

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 16369/2022

DATE: 07-09-2023

In the matter between

PANAYIOTIS PAPADAKIS

and

OLD MUTUAL TRUST (PTY) LRD N.O & 12 OTHERS

Respondent

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED.

DATE 7 September 2023



SIGNATURE

Applicant

JUDGMENT *EX TEMPORE*

WILSON, J: The applicant concluded an agreement with a Mr Delport, who is cited as the fourth respondent in these proceedings, for the purchase of a property from a deceased estate. The estate is administered by the first respondent, Old Mutual, by whom Mr Delport was employed at the time the agreement was concluded.

It turns out that, on Old Mutual Trust's version, Mr Delport was not authorized to enter into that transaction or

to conclude that agreement. Mr Papadakis thinks otherwise. He has applied to this court to obtain relief declaring the agreement he entered into with Mr, Delport valid, binding and enforceable.

That is the main application, which is not before me. In that application affidavits have been exchanged and pleadings have closed.

This is an application interlocutory to that application, in which Mr Papadakis seeks discovery of certain documents he says are material to his case in the main application. Those documents are listed at paragraphs 2.1 to 2.6 and 3.1 of his notice of motion.

At the outset of her argument, Ms Killian who appeared from Mr Papadakis, informed me that Mr Papadakis no longer seeks discovery, in these proceedings at least, of the documents in paragraph 2.1, 2.2 and 2.3 of the notice of motion.

Mr Papadakis, however persists in seeking the documents identified in paragraphs 2.4, 2.5 and 2.6 of the notice of motion, and the documents identified at paragraph 3.1.

The Rules of discovery do not generally apply in application proceedings. What Mr Papadakis asks me to do is to exercise my powers under Rule 35(13) of the Uniform Rules of Court, to declare that the Rules of discovery that

ordinarily apply to trial proceedings, should apply to the application proceedings in the main case.

During the course of argument, it was revealed that such a declaration is only really necessary to assist Mr Papadakis' pursuit of the document identified in paragraph 2.4 of the notice of motion. That document is a resolution taken by Old Mutual dated on or about the 9th of July 2019.

That resolution appears to concern the arrangements made for the delegation of certain forms of authority by Old Mutual to various of its employees. In relation to the documents sought in paragraph 2.5 and 2.6 of the notice of motion, an order in terms of Rule 35(13) is not required, because they have been sought in terms of Rule 35(12), which applies to both motion and trial proceedings.

A declaration in terms of Rule 35(13) is also not required to order the production of the documents identified at paragraph 3.1 of the notice of motion, since those are sought in terms of Rule 35(11) which, on the face of the Rule, also applies to both motion and trial proceedings.

It follows from all of this, that the application in respect of the documents sought in paragraphs 2.5 and 2.6 is misdirected, because Mr Papadakis need only have brought an application to compel compliance with the notice in terms of Rule 35(12), that he has already issued and in

which he seeks those documents.

There is no reason why I should order disclosure of those documents in these proceedings pursuant to a declaration under Rule 35(13), not least because in order to make such a declaration I need to be satisfied that there are exceptional circumstances warranting the application of the Rules of discovery under trial actions to the main application.

There are no such circumstances present here, given that, as I have held, and as was accepted by Ms Killian, the documents at paragraphs 2.5 and 2.6 of the notice of motion can be sought through an application to compel compliance with Rule 35(12).

That leaves the document at paragraph 2.4 – the resolution. In the main application the disputes between the parties can be summarized as follows: 1, whether or not Mr Delport had the requisite authority to enter into an agreement with Mr Papadakis and 2, even if he did not on the face of it have that authority, whether Old Mutual is in any event bound as a matter of law to honour the agreement reached with Mr Papadakis.

Those disputes are defined in the affidavits in the main application. The approach, when the matter is to be heard, will be to decide whether there is a dispute of fact about Mr Delport's authority (it seems obvious that there is)

and whether if there is such a dispute it is material.

If there is a material factual dispute as to Mr Delport's authority that cannot be resolved on the papers, there are a number of options open to the parties. One of these is a referral to oral evidence on the defined issue.

In those circumstances, discovery of various documents relevant to the factual dispute, which will be defined in the hearing on the main application, can be pursued. That is the ordinary course of things.

In application proceedings one assesses the affidavits on their face, accepts the facts alleged unless they are so far-fetched and untenable that they can be rejected merely on the papers, and applies the ordinary Rules of evidence to those facts.

In exceptional circumstances, a party may be permitted to go behind the factual allegations made by the other party, in order to require discovery of a particular document. But in my view, that would only be possible if the particular document to be discovered is so material to the main issue between the parties that it is likely to be completely dispositive of it.

In other words, one would only apply the Rules of discovery to motion proceedings of this nature if the document sought to be discovered would curtail the proceedings in a manner that would render a reference to

oral evidence unnecessary.

I accept that if those circumstances were present, they would be exceptional. In this case however I cannot accept that such circumstances are present. What Mr Papadakis wants is a resolution dealing with delegation arrangements within Old Mutual.

There is no allegation before me that that resolution is likely to contain material that will be virtually dispositive of the issues in the main application. The highest Ms Killian could put it, is that the document is likely to be relevant.

That may or may not be, but merely demonstrating the relevance of the document does not mean that there are exceptional circumstances justifying the application the rules of discovery to motion proceedings. If the matter ever goes to oral evidence or to trial, the ordinary Rules of discovery will apply and the document may or may not be retrieved then, but there is no reason that I can see on these papers to short circuit that process and allow the application of the whole of Rule 35 to the main motion proceedings, in order to permit Mr Papadakis to obtain the document in paragraph 2.4 of his notice motion.

To put it succinctly, there are simply no exceptional circumstances that would permit me to exercise my discretion in that direction.

That leaves the documents sought under Rule 35(11) defined in paragraph 3.1 of the notice of motion. In that respect, Mr Papadakis faces a further obstacle in that I have no idea what documents he wants under the rubric of paragraph 3.1 of the notice of motion.

Paragraph 3.1 refer to “the 6th and 7th respondents’ performance in terms of the agreement dated on or about the 9th of May 2022”. What Rule 35(11) permits is disclosure of such documents or tape recordings in such party’s power or control relating to any matter in question in such proceedings as the court may deem appropriate.

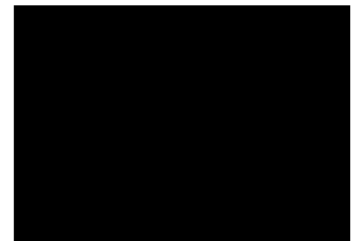
Paragraph 3.1 of the notice of motion plainly does not identify any document or tape recording. What it does is identify a rather porous category (the 6th and 7th respondents “performance” – whatever that is) into which certain documents may fall, but I am unable to determine on the face of the notice of motion, even read in light of the founding affidavit, what documents or tape recordings would constitute evidence of the 6th and 7th respondents’ “performance” in terms of the agreement dated on or about the 9th of May 2022.

For that reason, prayer 3.1 of the notice of motion cannot be granted.

To sum up, the documents listed in paragraphs 2.1 to 2.3 of the notice of motion are no longer sought. There

are no exceptional circumstances in this case which would warrant me exercising my discretion to apply the ordinary Rules of discovery, so as to enable the applicant to compel production of the documents listed in paragraph 2.4. The documents in paragraph 2.5 and 2.6 are available through an application to compel under Rule 35(12) of the uniform Rules of court, and for that reason there can be no exceptional circumstances that warrant their production through the process Mr Papadakis has chosen to adopt. Finally, the documents in paragraph 3.1 are so vaguely specified as to render an order under that paragraph meaningless.

For all those reasons, the application is dismissed with costs.



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WILSON, J
JUDGE OF THE HIGH COURT
7 September 2023