

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 34270/2014

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

.....

DATE

.....

SIGNATURE

In the matter between:-

**THE BODY CORPORATE OF THE DELFLORA
SCHEME N.O. SS 117/1984**

Applicant

And

H & M PROPERTY MANAGEMENT

Respondent

JUDGMENT

CORAM: CRUTCHFIELD AJ

[1] This opposed interlocutory application came before me in the course of the unopposed motion roll of Tuesday, 16 February 2016.

[2] The applicant claimed the following relief:

2.1 That the respondent make available to the applicant, within two days of the date of this order, complete and unredacted copies of the bank statements referred in the applicant's notice in terms of Rule 35(12) dated 24 July 2015; and

2.2 That the respondent pay the costs of this application on the scale as between attorney and own client.

[3] The respondent opposed the application claiming that it be dismissed with costs.

[4] The relevant common cause facts are set out below:

4.1 The respondent previously acted as the *de facto* managing agent of the applicant.

4.2 As such, the respondent received payment on behalf of the applicant of levies and utility charges raised against the owners in the sectional title scheme, and paid various expenses on behalf of the applicant.

- 4.3 The account designated by the respondent into which payments on behalf of the applicant were made, was held by the respondent with Standard Bank under account number 081371291 ('the designated account').
- 4.4 The respondent's purported mandate was terminated not later than 28 February 2014.
- 4.5 During September 2014, the applicant commenced the main application for inter alia, payment of an amount of R378 216.85 from the respondent, being monies received by the respondent on behalf of the applicant which the respondent failed to pay over to the applicant ('the main application').
- 4.6 The respondent did not initially deliver an answering affidavit in the main application but issued an interlocutory application challenging the authority of the applicant's trustees and attorneys, which application the respondent withdrew on 24 June 2015.
- 4.7 Thereafter, on 8 July 2015, the respondent furnished its answering affidavit in the main application.
- 4.8 The respondent conceded that it remains in possession of funds received on behalf of the applicant as aforementioned, the quantum of which is the issue in the main application.

[5] The respondent alleged inter alia, that there is a dispute of fact in respect of the amount owing by the respondent to the applicant, which dispute cannot be resolved on the papers before the court without the hearing of oral evidence.

[6] The applicant calculated the amount owing by the respondent with reference to the last statement rendered by the respondent (for November 2013), by adding thereto the amounts paid to the respondent on behalf of the applicant from December 2013 onwards, and deducting the payments which it was able to identify as having been made by the respondent.

[7] The applicant invited the respondent in the main application, '...in the event that the respondent dispute(d) that any of these payments were made to it, to disclose the bank statements in respect of the designated account which (would) conclusively prove or disprove these payments'.

[8] The respondent referred in paragraph 42 of its answering affidavit to two specified bank accounts which it operated in relation to the applicant's funds: account number 081371291 with Standard Bank under the name 'Current Account H & M Property Trust', (the designated account aforementioned), and, account number 081372027 also with Standard Bank in the name 'Current Account H & M Property Management'.

[9] The respondent, despite it not having access to certain documents allegedly in the applicant's possession and necessary to determine the amount owing to the applicant, compiled a schedule of payments made by it on the applicant's behalf from 25 October 2013 ('the schedule').

[10] The respondent referred to the schedule compiled 'with reference to the respondent's bank statements' in paragraph 85 of the answering affidavit, and included

the schedule as an annexure thereto, but declined to furnish the bank statements with reference to which the schedule was compiled.

[11] On 17 July 2015, the applicant delivered a notice in terms of rule 35(12), requiring the respondent to produce the bank statements for the two bank accounts identified in paragraph 42 of the respondent's answering affidavit in the main application.

[12] The respondent replied that 'the applicant (was) not entitled to the information sought, as the respondent did not refer (in paragraph 85 aforementioned), to the documentation required in terms of the Rule 35(12) notice'.

[13] The applicant argued that whilst the respondent did not refer to the accounts 'by name and number in paragraph 85 of the answering affidavit', in the light of the respondent's statement in paragraph 42 that the two specified bank accounts were opened in relation to the applicant's funds, the respondent could only have compiled the schedule with reference to the bank statements relating to those accounts.

[14] Notwithstanding, on 28 July 2015, the applicant delivered a second notice in terms of rule 35(12), requiring the production of the bank statements referred to in paragraph 85 of the respondent's answering affidavit for the period October 2013 to June 2014.

[15] The respondent replied by correspondence dated 28 July 2015 stating '... We will only be in possession of the required bank statements during the course of next week. Therefore, we will inform you as to when the documents [sic] available for inspection'.

[16] The respondent's counsel conceded in argument that the correspondence abovementioned reflected a tender to the applicant to inspect the bank statements in

their original form, but stated further that the respondent's representative subsequently 'changed its mind'.

[17] Correspondence dated 6 and 14 August 2015 from the applicant's attorney requesting inspection of the bank statements referred to in the second rule 35(12) notice, followed, without any reply from the respondent. This resulted in a final demand, on 20 August 2015, in which the applicant advised that absent compliance by the respondent it would launch a compelling application and seek a punitive costs order against the respondent.

[18] On 25 August 2015, the respondent advised that it would provide the applicant with redacted copies of the bank statements only.

[19] The respondent stated that it would delete 'all information not concerning and/or about (the applicant)', as a trustee of the applicant, Ms Zahos, had allegedly threatened to expose the respondent in the event that she ascertained the identities of the other entities for which the respondent performs services. The respondent alleged further that two of its contracts had been cancelled as a direct result of the trustee's actions.

[20] Notwithstanding receipt by the applicant on 4 September 2015, of correspondence which appeared to reflect that complete and unredacted copies of the relevant bank statements would be furnished to the applicant, this did not transpire.

[21] The respondent produced copies of the required bank statements but deleted all information reflected thereon which the respondent considered to be irrelevant to the applicant.

[22] The bank statements furnished to the applicant, albeit in a heavily redacted form, were the statements initially requested by the applicant in terms of rule 35(12).

[23] The applicant argued that the required bank statements are relevant as they evidence the payments made to the respondent on behalf of the applicant, the amounts and the source thereof, which the applicant averred comprises 'the nub of the dispute between the parties'.

[24] The respondent alleged that it utilised the bank accounts not only in respect of its services to the applicant, but also to various other bodies corporate. Accordingly, the requested bank statements contain entries relevant to bodies corporate other than the applicant, which information the respondent deleted.

[25] Thus, the respondent contended that the bank statements contain confidential information and information not relevant to the issues raised in this application, and refused to produce the unedited bank statements.

[26] In short, the respondent relied upon its fear of abuse by the applicant of the information, to the detriment of the respondent.

[27] The respondent tendered, however, to furnish the unedited bank statements to the court at the hearing of this application in order to enable the presiding judge and the legal representatives of the applicant to satisfy themselves that the edited bank statements contain all entries relevant to the applicant's business.

[28] Whilst the respondent's tender failed to materialise, the applicant was not to be appeased, arguing that the tender did not meet its right to due process, including the

applicant's right to consult with its legal representatives in respect of the required bank statements.

[29] Such requests for limited production are not to be countenanced, however, unless very special circumstances exist.¹ No such special circumstances were alluded to or relied upon by the respondent, and it does not seem to me that any such special circumstances exist.

[30] Furthermore, the applicant demonstrated in argument by reference to various annexures in the papers, that the redacted bank statements furnished by the respondent did not reflect all of the information relevant to the dispute.

[31] The respondent argued that the original unedited statements were not relevant to the dispute as the documentation in the applicant's possession was sufficient to substantiate the amount claimed by the applicant in the main application, and hence the unedited bank statements were not relevant to compute and prove the applicant's claim.

[32] The applicant's reply, to the effect that the unredacted bank statements remain relevant for so long as the respondent disputes the amount claimed by the applicant, is self evidently correct.

[33] As regards the respondent's reliance on the alleged confidentiality of certain of the information reflected on the unedited bank statements, the applicant argued that the names of the respondent's clients do not fall within the category of information which is classed as confidential. Moreover, the applicant is not in competition with the

¹ *Unilever PLC & another v Polagric (Pty) Ltd* 2001 (2) SA 329 (C) at 341B-342A

respondent, and there are no confidentiality agreements between the respondent and its clients.

[34] In respect of the alleged threat by Ms Zahos, or the respondent's alleged reasonable apprehension that the applicant would expose the respondent and cause its contracts and source of income to be terminated, the applicant alleged that there was no evidentiary basis that the applicant would expose the respondent as alleged.

[35] Uniform rule 35(12) authorises the production of documents which are referred to by a party in its pleadings or affidavit. The rule creates a prima facie obligation on a party who refers to a document in a pleading or affidavit, to produce such document when called upon to do so in terms of the rule. The entitlement to inspect arises upon reference being made to the document.

[36] The party requested to produce, the respondent herein, is obliged to adduce facts relieving him of the obligation to do so and pursuant to which the court should exercise its discretion in favour of the respondent.²

[37] The issue of relevance of documents is to be determined by a court having regard to the issues at hand, and does not depend upon the subjective view of the party called upon to discover.³

[38] The applicant relied upon the unreported decision of the Supreme Court of Appeal in *Centre for Child Law v the Governing Body of Hoërskool Fochville and another*,⁴ which held that:

² *Centre for Child Law v the Governing Body of Hoërskool Fochville and another* [2015] ZASCA 155 [18] (8 October 2015)

³ *Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd* 2005 (1) SA 398 (C) at 404H-I

‘... the court has a general discretion in terms of which it is required to strike a balance between the conflicting interests of the parties to the case. Implicit in that is that it should not fetter its own discretion in any manner and particularly not by adopting a pre-disposition either in favour of or against granting production. And, in the exercise of that discretion, it is obvious, I think, that a court will not make an order against a party to produce a document that cannot be produced or is privileged or irrelevant.’

[39] The respondent did not deny possession of the required bank statements, nor contend that they are privileged.

[40] As regards the relevance or otherwise of the unedited bank statements, the disputed issue is the amount owing by the respondent to the applicant. The underlying transactions relevant to the calculation of that amount comprise the payments made to the respondent on behalf of the applicant, and the expenses paid by the respondent on behalf of the applicant, within a specified time frame.

[41] It follows that the statements of the relevant bank account/s reflecting these transactions, are relevant to the calculation of the disputed amount. Correspondingly, the required bank statements serve to prove, or disprove, the amount claimed by the applicant.

[42] Hence, the applicant is correct that for so long as the amount claimed by it is disputed by the respondent, the bank statements reflecting the underlying transactions are relevant to the issue.

[43] In respect of the respondent’s argument that the original unedited statements are not relevant as the documentation in the applicant’s possession is sufficient to substantiate the amount claimed by the applicant, rule 35(12) entitles the applicant to

⁴ *Centre for Child Law* above n 2 [18]

inspect the bank statements referred to by the respondent, for the specific purpose of considering its position.⁵

[44] To my mind, the mere fact that the respondent on its own version, utilised the bank statements in order to compile a schedule of payments made by it on the applicant's behalf, evidences the relevance of the required bank statements.

[45] As referred to hereinabove, the applicant demonstrated that the redacted bank statements do not reflect all of the relevant information, as claimed by the respondent.

[46] No evidence was furnished by the respondent as to any ulterior motive or threat on the part of the applicant, or Ms Zahos, sufficient to deny the applicant's right to inspect the required bank statements.

[47] In any event, the respondent has its remedies should the alleged threat be considered to be real, but refusing to allow the applicant to exercise its right to inspect the bank statements referred to by the respondent, and to consult with its legal representatives in respect thereof, is not among those rights.

[48] Moreover, the respondent cannot rely upon its own unlawful conduct as a means to prevent the applicant from exercising its lawful right to production of the documents. The respondent only has itself to blame in the event that its unlawful conduct becomes public knowledge.

[49] Whilst I do not consider the identity of the respondent's clients reflected on the bank statements to be confidential, even if it was confidential that is not a reason to refuse the applicant access to the unredacted bank statements.

⁵ *Unilever PLC* above n 1 at 336G/H-I/J

[50] The issue of confidentiality was dealt with in *Unilever PLC*⁶ and *Comair Limited v Minister of Public Enterprises and Others*.⁷ Confidentiality does not in and of itself, confer any privilege against disclosure.

[51] In addition, rule 35(12) entitles a party to inspect a document to which reference is made, in its entirety, and the rule does not permit production of only the portion of the document upon which the other party relies.⁸

[52] The applicant's right is to full inspection of the relevant documents, and disclosure of the content thereof in its entirety is the inevitable consequence of the respondent's reference to the required bank statements.⁹

[53] As regard the costs of the application, the applicant sought costs as between attorney and own client, whilst the respondent contended that the costs, in the event that the Court found in favour of the applicant, should be reserved. This because a court seized with the matter in the future might find that the applicant was not entitled to the bank statements for the purpose now claimed by the applicant. I disagree.

[54] I have heard full argument in this interlocutory application, which deals with a crisp and self-contained issue. I do not see any good reason why a court sitting at a later stage should have to reconsider the issues dealt with by me, in order to determine the costs consequent upon the order that I intend to make. There is no merit in burdening another court with the costs of this application.

⁶ *Unilever PLC* above n 1 at 340A

⁷ *Comair Limited v Minister for Public Enterprises & Others* 2014 (5) SA 608 (GP) at [43]

⁸ *Protea Assurance Company Ltd v Waverly Agencies CC* 1994 (3) SA 247(C) at 249B

⁹ *Unilever PLC* above n 1 at 342A

[55] The applicant requested the original unedited bank statements from the respondent, repeatedly, and over a period of some months. In addition, two items of correspondence apparently tendering production of unredacted copies of the documents, were furnished by the respondent who subsequently failed to comply with its own tenders.

[56] Thus the Applicant was put to unnecessary trouble and forced to incur unnecessary costs, in circumstances where no good reason existed to prevent the applicant from exercising its right to full inspection of the relevant documents consequent upon the respondent's reference thereto.

[57] Whilst I am of the view that the respondent's conduct justifies a punitive award of costs, the respondent's conduct lacks the element of extreme opprobrium necessary for the costs order sought by the applicant.¹⁰

[58] I make the following order:

58.1 The respondent is ordered to make available to the applicant, within 5 days hereof, complete and unredacted copies of the bank statements referred to in the applicant's notice in terms of Rule 35(12) dated 24 July 2015.

58.2 The respondent is ordered to pay the costs of this application on the scale as between attorney and client.

¹⁰ *Hyperchemicals International (Pty)Ltd v Maybaker Agrichem (Pty) Ltd* 1992 (1) SA 89 (W) at 101J-102A

**A A CRUTCHFIELD
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

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