

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



CASE NO.: 40537/2016

14/12/17

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

14/12/2017

In the matter between:

CENTURION VISION DEVELOPMENT (PTY) LTD

APPLICANT

and

SOUTH AFRICAN POST OFFICE (SOC) LTD

RESPONDENT

IN RE:

SPECIAL INVESTIGATING UNIT

1st APPLICANT

SOUTH AFRICAN POST OFFICE (SOC) LTD

2nd APPLICANT

MINISTER OF TELECOMMUNICATIONS AND
POSTAL SERVICE

3rd APPLICANT

and

CENTURION VISION DEVELOPMENT (PTY) LTD

RESPONDENT

JUDGMENT

VAN DER WESTHUIZEN, A J

- [1] This is an application in terms whereof the applicant applies for an order that the respondent complies with the Notice in terms of Rule 35(12) of the Uniform Rules of Court relating to making available specific documents referred to in a founding affidavit deposed to on behalf of the respondent.
- [2] The respondent is co-applicant in an application in terms whereof it is sought that a lease agreement is declared void *ab initio* together with ancillary relief. In the founding affidavit to that application, reference is made to a number of documents. The applicant, in terms of the provisions of Rule 35(12) has sought insight into those documents prior to it filing its answering affidavit in that application (the main application).
- [3] The aforementioned Notice in terms of the Rule 35(12) application was directed at and served upon the respondent and the first applicant in the main application. The first applicant in the main application, the Special Investigating Unit (SIU) filed a response in which it made available certain of those documents and responded on affidavit in respect of the other documents. The respondent failed to respond to the Notice.
- [4] The documents dealt with in the responding affidavit on behalf of the SIU, so it is submitted on behalf of the applicant, must be in the possession of the respondent. The applicant subsequently filed a Notice in terms of the provisions of Rule 30(A) upon the respondent seeking that the respondent complies with the said Rule 35(12) Notice. The respondent filed a response to the said Rule 30(A) notice. The

respondent failed to comply and did not provide any of the outstanding documentation. In that regard, the respondent made the following statement in its responding affidavit:

"In having considered the responses of the SIU deposed to by Mr. Reddy on 29 July 2016, SAPO aligns itself with the responses furnished in that affidavit."

- [5] The SIU's response was two fold. In the first instance the SIU made available those documents that it had in its possession. Secondly, and in respect of the documents it did not make available, it stated that it did not have any of those documents in its possession.
- [6] The applicant, on receipt of the aforesaid response, served a second Rule 30(A) upon the respondent. The respondent was cautioned that failure to comply appropriately with the said Rule 35(12) and Rule 30(A) Notices would result in the launching of the present application.
- [7] The respondent followed suit and failed to comply with the said Rule 35(12) Notice. In response a second affidavit was filed on behalf of the respondent. In paragraph 4 of that affidavit the following statement is made.

"The SAPO does not have such document(s) in its possession or under its control nor are the whereabouts of the requested documents, if they do exist, known to SAPO. The production of such document can therefore not be made available or produce for inspection as they are not available."

- [8] The applicant launched the present application to compel. As recorded above, the respondent opposes the relief sought. The opposition is premised upon two bases. The first basis is that it did not make any reference to the stipulated documents in its founding affidavit in that the documentation is referred to in the SIU's founding affidavit. Secondly,

the respondent *"agrees and aligns itself in respect of all the responses furnished by the SIU in the affidavit deposed to by Mr Reddy on the 29th of July 2016"*.

- [9] The first defence can be dealt with summarily. The respondent in its founding affidavit states unequivocally that its co-application in the main application is an independent application. However, it is further unequivocally stated that for the sake of convenience and in an attempt to avoid prolixity, it refers to the allegations contained in the founding affidavit of the SIU and the annexures attached thereto and prays that it be read into the respondent's founding affidavit as if specifically mentioned therein. Such statement incorporates by reference the whole content of the SIU's founding affidavit into that of the respondent. It is trite law that in so doing, any reference to a document is consequently included in the affidavit of the respondent. Counsel for the respondent did not contend the contrary. There is no merit in this ground of opposition. Counsel for the respondent in his oral argument did not press this ground of opposition and rightly so. It is further trite that where reference to a further document is made in the initial referred document, a party is also entitled to access to that further document.
- [10] The only context in which the respondent's "aligning" with the SIU could be understood, is that it agrees that some documentation was made available and that the SIU did not have in its (SIU) possession. *Non constat* that the respondent did not have the latter documentation in its possession. Such inference does not follow logically and the pertinent issue is not addressed. The respondent's response was clearly inadequate. The simulated attempt to shy away from its obligation to provide the required documents, the respondent hides behind the response by SIU that it does not have in its possession the required documents. The respondent further shirks its obligation when it alleges that the SIU, during its investigation, collected all the documents of the respondent and later returned them. In this regard,

the deponent to the answering affidavit, Mr Barnes the present CEO of the respondent, merely states that the documentation was collected by the SIU prior to his appointment as CEO and that subsequently, the same documents were returned. He further states that the present Board of the respondent was only appointed after the investigation commenced. From those statements, Mr Barnes seeks to distance himself and the Board from disclosing where the documents are. In no uncertain terms, as is indicated in the passage quoted above with reference to paragraph 4 of the response, Mr Barnes questions the very existence of the required documents. That approach is echoed in the answering affidavit of Mr Barnes. The required documents simply do not exist.

- [10] Counsel for the respondent submitted that a party cannot be compelled to produce documents that it does not have in its possession. Such order would have no practical effect.
- [11] It is gleaned from the schedule handed up by counsel on behalf of the applicant relating to the required documents, that all those documents either originated from the respondent or would of necessity be in its possession. In this regard, the first three items relate to the Procurement Policy of the respondent. It is difficult to follow why those documents would not be in the respondent's possession. The majority of the remaining items related in one way or the other to minutes of meetings of the respondent or correspondence originating from it. Why such items would not be in the possession of the respondent is equally not explained.
- [12] Furthermore, the attorneys of record of the respondent addressed a letter dated 4 March 2016 to the State Attorney, the attorney of record of the Special Investigation Unit, requesting the return of the documentation listed in the letter that was removed from the respondent's offices to enable the Special Investigation Unit to compile a report. It is noteworthy that the very documentation now sought by

the applicant is specifically enumerated in the said letter. The respondent's response as recorded above that those documents do not exist, is not understood in view of what is contained in the said letter.

- [13] In the matter *Tracklot General Trading (Pty) Ltd v Sethole et al*¹ the court held as follows:

"[24] From this it is clear that court has a discretion which should be exercised in such a way as to attempt to strike a balance between the interests of the various parties. In my view the court should be guided in the exercise of this discretion by the justifications given by the party for resisting the delivery of the particular document. In other words, if a party resists the delivery of a particular document, he should adduce evidence why he is resisting. It is only with this evidence that the court would be in a position to exercise its discretion properly and appropriately. But it is important that neither party should be prejudiced unfairly in this process.

...

[28] In respect of the documents that the respondents claim are not in their possession, they need to set up facts to support this claim. If they know who else is in possession of the requested document, they should reveal who this is. But this raises the other issue of whether the party should obtain the requested document from this other party ... I think at least a reasonable attempt should be made to find the document and produce it ..."

- [14] I am in agreement with the aforesaid *dicta*. The respondent has blandly stated that it is not in the possession of the documents and

¹ (7406/2015) [2016] ZAGPPHC 2014 (23 March 2016)

further that the documents do not exist. The latter statement flies in the face of the facts that the required documents originated from the respondent and/or would and ought to have been in its possession at some stage. That much is to be gleaned from the aforementioned letter. There is simply no explanation.

[15] In my view, a deponent cannot simply state that the documents were removed prior to him holding the position and thus that such documents do not exist. It smacks of a lackadaisical approach.

[16] The respondent has not explained what attempts were made and what steps were taken to obtain the required documents. Clearly the respondent has not met the obligations set out in the *Tracklot, supra*, matter.

[17] It follows that the applicant is entitled to the relief sought.

I grant the following order:

1. The Respondent (The South African Post Office (SOC Limited)) is ordered to produce and make available for inspection, the following documents specified in the Rule 35 Notice annexed to the Founding Affidavit as annexure **IMT2**:

Paragraph 2

Paragraph 4.1

Paragraph 4.2

Paragraph 4.3.2

Paragraph 7.2.1

Paragraph 8.1

Paragraph 8.2

Paragraph 8.3

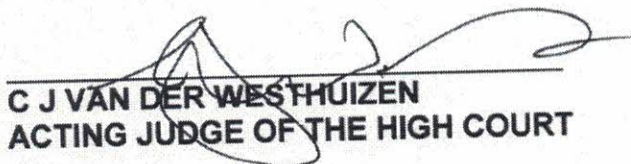
Paragraph 14.2.2

Paragraph 15.1

Paragraph 15.2
Paragraph 15.3
Paragraph 15.4
Paragraph 15.5
Paragraph 15.6
Paragraph 17.3
Paragraph 17.4
Paragraph 17.5
Paragraph 17.6
Paragraph 17.7
Paragraph 17.8
Paragraph 17.9
Paragraph 17.10
Paragraph 17.11
Paragraph 17.12
Paragraph 17.13

2. The Respondent is ordered to produce and make available for inspection the aforesaid documents within 15 (fifteen) days of granting this order, and to allow the Applicant (Centurion Vision Development (Pty) Ltd) to make copies of all such documents.
3. In the event of the Respondent being unable to produce any of the documents because it is not in the Respondent's possession, and in that event the Respondent shall, within 15 (fifteen) days of the date of this order serve and file an affidavit setting out the following:
 - 3.1 Whether such document was ever in the possession of the Respondent;
 - 3.2 If indeed, what steps the Respondent took to locate the document;
 - 3.3 Should the document no longer be in possession of the Respondent, the reason therefore; and

- 3.4 Where such document can be found, if known to the Respondent; alternatively
- 3.5 That such document was never in Respondent's possession.
4. The Respondent is ordered to pay the costs of this application on attorney and client scale, inclusive of the cost consequent employment of 2 (two) counsel.



C J VAN DER WESTHUIZEN
ACTING JUDGE OF THE HIGH COURT

Date of Hearing:	16 November 2017
On behalf of Applicant:	M C Erasmus SC Ms E M Baloyi-Mere W T B Ridgard
Instructed by:	A B Löwe Attorneys
On behalf of Respondent:	R Ram
Instructed by:	Shepstone & Wylie
Judgment delivered:	14 December 2017