IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 4967\04

DELETE WHICHEVER IS NOT APPLICABLE

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

3/6/05
DATE

SIGNATURE

3/6/2005

In the matter between:

R.H. WOLLENHAUPT **PLAINTIFF**

VS

MINISTER OF HOME AFFAIRS **DEFENDANT**

JUDGMENT

SHONGWE, J

[1] This is an application to compel in terms of Rule 35(7) of the Rules of Court.

[2] The applicant seeks an order firstly compelling the Respondent to comply with the notice in terms of Rule 35 (1) and secondly, compelling the Respondent to comply with the notice in terms of Rule 35 (3).

[3] It is common cause that on the 10th August 2004 the Respondent did supply an affidavit in response to the Rule 35 (1) notice, however it appears that Ms Chiloane, the defendant, referred to herself instead of speaking on behalf of the Respondent. It seems a technical impediment to me, the substance of the documents intended to be discovered and those privileged is clear from the papers.

[4] It is furthermore common cause that on the 7 February 2005 the Respondent did supply a response to the Applicant's notice in terms of Rule 35 (3). The gist of the response was that some of the information requested by the Applicant was irrelevant to the issues between the parties on the pleadings and some, the Applicant was not entitled to for reasons stated in the affidavit of Mr W. V. Mavimbela.

[5] The applicant was apparently not satisfied with the responses to his Rule 35 (1) and Rule 35 (3) notices. Hence, a Rule 35 (7) notice was filed. Subsequent to the service of the Rule 35 (7), the Respondent filed another Discovery Affidavit, in an attempt perhaps, to rectify the first Discovery Affidavit. This was followed by an explanatory letter, dated the 30th March 2005, from the Respondent's attorney.

[6] The Applicant proceeded with the application in terms of Rule 35 (7) because, he was not satisfied with the manner in which the

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Respondent went about in respect of the discovery procedure and to some extent the contents of the discovery notices and affidavits.

[7] Having read the heads of argument of the Applicant and having heard counsel, it was clear to me that the emphasis was on the documents or information referred to as privileged by the Respondent.

[8] It is clear from the papers before me that the Respondent acknowledged the existence of certain documents or information in respect of which privilege is claimed, and the grounds on which privilege is claimed. The respondent even disclosed the whereabouts of the said documents or information, namely in the hands of the National Intelligence Agency. It was also disclosed that due to the sensitive nature of such documents, the respondent doubted whether the National Intelligence Agency would make such documents available to the Applicant. **(See Tractor &. Excavator Spares (Pty) Ltd vs Groenedijk 1976 (4) SA 349 (T) &. Ferreira vs Endley 1966 (3) SA 618 (E) at 620 H-621A}.**

[9] The Applicant expressed his discontentment on the affidavit of Mr Mavimbela which was signed in 1999 and also the fact that the Respondent's attorney deposed to the affidavit instead of a government official. If what was deposed to in 1999 still prevails and is still relevant why can't it be given effect to unless it can be shown that

it is archaic. I am unable to find substance in applicant's discontent. It may be so that the Respondent's approach was not strictly in accordance with the last letter of the rules, however, substantially, it is my view, the respondent has complied with the applicant's request to discover.

[10] In Continental ORE vs Highveld Steel and Vanadium Ltd 1971(4) 589 (W) at 597 Margo J (as he then was) said

> 'It has further been held in a series of cased before the enactment of the present Rules that when a party to an action refuses to make discovery of or to produce for inspection any documents on the ground that they are not relevant to the dispute, the court is not entitled to go behind the oath of that party unless reasonably satisfied that the denial of relevancy is incorrect'.

The onus of proving that such documents are relevant vests upon the applicant.

[11] Schutz AJ (as he then was) in **Crown Cork & Seal Co vs Rheem SA (Pty) Ltd 1980 (3) SA 1093 (w) at 1095** quoted with approval what an English judge said in **Church of Scientology of California vs Department of Health and Social Society [1979] 3 All ER 97 (CA) at 104-5, [1979] 1 WLR 723 at 733** that:

'The object of mutual discovery is to give each party before trial all documentary material of the other party so that he can consider its effect on his own case and his opponents case, and decide how to carry on his proceedings or whether to carry them on at all.. ..... Another object is to enable each party to put before the court, all relevant documentary evidence ..... '

[12] The form or format may not have been the usual everyday response on affidavit, however the substance is sufficient and substantial compliance with the requested discovery. I conclude that the applicant has failed to make out a proper case. The information at the disposal of the applicant has been sufficiently identified and the whereabouts has been specified. The relevance has been clearly shown to be falling

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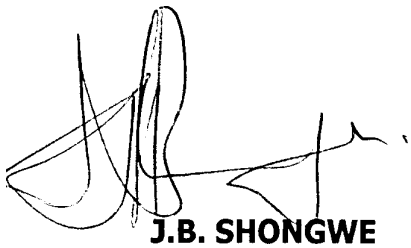
outside the issues in dispute on the pleadings.

[13] **I therefore make the following order: The application is dismissed with costs.**



J.B. SHONGWE

JUDGE OF THE HIGH COURT

FOR THE PLAINTIFF: ADV M CHAITOWITZ SC AND ADV. D J COMBRINK
INSTRUCTED BY: MESSRS PAUL CASASOLA & ASSOCIATES c/o SANET DE LANGE
FOR THE DEFENDANT: ADV S M LEBALA
INSTRUCTED BY: MESSRS T T TSHIVHASE (STATE ATTORNEY)
DATE OF JUDGMENT: 03 June 2005
HEARD ON: 27 MAY 2005