

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

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|-----|--|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: ✓ |

Date: **1st August 2023** Signature: _____

CASE NO: 43012/2018

DATE: 1ST AUGUST 2023

In the matter between:

LIBERTY GROUP LIMITED

Plaintiff

and

CLARK, ROCHE ALLEN

Defendant

Neutral Citation: *Liberty Group v Clark* (43012/2018) [2023] ZAGPJHC ---
(01 August 2023)

Coram: Adams J

Heard: 31 July 2023

Delivered: 01 August 2023 – This judgment was handed down electronically by circulation to the parties' representatives by email, being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 01 August 2023.

Summary: Practice and Procedure – application to compel further and better discovery – rule 35(3) and rule 35(12) discussed – application for condonation for

late filing of answering affidavit – discovery affidavit conclusive as to possession of documents – court not to go behind affidavit – court cannot generally go behind a discovery affidavit which is regarded as conclusive.

Defendant's application to compel better discovery refused with costs.

ORDER

- (1) The defendant's application, in terms of Uniform Rule of Court 35(7), to compel the plaintiff to make further and better discovery, be and is hereby dismissed.
 - (2) The plaintiff's shall pay the defendant's costs of the application to compel up to and including 06 June 2022.
 - (3) The defendant shall pay the plaintiff's costs relating to the said application to compel after 06 June 2022.
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JUDGMENT

Adams J:

[1]. I shall refer to the parties as referred to in the main action, in which the plaintiff claims from the defendant an amount of R1 107 879.78, which represents, according to the plaintiff, a 'clawback' of commission paid to the defendant pursuant to and in terms of a Franchise Consultant Agreement ('the agreement') concluded between the parties on 25 October 2007.

[2]. In its plea, the defendant admits the conclusion of the agreement and its expressed terms. He, however, specifically denies that he is indebted to the plaintiff. In a counterclaim, the defendant prayed for an order directing the plaintiff to render to the defendant full details of the commission accounts. The defendant is seeking a further order directing that he be allowed to debate the commission account with the plaintiff and to ascertain if there is any outstanding commission that accrued to him after the termination of the agreement. On this basis the

defendant is resisting the plaintiff's claim in the main action.

[3]. Before me is an interlocutory application by the defendant in terms of Uniform Rule of Court 35(7) for an order compelling the plaintiff to comply with defendant's rule 35(3) and rule 35(12) notices, dated 29 March 2022. The plaintiff opposed the application but failed to file its answering affidavit within the time limits prescribed in terms of the rules. The plaintiff is applying for condonation of its late filing of the answering affidavit.

[4]. The plaintiff, in its application for condonation of the late filing of its answering affidavit, avers that it believed that the defendant's application to compel would not proceed to hearing as he had already replied to the notices in terms of rule 35(3) and rule 35(12) on 01 June 2022. On the same day, the plaintiff served its supplementary discovery affidavit containing additional documents. A rule 35(6) notice, inviting the defendant to inspect the discovered documents, was also served on the said date. Thereafter, the plaintiff wrote to the defendant requesting that the matter be removed from the roll and the plaintiff also tendered the defendant's wasted costs occasioned by the application. The plaintiff was expecting – reasonably so – the defendant to withdraw the application to compel at that stage and, if necessary, to remove the matter from the roll as the issue had become moot.

[5]. I find the plaintiff's reasons and its explanation for the late delivery of the answering affidavit acceptable. Moreover, in my view, there is no conceivable prejudice to be suffered by the defendant should condonation be granted. Accordingly, the condonation, as applied for by the plaintiff, be and is therefore granted.

[6]. That brings me to the defendant's application to compel, in which is sought the following relief:

- '(1) That the [plaintiff] be ordered to comply with the [defendant's] notices in terms of rule 35(3) and 35(12) dated 29 March 2022, within ten days after service of this order by delivery thereof by the [defendant's] attorneys of record to the [plaintiff's] attorneys of record;
- (2) That the [defendant] be entitled to approach this Honourable Court on the same papers, amplified if necessary, for an order dismissing and/or striking out the [plaintiff's] claim should the [plaintiff] not comply with the order as set out in (1) above;

(3) That the [plaintiff] be ordered to pay the costs of the application, alternatively, costs of the application on the scale as between attorney and own client;

(4) '

[6] In his rule 35(3) notice, the defendant requested the plaintiff to discover the 'Schedule A' to the Financial Advisor Agreement, as well as the 'Financial Advisor Agreement'. On the same date, the defendant also served a rule 35(12) notice, calling upon the plaintiff, within ten days of receipt of the notice to make available for inspection the following documents: -

- (a) The 'Schedule of commission credits shown in schedule A' as referred to in paragraph 5.1 of the Franchise Consultant Agreement (Annexure C to the plaintiff's particulars of claim);
- (b) The 'Schedule A' as referred to in paragraph 5.1 of the Franchise Consultant Agreement) (Annexure C to the Plaintiff's particulars of claim); and
- (c) The 'Financial Advisor Agreement' as mentioned in paragraph 1 of Annexure A to the Franchise Consultant Agreement (Annexure C to the Plaintiff's particulars of claim).

[7] From correspondence exchanged between the parties and the answering affidavit, it is clear that the plaintiff was unable to timeously reply to the defendant's notice in terms of rule 35(3) and rule 35(12) due to the deponent to the plaintiff's affidavit contracting Covid-19. The plaintiff submitted a medical certificate in this regard. When the defendant did not get the response from the plaintiff, he launched an application to compel better discovery on 06 May 2022.

[8] On 01 June 2022 the plaintiff replied to the defendant's Rule 35(3) and Rule 35(12) notices. The plaintiff also filed a supplementary discovery affidavit whereby the following additional documents were discovered: A schedule of commission credits; a schedule of production credits; and a schedule of commission and fees relating to several years. The plaintiff, in a rule 35(6) notice, also invited the defendant to inspect the said discovered documents at the plaintiff's offices. In a letter dated 06 June 2022, the plaintiff's attorneys called on the defendant to withdraw the application and tendered defendant's wasted costs occasioned by the application. In a letter dated 12 July 2022, the defendant

refused to withdraw the application and recorded its intention to supplement its affidavit, which, incidentally, was never done by the defendant.

[9] The important point is that by 1 June 2022, the plaintiff had replied to the defendant's notices in terms of rules 35(3) and 35(12) and, howsoever one views the matter, the need for the defendant's application to compel had fallen away. The fact that the defendant was of the view that the replies were inadequate and insufficient was not a valid reason for the defendant to insist on pursuing the application to compel. He should have complied with the demand by the plaintiff that he withdraws the application to compel and, for this reason alone, the application should fail.

[10] Moreover, in its answering affidavit in the defendant's application to compel, the plaintiff explains that it had discovered any and all documents relevant to the issues in dispute between the parties. The plaintiff again explained under oath that the Financial Advisor Agreement referenced in annexure 'A' to the Franchise Consultant Agreement is in fact a reference to the very same Franchise Consultant Agreement. As regards schedule 'A', the plaintiff explained that this is a reference to a schedule of commission credits, which it discovered in its supplementary discovery affidavit. Importantly, the defendant did not file a replying affidavit and plaintiff's version, as contained in its answering affidavit, is to be accepted by the court.

[11] The defendant also did not take any further steps to set down the application for hearing. The plaintiff, in turn, was required to bring an application to compel the defendant, in his own interlocutory application, to file his heads of argument, which he was ordered to do as per the court order dated 24 January 2023. The plaintiff thereafter proceeded to set the matter down for hearing. The point simply being that the defendant himself probably realised at some point that his application for compel further and better discovery should not be pursued, hence his supine attitude to progressing the application to a hearing.

[12] In summary, it was argued on behalf of the plaintiff that it had complied with the defendant's request for further and better discovery. It is further argued that the application to compel was brought and persisted with for purpose only of

delaying the matter which is evidenced by the failure of the defendant to inspect the discovered documents and to bring the matter to court. The plaintiff submitted that the application be dismissed with costs from the 06 June 2022 on an attorney and client scale.

[13] It was submitted in the defendant's heads of argument that the plaintiff's response to the respondent's request for further and better discovery in terms of rules 35(3) and 35(12) is inadequate. It is argued by the defendant's counsel that the defendant believes that the Financial Adviser Agreement is separate from the Franchise Consultant Agreement that was attached to the plaintiff's particulars of claim. The defendant also believes that the schedule A referred to in the Franchise Consultant Agreement is different to annexure A to the agreement. It was argued further that a supplementary affidavit would detail further grounds why the discovery of the documents in the plaintiff's supplementary affidavit was wholly inadequate. Such a supplementary founding affidavit by the defendant was however never forthcoming, nor was a replying affidavit by him ever filed.

[14] The court is to decide whether the defendant has made out a case in its papers for an order sought in its notice of motion.

[15] Rule 35(3) provides as follows:

'(3) If any party believes that there are, in addition to documents or tape recordings disclosed as aforesaid, other documents (including copies thereof) or tape recordings which may be relevant to any matter in question in the possession of any party thereto, the former may give notice to the latter requiring him to make the same available for inspection in accordance with subrule (6), or to state under oath within ten days that such documents are not in his possession, in which event he shall state their whereabouts, if known to him.'

[16] It is established in our law that when a court decides an application in terms of Rule 35(7), the court must exercise its discretion whether or not to grant the relief sought based on the relevance of the documents requested in such a notice in terms of Rule 35(3). What is more is that, as a general principle, a court cannot and should not without more go behind the discovery affidavit of a party. The plaintiff explained that it had discovered any and all documents relevant to the issues in dispute between the parties. The courts are reluctant to go behind a discovery affidavit which is regarded as conclusive, save where it can be shown

either (i) from the discovery affidavit itself, (ii) from the documents referred to in the discovery affidavit, (iii) from the pleadings in the action, (iv) from any admission made by the party making the discovery affidavit, or (v) the nature of the case or the documents in issue, that there are reasonable grounds for supposing that the party has or has had other relevant documents or tape recordings in his possession or power, or has misconceived the principles upon which the affidavit should be made.

[17] That, in my view, spells the end of the defendant's application to compel replies to his notices in terms of rule 35(3) and (12).

[18] For all of these reasons, the defendant's application falls to be dismissed.

Costs

[19] The general rule in matters of costs is that the successful party should be granted costs in its favour, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*¹.

[20] The plaintiff, as the successful party, should therefore be awarded the costs of the opposed application. There is, however, the concession by the plaintiff that it is liable for the costs up to 06 June 2022, by which date the rule 35(3) and (12) notices had been replied to and on which date an offer to pay the defendant's costs was in fact made. A costs order to that effect should therefore be made.

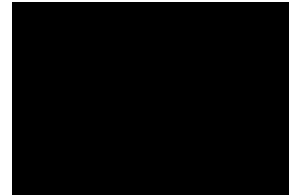
[21] I therefore intend ordering the defendant to pay the costs of the application from 06 June 2022 and the plaintiff to pay the costs up to that date.

Order

[22] In the result, I make the following order:

¹ *Myers v Abramson*, 1951(3) SA 438 (C) at 455;

- (1) The defendant's application, in terms of Uniform Rule of Court 35(7), to compel the plaintiff to make further and better discovery, be and is hereby dismissed.
- (2) The plaintiff's shall pay the defendant's costs of the application to compel up to and including 06 June 2022.
- (3) The defendant shall pay the plaintiff's costs relating to the said application to compel after 06 June 2022.



L R ADAMS
Judge of the High Court
Gauteng Division, Johannesburg

HEARD ON:	31 st July 2023
JUDGMENT DATE:	1 st August 2023 – Judgment handed down electronically
FOR THE PLAINTIFF:	Advocate C D Roux
INSTRUCTED BY:	R C Christie Incorporated, Edenvale, Germiston
FOR THE DEFENDANT:	Advocate J R Minnaar
INSTRUCTED BY:	Slade Shezi Attorneys, Waterkloof Ridge, Pretoria