, and the grounds on which privilege is claimed must be stated sufficiently clearly for the Court, if called upon, to decide whether the documents are in fact privileged from production or not. The mere claim of privilege is certainly no reason for omitting all reference to the documents in the discovery affidavit.”

[13] The respondent’s opposing affidavit discloses no grounds on which privilege is claimed. In paragraph 19 of the affidavit the respondent states that the documents are in effect witness statements and their discovery would have the effect of disclosing the respondent’s evidence. It is trite that witness statements are privileged. They cannot be discovered as this will indeed have the effect of disclosing that party’s evidence. A party can claim this privilege only in respect of a statement made by a witness he intends to call. See **Mlamla & Another v Marine & Trade Insurance Co. 1978 (1) SA 401 (E)** at 402D - 403A where De Wet J said:

“The right of a party to an action to resist discovery or to refuse to disclose evidence is a limited right existing only in certain well defined circumstances. As was held in *Adams v Moffat, Hutchins & Co., (1906) 23 SC 343*, there are four main grounds upon which discovery can be resisted. The first is if the document is criminatory or penal; the second if it is covered by legal professional privilege; the third is if it will disclose the party’s evidence and the fourth ground that if it were disclosed it would be injurious to public interest.

In the instant case the only ground possibly applicable is that the document would disclose the defendant’s evidence. It seems to me that

the reason for this rule is that the one party is not entitled to know whether the other party is going to call witnesses and, in the event of such party calling witnesses, who they are and what they will say. (Cf *Knapp v Harvey*, (1911) 2 K.B. 725) as was held in *re Stracham*, (1895) 1 CH. 439, to give one side the opportunity of knowing what the witnesses for the other side are going to say and who they are, would give an undue advantage to that side, which from experience would be most unjust to the other side.

Statements such the one made by second plaintiff to defendant's agent are in my view on a different footing. Defendant does not hold this document as a statement of his witness, nor does he intend using it as such. He holds it with the intention, if possible, of damaging the plaintiff's case. Frankness in discovery is encouraged because this will narrow down the issues and cut down the volume of evidence. It seems to me that there can be no difference between a statement like the one now under discussion and a letter written by the second defendant containing the same information.

I accordingly hold that this is not a privileged statement and that it should have been disclosed by the defendant in his affidavit of discovery. Unless, therefore, the defendant is granted leave in terms of Rule 35(4) to make use of this document it may not be used in cross-examination or in any other way."

These remarks were cited with approval by Jones J in *Mazele v Minister of Law & Order* 1994 (3) SA 380 (E).

[14] The respondent's allegation that the requested documents are witness statements can be related to the request for discovery of "any internal or other memoranda concerning the operation undertaken by the undercover agents". These documents are essentially communications between the respondent and its undercover agents regarding the undercover operation. They can therefore be regarded as communications between principal and agent.

[15] The general rule regarding communications between principal and agent is that they are not privileged unless those communications are made when litigation is pending or

anticipated and relate to evidence likely to be produced at the trial by the principal. See **Herbestein & Van Wirren (supra)** at page 598. In **United Tobacco Companies (South) Ltd 1953 (1) SA (T)** the court ordered the discovery of certain reports which contained information regarding the transaction that formed part of the subject matter of litigation. The court's reasoning was that those specified communications were not made when litigation was pending or in contemplation thereof. The court held: (quoting from the head note):

“.....however, as the February report which was a communication between principal and agent in the matter of his agency, contained information of the facts and circumstances of the transaction which was the subject matter of the litigation, that it was not privileged even though the possibility of litigation might at that time have been contemplated.”

[16] In the matter before me there is no doubt that when the communications took place between the respondent and the undercover agents there was no pending litigation between the parties nor can it be said that they were made in contemplation of litigation. I am also not persuaded that these documents are not otherwise discoverable. It is clear that these documents are relevant and that their discovery will lead to a train of enquiry which may ultimately serve to advance the applicants' case or impeach the respondent's case. In **Ferreira v Endley (supra)** Eksteen J said at 622A-D:

“The words

“all documents relating to any matter in question in such action (whether such matter is one arising between the party requiring discovery and the party required to make discovery or not)”

appearing in Rule 35, must be given a wide interpretation, and will include any document which may lead to a train of enquiry which may ultimately serve to advance the case of the party seeking discovery or to damage the case of his adversary. (Cf *Compagne Financiere et Commerciale du Pacifique v Peruvian Guano Co.*, (1882) 11 Q.B.D. 55, quoted with approval in *Maxwell and Another v Rosenberg and Others*, 1927 W.L.D. 1 at p4, and *Federal Wine & Brandy Co. Ltd v Kantor*, 1958 (4) SA 735 (E). In the present case several of the letters which are not referred to in the discovery affidavit contain references to issues between

the parties which may well be important at the trial, and I do not consider that, at this stage, I can say that the defendant cannot be prejudiced by non-disclosure. I have no doubt, therefore in all the circumstances, that defendant is entitled to succeed in his application for a postponement and the plaintiff should be ordered to pay the wasted costs caused by his late and incomplete discovery.”

It therefore appears justified to conclude, on this basis that the communications between the respondent and the undercover agents are not privileged and should be discovered.

[17] The other documents sought to be discovered are **“a copy of any writing embodying any contractual arrangements between the undercover agents and the respondent”** and **“copies of the records of all other disciplinary proceedings in which any of the undercover witnesses gave evidence - regardless of whether the employees were found guilty or not.”** A document embodying a contractual arrangement between parties can hardly be regarded as a communication between those parties. It is a document regulating the parties’ relationship. A party seeking the discovery of the document must satisfy the court of that document’s relevance. In this case applicants have not demonstrated in what respects they allege that this document is relevant. The most they state about the undercover agents is:

“17.1 The legitimacy of the undercover agents, more specifically, their identity and whether they were in fact employed by the respondent and were not persons who were arbitrarily called upon to give evidence against the second to fifth applicants at their disciplinary enquiries;

17.2 The accuracy and truthfulness of the evidence which was given by the undercover agents and relied upon in dismissing the second to fifth applicants.”

[18] In my view there is no basis to suggest that documents embodying contractual arrangements between the respondent and the agents are relevant to the issues in this matter.

The subject matter in this matter has nothing to do with the contractual arrangement between the respondent and the agents, it has more to do with the veracity of their evidence. I can also find no basis to suggest that these documents will advance the case of the applicants or may impeach the respondent's case.

[19] The other category of documents requested relate to the evidence of the undercover agents at disciplinary enquiries involving other employees. These documents do not relate to any matter in dispute in the present matter. Their relevance can only relate to the modus operandi of the undercover agents and possibly be relevant concerning questions of credibility and reliability. I have already stated that courts have in the past permitted the discovery of a document which may lead to a train of enquiry which may ultimately serve to advance the case of the party seeking discovery and/or to damage the case of the party resisting discovery. See **Ferreira v Endley (Supra)**. On this basis I find that the respondent is not justified in refusing to discover these documents.

[20] Whilst it is so that I have found no merit in the respondent's resistance to discovering two of the three categories of documents, there remains, still for consideration, the matter of the respondent's intended application to lead the evidence of the undercover agents in camera. It is correct, as pointed out by the respondent that discovery of the documents will render such intended application nugatory. It appears justified therefore to rule that the discovery of further documents permitted by this court be held in abeyance until after the respondent's intended application has been finally determined.

[21] In the circumstances I make the following order:

1. The respondent is ordered to discover the documents set out in paragraphs 1 and 3 of the notice of motion.
2. The respondent shall make discovery of the stated documents within 14 days from the date on which an order or judgment is given relating to its application to lead certain evidence in camera.
3. The respondent is ordered to lodge its application in which it seeks to lead evidence in camera, within 21 days from the date of this judgment.
4. The respondent is ordered to pay the applicants' costs.

MLAMBO J

Date of judgment: 05 March 1999

For the applicants: Mr I Moodley instructed by Van Onselen O' Connel Inc.

For the respondent: Mr L.C.A Winchester instructed by Strauss Daly Inc.