CASE NO. I 105/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

NICA JANA RUDA VAN DER MERWE	**1ST PLAINTIFF**
MELANIE VAN DER MERWE	**2ND PLAINTIFF**
MORGAN RUTH VAN DER MERWE	**3RD PLAINTIFF**

and

DEUTSCHER SCHULVEREIN WINDHOEK	**DEFENDANT**

CORAM: SMUTS J

Delivered on: 14 July 2011

JUDGMENT – RULE 35 (11) APPLICATION

Smuts, J [1] This is an interlocutory application brought on behalf of the plaintiff in terms of Rule 35 (11). This application was made from the bar on the fifth day of this trial on 15 April 2011 shortly before the trial was to be postponed for its resumption or a later date. The five days allocated for the trial turned out to be hopelessly insufficient. On the last designated day before the adjournment, the plaintiff's counsel requested that the following documentation be produced by the defendant under Rule 35 (11);

> *"All documents created during the defendant's internal investigation of the incident which occurred on 17 November 2006 for purposes of preparing a final report, as well as the final report and other documents created when any steps as recommended in the final report, were implemented."*

[2] Plaintiff's counsel referred to Rule 35(11) and moved for an order to compel the defendant to produce this category of documents (as set out in the description quoted above). Defendant's counsel was caught unawares by this application and stated that he needed time to research Rule 35 (11) and was not in a position to address the application there and then.

[3] I took a short adjournment for counsel to obtain dates for the resumption of the trial and for counsel to consider the procedure to be followed with reference to this application made under Rule 35 (11). I specifically pointed out that a ruling on the issue

would be preferable well in advance of the resumption of the trial and that counsel should consider a procedure whereby this could be achieved, taking into account considerations of costs and an expedited hearing of the issue.

[4] Following the short adjournment, counsel informed me that they had agreed upon the exchange of affidavits and for the filing of heads of argument for the Rule 35 (11) application. It was accordingly agreed that the defendant would provide an affidavit dealing with the request for documentation under Rule 35 (11) and that the plaintiff would thereafter have an opportunity to reply to that affidavit. The plaintiff would thereafter file heads of argument, to be followed by heads of argument prepared on behalf of the defendant. The parties further agreed that I would then determine the issue without the presentation of oral argument. Although not all the documentation was filed punctually within the agreed time periods, the documents followed that sequence and defendant's heads of arguments were filed on 16 June 2011.

[5] Before I deal with what the parties have each stated with regard to the request of documentation, I stress that this enquiry concerns Rule 35 (11). That was the basis raised by counsel for the plaintiff for the production of the documentation in question. The fact that the parties subsequently agreed to a procedure for the determination of the issue would not alter the nature of the enquiry itself. The contention on behalf of the plaintiff that the enquiry broadened into a discovery application because Rule 35 (11) – and not Rule 35 (13) repeatedly referred to in the heads – was not referred to in the

agreement, would not also change the nature of enquiry. The agreement related to the procedure to be followed by the parties for the determination of the issue.

[6] In response to the notice, the defendant raised a number of issues in its affidavit. Firstly, the defendant referred to the discovery procedures invoked by the plaintiffs thus far in the matter. On 8 March 2011, the plaintiffs caused a Rule 35 (3) notice to be served upon the defendant. In response, the defendant provided a two page document entitled “Minutes from memory by Ms Erdmann” to the plaintiff’s legal practitioners on 18 March 2011. The trial commenced on 11 April 2011. A supplementary discovery affidavit was subsequently filed by the defendant on 5 April 2011 including the usual category of documents contained in part two of the schedule in respect of which privilege was claimed. These included documents prepared with the view to enable the plaintiff (although clearly reference to the defendant was intended) to prosecute its defence. It was then stated that those documents which would not be discovered were either not relevant or were covered by the latter category of privilege. On the two page document which was provided and referred to, there was an inscription made by the sworn translator which in turn referred to a “bundle of documents consisting of fourteen German language pages”. The documentation sought is with reference to that inscription.

[7] The defendant takes the point that Rule 35 (11) would not be available as a substitute for invoking the discovery procedures embodied in Rule 35(1), (3), (6) or (7)

and is confined to the production of documents. It is contended that if the plaintiff wished to cause the discovery of the documents referred to, then this should have been done by way of an application to compel discovery under Rule 35 (7). It was accordingly submitted that there would be no reason why Rule 35 (11) should be available to a party in the absence of any explanation as to why there had been failure to pursue discovery under the provisions of Rule 35 (1), (3), (6) or (7).

[8] The point is also taken on behalf of the defendant that the jurisdictional requirements for the invocation of Rule 35 (11) have not been met. The defendant also invokes privilege in respect of the documents in question in the absence of the two prior points not resulting in dismissal of the application.

[9] The plaintiffs contended on the other hand that the application should be determined with reference to the ordinary principles applicable to discovery and not be limited to Rule 35 (11). It is further contended on behalf of the plaintiffs that, upon the application of principle, sufficient details of the documents should be given and that the reliance upon confidentiality would not amount to privilege and that documentation should be produced. The plaintiffs also contended that the documents are relevant and, if there be any doubt as to this, this Court should exercise its inherent power to examine the documents in order to determine whether they are relevant or not. The plaintiffs further contend that privilege does not attach to the documents and that, even if the documents were privileged, this had subsequently been waived.

[10] It is accordingly apposite to first consider the provisions of Rule 35 (11). This sub-rule provides:

> *"The Court may, during the course of any proceeding, order the production by any party thereto under oath of such documents or tape recordings in his/or her power or control relating to any matter in question in such a proceeding as the Court may think meet, and the Court may deal with such documents or tape recordings when produced, as it thinks meet".*

[11] The ambit of this sub-rule was considered by this Court as it was previously constituted in *Kakuva v Minister van Polisie*.[1] In that matter, an opposed motion had been referred to trial. The applicants had not invoked Rule 35 (2), (3) or (7) but had instead made an application in terms of Rule 35 (11) after the commencement of trial requesting the Court to order the production of the documents which were relevant in that matter. The application under Rule 35 (11) had been opposed on the basis that a substantive application was required. The Court, in the exercise of its discretion, held that the sub-rule is supplementary to the other provisions in Rule 35 (11) and that the Court had discretion to order the production of documents without the other procedures or requirements having been first followed. The fact that a party had not exhausted the other procedures in Rule 35 may be a factor which a Court would consider in the exercise of its discretion in granting the relief or not. In the *Kakuva* matter, the Court

[1] 1983 (4) SA 787 (SWA)

was prepared to overlook the fact that discovery notices had not been exchanged when directing the production of the documentation in question. The compelling factual circumstances in that matter may have played an important role in the exercise of the Court's discretion, given the fact that the documents in question or related to police detention registers and the like which were pertinent in order to shed light on the fate detainees in the hands of the police who had been detained without trial. I agree with the approach of the Court in *Kakuva* that Rule 35 (11) would appear to be a supplementary provision and that Rule 35 (11) vests the Court with a wide discretion in order to do justice between the parties in a trial action.

[12] The fact that the plaintiffs in this matter had provided discovery notices and could have proceeded with an application under Rule 35 (7), would not in my view necessarily result in the dismissal of the plaintiff's application. I take into account that the parties have been able to exchange affidavits on the issue and provide full heads of argument relating to the interpretation of the rules and also as to the important question of privilege. The defendant has thus had the opportunity to be fully heard on the issue and has thus not in my view been prejudiced by the way in which the documentation has been sought.

[13] In exercise of my discretion, I would permit the applicants' (plaintiffs) to seek the production of the documentation under Rule 35 (11) even though there had been an opportunity to further pursue the matter by way of an application on Rule 35 (7).

Whether or not to permit this form of procedure being invoked would be a matter for trial judges to determine on the specific facts before them. Issues of prejudice and ensuring an expeditious decision of matters on their real merits are in my view important factors to take into account in the exercise of a Courts' discretion. The ringing words of Schreiner, JA in *Trans-African Insurance Co Limited v Maluleka*[2], although stated in a different context would, in my view find application in this matter:

> *"No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits".*

[14] I accordingly find that the point taken by the defendant that Rule 35 (11) could not be invoked in the manner which has been done in this matter not to be sound.

[15] The next question I consider is whether the plaintiff has established the threshold jurisdictional requirements for reliance upon Rule 35 (11).

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[2] 1956 (2) SA 72 (3) A at 278

[16] The key requirement in this regard is that the documents sought to be produced must relate "to any matter in question in such proceeding." This requirement is similar to that contained sub-rule 35 (1). I agree with the learned authors of *Erasmus Superior Court Practice*[3] that the authorities with regard to sub-rule (1) would also apply to the use of the similar phrase in sub-rule 35 (11). These authorities are clear. The test is that documents which should be produced are those which may and not must either directly or indirectly advance the case of the plaintiff or damage the defendant's case.[4] I agree that the fact that documents had been compiled and prepared in relation to the incident of 17 November 2006, which is at the heart of these proceedings, would not necessarily render those documents to be relevant in this sense. It would depend upon on whether the documents meet the test that they may and not must advance plaintiffs' case or damage that of the defendant. The defendant has furthermore disavowed any intention to use the documents at the trial.

[17] It has been held that the relevance of the documentation is to be determined with reference to the pleadings and to the issues raised by them.[5] This test is pertinent both to the issue of relevance as well as to the claim of privilege raised by the defendant.

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[3] 1st Ed, 1994, updated at B1-260.
[4] Erasmus Superior Court Practice Supra at B1-250-251.
[5] Swissborough Diamond Mines of the RSA 1999 (2) SA 279 (T) at 311 A.

[18] The documents in question are referred to in the defendant's affidavit, merely by being designated A to E and primarily with reference to dates except in respect of document D which is referred to as an undated personal note not signed by any party and reflecting the personal views and opinions of its author on the merits and demerits of the litigation that could possibly be instituted against the defendant. The other documents are not further described except with reference to their dates being 24 November 2006, 23 January 2007, the undated document further described above and a document bearing a date of 30 November 2006. These are dates relevant with reference to the claim of privilege.

[19] The descriptions of the documents themselves do not shed any further light as to their relevance. But the plaintiffs rely upon the statement that the documents concern the investigation of the incident of 17 November 2006. That incident forms the basis of the plaintiff's cause of action against the defendant. Documentation prepared with the view to investigate the incident would ordinarily be relevant to the issue of liability for that incident except if privileged. Whilst the defendant has denied their relevance, the plaintiff has invited me to exercise the inherent power of this Court to examine any of the documents in order to determine whether they are relevant or not. This invitation was made with reference to *Lenz Township Co. (Pty) Ltd v Munnick and Others*[6]. The Court in that matter (per Williamson, J – as he then was) referred to this approach both in the context of a claim of privilege as well as in the context of an objection as to relevance.

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[6] 1959 (4) SA (T) at 574

[20] The test of discoverability in this regard was set out in Continental Ore v Highveld Steel and Venadium Ltd.[7]

> "***The test of discoverability to produce for inspection, where no privilege or like protection is claimed, is still that of relevance; the oath of the party alleging non-relevance is still prima facie conclusive, unless it is shown on one or other of the bases referred to above that the Court ought to go behind that oath; and the onus of proving relevance, where such is denied, still rests on the party seeking discovery or inspection."***

(This test was cited with approval by this Court in South African Sugar Association v Namibia Sugar Distributors.[8] This Court in that matter also quoted with approval the basis on which a Court ought to go behind an oath in this context as set out in the Continental Ore v Highveld and Venadium Ltd – matter[9]

> ***"The Court will go behind the affidavit only if it is satisfied –***
>
> **(i)** ***From the discovery affidavit itself; or***
>
> **(ii)** ***From the documents referred to in the discovery affidavit; or***
>
> **(iii)** ***From the pleadings in the action; or***

[7] 1971 (4) SA 589 (W) at 598 D-F.
[8] 1999 NR 241 (HC).
[9] At 597 H-598 A.

(iv) ***From any admissions made by the party making the discovery; or***

(v) ***From the nature of the case or the documents in issue, that there is a probability that the party making the affidavit has or has had other relevant documents in his possession or power or has misconceived the principles upon which the affidavit should be made"***

[21] The defendant claims privilege primarily on the basis of a meeting which was held between the second plaintiff, her late husband and an attorney accompanying them on the one hand, and the defendant's representative on the other. In the course of that meeting, it emerged from the evidence thus far that the plaintiffs' then attorney, Mr F C Brandt, made it clear that unless the defendant were to "adopt an accommodative attitude" **(sic)** concerning the question as to payment of or settling the plaintiff's costs, the "case" would not be wound up "unproblematically".

[22] It is stated under oath that the defendant understood that unless certain claims which the plaintiffs would make were paid, then legal action would be pursued against it. It is also pointed out that Mr Brandt also referred to the "violation of the supervisory duty on the part of the teachers" and "neglect" which could be attributed to the defendant. The defendant stated that there was a threat at that stage already of a damages action.

This is not only entirely understandable but is also justified by reason of the language used.

[23] Given these facts, the plaintiffs have not in my view raised any factual material which would justify going behind the oath of the defendant with reference to the claim of privilege raised concerning documentation which was prepared after that meeting of 25 November 2006. The defendants' difficulty however arises with reference to the document which has been prepared prior to that meeting. The claim of privilege in respect of that document is based upon the parents of the first plaintiff "vociferously" on 21 and 22 November 2006 "voicing their views about the incident in the manner indicating that they may well take legal action against the defendant". This vague statement would in my view give rise to doubt as to whether a claim of privilege is properly made in respect of this early document. It would seem to me that the defendant has misconceived the principles governing privilege in respect of that document.

[24] In those circumstances, I would be inclined to exercise my discretion to invoke the inherent power of this Court to examine the document referred to me as A for the purpose of determining whether it should be produced and then made available to the plaintiffs. It would need to be accompanied by a translation. It would also seem to me that, in the exercise of my discretion, I would be justified in going behind the oath of the defendant in respect of this document and examine this document.

[25] There remains the question of waiver of privilege in respect of the documents raised by the plaintiffs. The basis for contending for a waiver was with respect to the meeting on the 25 November 2006 where the second plaintiff states that an undertaking was given to provide a report on the incident to the plaintiffs. It is however stated on the other hand by the defendant that the document provided to the plaintiffs before the trial entitled "Minutes from memory by Ms. Erdmann" was privileged and that privilege in respect of that document had been waived. The waiver of the privilege and the purpose for which the document was provided are fully explained - as to inform the plaintiffs that an investigation did not appear to favour the plaintiffs' approach. The defendant specifically denies that this would indicate a waiver in respect of other documents.

[26] The plaintiffs bear the onus of establishing the requisites for the waiver contended for including that this occurred with the full knowledge of the defendants' rights.[10] As correctly contended on behalf of the defendant, the awareness of those rights would not arise prior to the compilation or preparation of a document and after there has been a threat of litigation and advice been taken.

[10]See Borstlap v Spangenberg 1974 (3) Sa 695 (A) at 704
Hepner v Roodepoort-Maraisburg Town Council 1962 (4) SA 772 (A)

[27] The plaintiffs contend that an implied waiver arose with reference the undertaking which was given at that meeting. But any such undertaking would be subject to receiving advice as to its rights following the threat of litigation.

[28] I also agree with the defendant's counsel, Mr T. Barnard, that it is not correct to contend that "portions of documents" were provided whilst others were not. The document which had been provided did not contain portions of other documents. It rather referred to other documents. It thus did not comprise a selective quotation from documentation but rather a note prepared with reference to other substantive documents. The mere reference to those documents (by a translator to them without any reference in the body of the document to them) would not in my view extend any waiver of privilege to them. I accordingly find that the plaintiffs have not discharged their onus on the papers before me to establish a waiver of privilege as contended for, and in particular that the waiver contended for had been made with an awareness of its rights.

[29] As to the question of costs, I propose to supplement this ruling to deal with this aspect after examination of the document.

[30] The order I make is as follows:

1. The defendant is required to produce the document referred to as A dated November 2006 including a translation thereof to this Court for examination so as to determine whether the claims of privilege and relevance are well founded;

2. The question as to the costs of this application will be determined after the examination of this document.

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SMUTS, J

ON BEHALF OF THE PLAINTIFF	ADV. R. HEATHCOTE SC
Assisted by:	ADV. C. VAN DER WESTHUIZEN
Instructed by:	ETZOLD-DUVENHAGE

ON BEHALF OF DEFENDANT	ADV. T. BARNARD
Instructed by:	BEHRENS & PFEIFFER