



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 3413/2021

In the matter between:

THE MEMBER OF THE EXECUTIVE COUNCIL
FOR HEALTH, FREE STATE

Applicant

and

HAROLD TYRONE BOSS
HELEN BOSS

1st Respondent

2nd Respondent

HEARD ON:

14 SEPTEMBER 2023

JUDGMENT BY:

DANISO, J

DELIVERED ON

27 DECEMBER 2023

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- [1] On 29 December 2019, the respondents' daughter (the deceased) passed away at Pelonomi hospital due to injuries she had sustained in a motor vehicle which took place the previous day on 28 September 2019. Pursuant to the death of their daughter, the respondents (plaintiffs) instituted a claim against the applicant (defendant) for loss of support in the amount of R2 million on the grounds that at the time of her death the deceased supported the plaintiffs financially and her

death was caused by the negligence of the defendant's employees namely: the medical and nursing staff who attended to the deceased after she was injured and during her hospitalization at Thebe Hospital from where she was transferred to Pelonomi hospital where she passed away.

- [2] The claim was defended by the defendant. At the close of the pleadings the plaintiffs delivered their discovery affidavits on 21 January 2022 which the defendant found to be inadequate as a result on 5 May 2022 the defendant served the plaintiffs with a notice in terms of rule 35(1) of the Uniform Rules of Court (the rules). The plaintiffs were requested to discover the following documents:

- "1. *Payslips and/or proof of income and/or financial statements of the deceased;*
2. *Payslips and/or proof of income and/or financial statements of the first and second plaintiff;*
3. *Proof of employment of the deceased (the hospital admission documents reflect the deceased as unemployed);*
4. *Proof of the relationship between the deceased and the first and second plaintiffs;*
5. *Confirmation of whether there was a RAF claim for loss of support and if so, all the documentation regarding such a claim.*

- [3] Pursuant to the defendant's rule 35(1) notice, the plaintiffs only discovered the information listed under item 4 namely, the deceased's unabridged birth certificate. It is in that regard that the defendant has launched these proceedings in terms of rule 35(3) seeking an order to compel the plaintiffs to produce the remaining information.

- [4] The provisions of rule 35(3) are trite: upon the request of an opponent, a party to an action is required to make available for inspection documents or tape recordings discovered or disclosed which may be relevant to any matter in question in its possession 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."

- [5] It is the defendant's case that the production of the deceased's proof of income and that of the plaintiffs and their financial records is relevant to the matter in question. So far, the plaintiff has only provided the defendant with copies of the deceased's qualifications which do not constitute proof of her employment. Except to aver that the remainder of the information is not relevant at this stage as merits and quantum have been separated, not even an attempt was made to explain why the said documents have not been discovered. The documents must be discovered despite the separation as the rule does not provide for different stages of discovery.
- [6] The defendant continues to state that it is prejudiced by the plaintiffs' failure to discover the requested documents as its legal representative is unable to advise it accordingly.
- [7] The application is opposed on the grounds that: the documents required are not relevant at this stage because they relate to quantum and the parties had agreed to separate and stay the quantum for later determination and the information regarding employment and earnings of the deceased is not available yet it. It has been requested from the deceased's erstwhile employer on 15 March 2023 which is a Chinese Agency where she taught English but since then, there has been no response. The documents will be provided to the defendant once they become available.
- [8] In argument, counsel for the plaintiffs stated that at this stage the plaintiffs are not required to produce documents they are only required to state under oath the list of the documents in their possession and if they are not in possession of the documents to state their whereabouts.
- [9] To arrive at an appropriate determination of this issue I must have regard to the principles laid down in *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others*¹ at p 316E-317B:

¹ 1999 (2) SA 279 (T) at 316E-317B.

'The requirement of relevance, embodied in both Rule 35(1) and 35(3), has been considered by the Courts on various occasions. The test for relevance, as laid down by Brett LJ in Compagnie Financiere et Commerciale du E Pacifique v Peruvian Guano Co (1882) 11 QBD 55, has often been accepted and applied. See, for example, the Full Bench judgment in Rellams (Pty) Ltd v James Brown & Hamer Ltd 1983 (1) SA 556 (N) at 564A, where it was held that: After remarking that it was desirable to give a wide interpretation to the words "a document relating to any matter in question in the action", Brett LJ stated the principle as follows: "It seems to me that every document relates to the matter in question in the action which, it is reasonable to suppose, contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly" because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of enquiry which may have either of these two consequences."

The broad meaning ascribed to relevance is circumscribed by the requirement in both subrules (1) and (3) of Rule 35 that the document or tape recording relates to (35(1)) or may be relevant to (35(3)) "any matter in question". The "matter in question" is determined from the pleadings. See in this regard SA Neon Advertising (Pty) Ltd v Claude Neon Lights (SA) Ltd 1968 (3) SA 381 (W) at 385A-C; Schlesinger v Donaldson and Another 1929 WLD 54 at 57, where Greenberg J held "In order to decide the question of relevancy, the issues raised by the pleadings must be considered . . .", and Federal Wine and Brandy Co Ltd v Kantor 1958 (4) SA 735 (E) at 753D-G.'

- [10] Having regard to the plaintiffs' pleaded case, the documents required by the defendant relates to the plaintiffs' assertion that they were depended on the deceased for financial support. The onus is on the plaintiffs to allege and prove the defendant's liability (the merits of the claim) that the deceased not only owed them the duty of support and that she did in fact provide that support. It is only when the plaintiffs have proven that they have suffered pecuniary damages as alleged that the court is bound to award damages by assessing quantum. I am thus in agreement with the defendant's contention that the deceased's financial means in terms of which she provided the alleged financial support to the plaintiff is indeed relevant to the matter in question including the extent of that financial support.

- [11] It must also be borne in mind that the purpose of an adequate discovery is to afford a litigant an opportunity to consider its case² in this matter, it would also be in the interest of justice and that of the plaintiffs that the documents which will determine the defendant's liability are produced timeously as the defendant may even consider a settlement of the matter instead of engaging in a costly trial.
- [12] I do not find the plaintiffs' explanation regarding the unavailability of the deceased's proof of earnings to be sound. As at the date of the hearing about six (6) months had passed since the date on which the plaintiffs allege to have requested the information that aside, proof of employment has been requested as an alternative to the documents relating to the deceased's payslips and /or financial statements. The plaintiffs have deliberately avoided explaining the whereabouts of the deceased's payslips and financial statements including the plaintiffs' own financial statements.
- [13] I also do not deem it unreasonable for the defendant to require the documents relating to whether the plaintiffs have instituted a claim against the Road Accident Fund because, the deceased's injuries arose from a motor vehicle accident and the Road Accident Fund³ is liable to compensate dependants for loss of financial support due to the death of the bread winner in a motor vehicle accident.

Conclusion and costs

- [14] Taking into consideration the facts of this matter, I am satisfied that the defendant has made out a case to compel the plaintiffs to produce the documents listed in the defendant's rule 35(3) notice dated 5 May 2022 (items 1,2, 3 and 5). I have found no reason for the departure from the general rule that costs follow the result.

- [15] In the premises, I make an order in the following terms:

² *Independent Newspapers (Pty) LTD v Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) In re: Masethla v President of the Republic of South Africa and Another* ZACC 6; 2008 (5) SA 31 (CC) 2008 (80 BCLR 771 (CC) (22 May 2008)

³ Section 17 of the Road Accident Fund Act, 56 of 1966 (as amended by the Road Accident Fund Amendment Act 19 of 2005).

ORDER

1. The respondents are ordered to produce for inspection: payslips and/or proof of income and/or financial statements of the deceased; payslips and/or proof of income and/or financial statements of the plaintiffs; and confirmation of whether a Road Accident Fund claim for loss of support has been lodged by the plaintiffs pursuant to the death of the deceased if so, all the documentation regarding such a claim.
2. The respondents shall pay the costs of this application jointly and severally, one paying the other to be absolved.

APPEARANCES:

Counsel on behalf of Applicant:

Instructed by:

Ms. R. D. Canham

Office of the State Attorneys

BLOEMFONTEIN

Counsel on behalf of Respondents:

Instructed by:

Adv. P.C. Ploos van Amstel

Du Plessis Attorneys.

c/o Lovius Block

BLOEMFONTEIN