IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: ***8th June 2018*** Signature: _____

CASE NO: 2016/18040

In the matter between:

FRANSCH, SAMANTHA CELEAS, on behalf of:
FRANSCH, JERMAINE Applicant

and

THE PREMIER, GAUTENG PROVINCE First Respondent
THE M E C FOR HEALTH, GAUTENG PROVINCE Second Respondent

JUDGMENT

ADAMS J:

[1]. I have before me two interlocutory applications by the applicant, who is the plaintiff in the main action, against the respondents, who are the

defendants. The first application is in terms of uniform rule 35(7) for an order compelling the respondents to reply to applicant's notice in terms of rule 35(3) and (6), which required the respondents to produce a list of 31 documents, comprising in the main clinical notes, hospital records and related documentation from the following three hospitals: the Germiston Clinic, the Bertha Gxowa Hospital and the Chris Hani Baragwanath Hospital. The second application is in terms of rule 30A(2) for an order striking out the defence of the respondents on the basis that, according to the applicant, the respondents have failed to reply to her questions / enquiries directed to the respondents in terms of rule 37(4) at the pre – trial conference.

[2]. Both applications are opposed by the respondents. In their answering affidavit in the first application deposed to by their attorney, the respondents allege that they have given notice to the applicant, in the form of an affidavit / affidavits, deposed to under oath, that they (the respondents) have been unable to locate the requested documentation. The respondents' discovery affidavit, stating that the required documents cannot be found, was delivered on the 2nd of November 2017, which, according to the respondents, replies to the applicant's notice in terms of rule 35(3) and (6), which is the subject of this application to compel. The applicant took issue with the claim by the respondents that they have replied to the rule 35(3) and (6) notice. One of the points taken by the applicant was that the said affidavit dealt only with documentation from the Bertha Gxowa Hospital and omitted to reply to the notice relating to documents from the Chris Hani Baragwanath Hospital and from the Germiston Clinic.

[3]. At the hearing of the application before me on the 5th of June 2018, Mr Van Nieuwenhuizen, Counsel for the applicant, advised me that the applicant accepts that the respondents had by then replied to the request for the discovery of the Chris Hani Baragwanath Hospital documentation, and the reply is acceptable to the applicant. Whilst the application was being argued, it

transpired that the reply in relation to the Germiston Clinic documentation was delivered on the 24th April 2018. That then also took care of the documents required from the Germiston Clinic, leaving us with the respondents' objection to the initial reply, which dealt only with documents from the Bertha Gxowa Hospital.

[4]. The applicant's objection to the reply is of a very technical nature. The affidavit, deposed to by the Chief Executive Officer of the Bertha Gxowa Hospital on the 20th October 2017, confirms that a number of steps were taken and procedures followed to locate the requisite documentation, but to no avail. He therefore confirms that the 'defendants are currently not in possession of the documents listed in plaintiff's notice in terms of rule 35(3) and the defendants do not know whether such documents exist'. The contents and substance of this 'affidavit' appears to be acceptable to the applicants, but not the form. The document was commissioned by a chief admin clerk at the Bertha Gxowa Hospital, which means that the commissioner of oaths was in fact an employee of the very same hospital and the deponent. This, according to the applicant, contravenes regulation 7(1) of the Regulations governing the Administration of an Oath or Affirmation, promulgated in terms of section 10 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963. This, so it was submitted on behalf of the applicant, is fatal and means that there has been non – compliance with the rule 35(3) and (6) notice.

[5]. There appears to be merit in this submission by Mr Van Nieuwenhuizen. In that regard, I have been referred to *Radue Weir Holdings Ltd t/a Weirs Cash & Carry v Galleus Investments CC t/a Bargain Wholesalers*, 1998 (3) SA 677 (E). At pg 679 Pickering J remarks as follows:

> 'There is also a wealth of authority to the effect that an affidavit attested to before an attorney who is acting for a party on whose behalf the affidavit is to be used in litigation is inadmissible as evidence. This prohibition arises not only from an

interpretation of the word 'interest' in reg 7(1) but also from the rule of evidence which governed the situation prior to the existence of any statutory provision to that effect and which operates side by side with the regulations 'the former in relation to proceedings in the Courts and the latter as a matter of general law' (per Caney J in the *Royal Hotel* case supra at 666F--G). As was stated by Marais J in *Papenfus v Transvaal Board for the Development of Peri-Urban Areas*, 1969 (2) SA 66 (T) at 69H -70A:

> 'Our law of evidence, following the practice in England, has for many decades set its face against admitting in evidence affidavits attested by commissioners of oaths who were the attorneys for the parties to the litigation in question (*In re Attestation of Affidavits*, 1926 WLD 89, and similar decisions in other Divisions).'

[6]. Applying these principles *in casu*, I am of the view that the affidavit filed by the respondents in relation to the Bertha Gxowa Hospital can and should be disregarded. Therefore, the respondent has not replied to the applicant's rule 35(3) and (6) notice in that regard. She is therefore entitled to an order compelling a reply to that effect.

[7]. I now turn my attention to the applicant's second application. As indicated *supra*, the applicant had raised a number of queries and directed questions to the respondents in terms of rule 37(4). The respondents replied to all of the questions. The applicant is not content with the replies given by the applicant. She believes that the respondents did not reply to the questions truthfully. The applicant was particularly aggrieved by the fact that the respondents alleged that they are unable to reply to certain questions because the hospital records have not been located. The respondents also refuse to answer other enquiries on the basis that those relate to matters of evidence. The respondents oppose the application on the basis that they have replied to the rule 37(4) questions and that the applicant cannot rely on rule 30A to extract replies she believes appropriate.

[8]. I find myself in agreement with the respondents' stance for the following reasons.

[9]. In the context of discovery, courts are reluctant to go behind a discovery affidavit which is regarded as conclusive, save where it can be shown that there are reasonable grounds for supposing that the party has other relevant documents in his possession. This principle, in my judgment, applies equally to a reply in terms of rule 37(4). The applicant, in my view, cannot be heard to bemoan the reply on the basis that the answers are inadequate. She should have demonstrated that there are reasonable grounds to suppose that the respondents were being untruthful. She has not done that and for that reason alone, her application should fail.

[10]. Additionally, and as pointed out by the author Erasmus: Superior Court Practice, the procedure laid down by subrule 37(4) that 'Each party shall . . . furnish every other party with a list', is to enable the parties to prepare properly for the conference under the rule, to facilitate the smooth running of the conference and to enable them to reach agreement on as many issues as possible without unnecessary delay. It may very well be that the procedure, which had become prevalent in some courts, of filing formal notices and replies thereto purportedly under the subrule amounts to an abuse of the process of the court. The subrule contemplates a list to be provided, *inter alia*, of enquiries which a party will direct to the other party and which are not included in the request for particulars for trial, and other matters regarding preparation for trial which he will raise for discussion. The list of enquiries is, therefore, intended to relate to matters which will be discussed at the pre-trial conference.

[11]. The remedy available to any party who is frustrated by a lack of co-operation or *bona fides* on the part of his opponent, is to request that the conference be held before the judge in chambers.

[12]. Accordingly, the applicant has not made out a case for the relief sought and her application in terms of rule 30A(2) stands to be dismissed.

Cost

[13]. The applicant has been successful, albeit to a limited extend only, in her application in terms of rule 35(7) to compel the respondents to make further and better discovery. This means that, applying the general rule, she would normally be entitled to the cost of the said application.

[14]. Conversely, the respondents also successfully opposed the applicant's application in terms of rule 30A(2), which means that they are entitled to the cost of that application.

[15]. The cost order to which the applicant is entitled would probably be cancelled out by the cost order which should be granted against her in favour of the respondents. Therefore, in my judgment, the fairest and most expedient way to deal with cost in relation to both applications is to order that each party shall bear his / her own cost. Such a cost order would be fair, reasonable and just to all concerned.

Order

Accordingly, I make the following order:-

1. The respondents shall within ten days from date of delivery of this order deliver a reply to the applicant's notice to discover in terms of rule 35(3) and (6) dated the 16th September 2017, relating only to the documents to be produced by the Bertha Gxowa Hospital.

2. The applicant's application in terms of rule 30A(2) for an order striking out the defence of the respondents be and is hereby dismissed.

3. Each party shall bear his / her own cost relating to both applications.

L ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	5th June 2018
JUDGMENT DATE:	8th June 2018
FOR THE APPLICANT:	Adv H P Van Nieuwenhuizen
INSTRUCTED BY:	Ivan Maitin Attorneys
FOR THE RESPONDENT:	Adv V Notshe SC
INSTRUCTED BY:	The State Attorney, Johannesburg