REPORTABLE **CASE NO.: (P) A 8/2005**

IN THE HIGH COURT OF NAMIBIA

In the matter between:

SIMEON MUTUMBE KAUAAKA (FIRST APPLICANT)

(FIRST RESPONDENT)

ST STEPHANUS – ST PHILLIPS HEALING MISSION CHURCH (SECOND APPLICANT)

(SECOND RESPONDENT)

and

ST PHILLIPS FAITH HEALING CHURCH RESPPONDENT

(APPLICANT)

CORAM: HOFF,J

Heard on: 2007.04.24
Delivered on: 2007.05.02

JUDGMENT:

HOFF, J: [1] This is an interlocutory application in terms of Rule

35 (13). The order sought by the applicants which appears in a notice of application in terms of Rule 35 (13) reads as follows:

> "1. Directing that the applicants discovery affidavit (annexed as "SK 15" – hereunder) and documents sought to be so discovered be allowed and admitted for purpose of the main application under case no. P (A) 8/2005 in terms of Rule 35 (13) of the rules of this Honourable *Court.*
>
> 2. *Costs of suit, in the event of the Respondent opposing this application.*
>
> 3. *Further and/or alternative relief."*

[2] This application was opposed by the respondent.

It is necessary in my view to place this application in context by briefly referring to the background to this application. I shall refer to the parties as they were cited in this application.

The respondent instituted application proceedings during January 2005 in which it sought the cancellation of a deed of transfer of immovable property executed in favour of second applicant on the grounds that such transfer was

unlawful.

Applicants opposed the application and filed an opposing affidavit. Respondent subsequently on 29 April 2005 filed its replying affidavit.

On 25 July 2005 the matter was postponed sine die in order for certain issues to be referred to oral evidence.

On 5 June 2006 this court upheld an application filed in terms of Rule 30 by the respondent in response to certain affidavits filed by applicants.

On 22 June 2006 applicants instituted this interlocutory application in terms of Rule 35 (13).

[3] Mr Strydom, who appeared on behalf of the respondent, raised a point in limine namely that this application is misconceived since the procedure adopted by the applicants is not contemplated by the provisions of Rule 35 (13), that the procedure employed by applicants is a guise to introduce new evidence in a attempt to bolster a poor defence and that such a procedure constitutes an abuse of court process.

[4] Mr Boesak who appeared on behalf of applicants

disagreed. He submitted that the grounds for bringing this application were that the documents intended to be discovered had been omitted due to an oversight by the erstwhile legal practitioner of applicants, namely Mr Rodger Kauta, and that the documents sought to be discovered are relevant to the adjudication of the dispute between the parties. He further submitted that since discovery of documents in application proceedings is only ordered in exceptional circumstances, that this court

should gauge the existence of exceptional circumstances by having regard to factors such as the nature of the defence, the relevance of the documentation requested, whether the application was a fishing expedition, the timing of the application, and that there was a reasonable apprehension that not all the documentation was before the court for the just and fair resolution of the dispute.

[5] For authority of his submissions this court was inter alia referred to Moulded Components and Remouldign South Africa (Pty) Ltd v Concourakis 1979 (2) SA 457 (W) at 470 D

[6] The issue raised by the point in limine is in essence whether the

approach by the applicants to this court to allow the discovery of documents in terms of Rule 35 (13) is appropriate or put differently is sanctioned by the provisions of Rule 35 (13).

[7] Rule 35 (13) provides as follows:

"The provisions of this rule relating to discovery shall ***mutatis mutandis*** *apply, in so far as the court may direct, to applications."*

[8] Rule 35 (1) provides that a party to an action may by notice in writing require any other party to make discovery of all documents and tape recordings relating to any matter in question in such action which are or have at any time been in the possession or control of such other party.

[9] It is common cause that the respondent at no stage required, by notice, the discovery of any documents or tape recording from the applicants.

[10] The applicants on their own volition are eager to make discovery of certain documents and a tape recording,

> whilst the respondent views this generosity as an unwelcome offer.

[11] Mr Boesak submitted that since Rule 35 (13) provides discovery as the court may direct, that it does not follow that once the court has directed, that discovery should be made, that Rules 35 (1), 35 (2) and 35 (3) automatically apply. These sub-rules would only apply if the court so directs, it was submitted.

It was further submitted that the dispute in main application is whether or not there was merger between the parties, and that the exceptional circumstances in the present interlocutory application exist due to the

> fact that the documents sought to be discovered are relevant and crucial in the determination of the dispute in the main application.

> [12] Regarding the question of the applicability of Rule 35 (13) in the present application there is authority for the view that where a party in application proceedings seeks discovery in terms of Rule 35 (13) and is successful, the provisions of sub-rules (1), (2) and (3) may be applicable.

[13] In Afrisun Mpumalanga (Pty) Ltd v Kunene NO and Others 1999

(2) SA 599 TPD at 611 I – J the following appears:

> *"Rules 35 (1), (2) and (3) are all discovery provisions and their applicability to applications is clearly dependant on a direction in terms of Rule 35 (13) that these discovery provisions shall apply. Even if such a direction has been made, before a party can rely on Rule 35 (3) it must invoke the provisions of Rule 35 (1) and receive a discovery affidavit in accordance with Rule 35 (2).*"

[14] The dilemma in which the applicant finds itself in, is, that the respondent did not require any discovery. This court was not referred to any other Rule which provides that a party may voluntarily make discovery.

It appears to me that the provisions of Rule 35 (13) are not applicable and that it has correctly been submitted, by Mr Strydom, that this application is misconceived.

[15] The applicant did not approach this court in order to provide relief not covered in terms of the provisions of the Rules of this Court.

[16] This court has in general an inherent power to grant

relief not specifically provided for in the Rules but such a power should be exercised sparingly.

[17] In Moulded Components and Rotomoulding South Africa (Pty) Ltd v Concourakis and Another 1979 (2) SA WLD 457 at 462 H – 463 B the following was said:

> *"I would sound a word of caution generally in regard to the exercise of the Court's inherent power to regulate procedure. Obviously, I think, such inherent power will not be exercised as a matter of course. The Rules are there to regulate the practice and procedure of the Court in general terms and strong grounds would have to be advanced, in my view, to persuade the Court to act outside the powers provided for specifically in the Rules. Its inherent power, in other words, is something that will be exercised sparingly. …I think*
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> > *that the Court will exercise an inherent jurisdiction whenever justice requires that it should do so. I shall not attempt a definition of the concept of justice in this context. I shall simply say that, as I see the position, the Court will only come to the assistance of an applicant outside the provisions of the Rules when the Court can be satisfied that justice cannot be properly done unless the*

relief is granted to the applicant."

[18] I am of the view that is important in this interlocutory application to have regard to the grounds advanced by the applicant why discovery should be allowed.

[19] The applicants in their founding affidavit, deposed to by Simeon Mutumbe Kauaaka, stated that in their opposing papers in the main application one of the contentions raised was that St Phillips Faith Healing Church (respondent in this application) had merged with St Stephanus Apostolic Mission Churc about 29 July 2000 at a convention held in Windhoek and that no supporting documentation had been attached in support of such contention. Paragraph 8 of the founding affidavit reads as follows:

"Upon discovery of the above issue, and consultation with our legal practitioners of record – Messrs Metcalfe Legal Practitioners – and

our counsel herein, we insisted that we had the necessary proof and had provided same to our erstwhile legal practitioners – Messrs Kauta, Basson & Kamuhanga.

However, we could not explain as to how the said documentation had not been annexed to our opposing affidavit and that the only reasonable conclusion that we could arrive at was that it was due to an omission from our earlier legal practitioners."

[20] In paragraph 19 of this founding affidavit applicants stated that failure to file the relevant documents timeously was due to an "inexplicable oversight".

[21] Mr Rodger Kauta, in a supporting affidavit filed by respondent, denied the allegation by the applicants. Paragraphs 5.2 and 5.3 of the supporting affidavit read as follows:

"5.2 I only saw these documents for the first time when same were shown to me subsequent to the bringing of this application. I therefore categorically deny that I at any stage had insight into these papers and/or that same were omitted at the time when the opposing affidavit were signed.

5.3 What I also find peculiar is that the same applicants now

before Court were also the respondents then and the deponent Mr Kauaaka was also the person who deposed to the main opposing affidavit and at that time, despite reading the contents thereof and signing it before a Commissioner of Oath, mentioned absolutely nothing about the existence of the documents that have now surfaced."

[22] This explanation is disputed by the applicants who in their replying affidavit stated that the explanation was given by Mr Kauta, with the view to cover his tracks and for him not to seem as if he dealt incompetently and/or negligently with this matter.

[23] Mr Boesak in his heads of argument submitted that the dispute regarding the question whether or not documents had been provided to Mr Kauta should be referred to oral evidence.

[24] It is not necessary for me to decide whether or not oral evidence should be heard at this stage.
It is sufficient to state that, as a rule, it is inappropriate in interlocutory proceedings to refer a dispute to oral

evidence.

(See The Civil Practice of the Supreme Court of South Africa by Herbstein an Van Winsen 4th Ed. 388 and the authorities referred to)

[25] The applicants deals with Mr Kauta's denial in paragraph 19.2 of its replying affidavit as follows:

"It is clear that Mr Kauta states that a request was made for all the documentation to be furnished to them and that same had been done. However, he seems to rely solely on the documentation annexed to the applicants answering affidavit (in the main application) as the basis of the documentation that had been supplied, whilst clearly forgetting that certain documentation had been excluded since he regarded such documentation as irrelevant to the issues before this court. He continues to state that all relevant documents and material to the case were attached and that nothing was attached, whilst, and the applicants reiterate this fact, numerous documentations had been set aside and that he advised us to keep certain documents since he did not find those documents to be relevant to the issues before the court or to be annexed with the answering affidavit of the applicants in the main application."

[26] It appears from applicants replying affidavit (paragraph 19.6) that it was due to the apparent delay of Mr Kauta in properly dealing with the

amendment or an application to have the documents and tape recordings and tape recording adduced that a decision was taken by the respective members of the applicant to instruct new legal practitioners.

[27] If it were true that applicants on the legal advice of their former legal practitioners failed to attach the documents now sought to be discovered, then applicants should have mentioned it in its founding affidavit in this application. Instead applicants in its founding papers ascribe the failure to attach the relevant documents and tape recording as "an inexplicable oversight" and remissness on the part of their former legal practitioners.

[28] There is in my view a material contradiction between the reason advanced in the founding affidavit and the subsequent reason advanced in the replying affidavit regarding the explanation why the relevant documentation and tape recording could not have been filed at the stage

the founding affidavit (in the main application) had been filed.

[29] It is further significant that the issue of the introduction of further documentation had been raised for the first time sixteen months after the filing of applicants opposing affidavit in the main application.

A litigant cannot indefinitely find solace in an alleged remissness of his or her legal representative. A line must be drawn somewhere and I am of the view that applicants have crossed that line a long time ago. In spite of the explanation given by applicants why documents had not been filed at the stage they should have been filed it is clear to me that applicants failure to act timeously can only be described as dilatory conduct.

[30] The conduct of applicants in their endeavour to discover the relevant documents is in my view opportunistic, not bona fide and an abuse of court process.

Even if it may be accepted, for the sake of argument, that the documents and tape recording may be relevant to the dispute in the main application, then in view of the conduct

of applicants mentioned supra, no exceptional circumstances are present which could be considered by this Court in the exercise of its discretion in terms of the provisions of Rule 35 (13).

[31] The lack of exceptional circumstances together with my finding supra that the present interlocutory application in misconceived compel me to uphold the point in limine.

[32] The award of costs is a matter wholly within the discretion of the Court and this discretion should be exercised judicially. The general rule that the successful party is entitled to his or her costs is in my view applicable in this application.

An order for costs on an attorney-and-client scale will normally be given where there is a special prayer for it or where notice has been given that such an order will be asked for.

However the absence of such a notice is not necessarily fatal.

[33] The respondent in this application has specifically prayed for a cost order on an attorney-and-client scale.

[34] I am of the view that in this matter a punitive cost order should be made against applicants as a stamp of the disapproval by this Court of the conduct of applicants.

[35] In the result the following orders are made:

1. The application is dismissed.

2. Applicants are ordered to pay the costs occasioned in respect of this application on an attorney-client scale.

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HOFF, J

COUNSEL ON BEHALF OF THE APPLICANTS:

ADV. BOESAK

Instructed by: *METCALFE LEGAL PRACTITIONERS*

COUNSEL ON BEHALF OF THE DEFENDANT: *ADV. STRYDOM*

Instructed by: *VAN DER MERWE-GREEFF INC.*