

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**



Case number: 62628/2021

Date of hearing: 1 February 2023

Date delivered: 21 February 2023

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	
(3) REVISED	
21/2/23	
DATE	SIGNATURE

In the matter between:

ATHOLL DAVID VICTOR LIEBMAN

Applicant

and

PUMEZO DAVID N.O.

First Respondent

MURRAY JAMES BARNETSON N.O.

Second Respondent

KANABO GUGULETHU SKHOSANA N.O.

Third Respondent

PUMEZO DAVID

Fourth Respondent

MURRAY BARNETSON

Fifth Respondent

KANABO GUGULETHU SKHOSANA	Sixth Respondent
BRADLEY BRETT LIEBMAN	Seventh Respondent
JACQUELINE JUNE LIEBMAN GENTILE	Eighth Respondent
DIANE JENNIFER PRAGER	Ninth Respondent
MASTER OF THE HIGH COURT, PRETORIA	Tenth Respondent

JUDGMENT

SWANEPOEL J:

[1] This matter commenced as an application to compel first to sixth respondents (referred to for convenience's sake as "the respondents") to respond to applicant's notice in terms of rule 35 (14), in which applicant sought to inspect certain documents in respondents' possession. The remaining respondents do not oppose the application.

[2] Applicant is an elderly businessman who resides in the United States of America. During his life he built up a formidable property portfolio which he held in property-owning companies and property-trusts. The first to third respondents are sued in their capacity as trustees of six of the trusts ("the trusts").

[3] On 20 May 2020 the applicant gave notice to the trustees of the termination of the trusts in terms of clause 9.1.1 of the respective trust deeds. The trustees acknowledge that the applicant was entitled to terminate the trusts, but they aver that the trusts can only terminate finally when the properties have been disposed of. They also say that they have

substantial difficulties in settling the trusts' tax affairs. The dispute has resulted in extensive litigation.

[4] In the main application applicant has sought a declaratory order that the trusts terminated on 20 May 2020. He also seeks the removal of the respondents as trustees of the trusts. He does so on the basis that the trustees have allegedly failed in their fiduciary duties to the trusts. Applicant alleges that the properties are not being maintained, that there are substantial monies owed to the municipal authorities, and that the trustees have refused to disclose what fees they have taken for their work in administering the trusts. Applicant's distrust in the trustees is obvious.

[5] In a voluminous answering affidavit the respondents deal in detail with the allegation that the municipal accounts are in arrears, and appear to show that the allegation is unfounded. They also deal with the issue of maintenance, alleging that the properties are maintained to the extent possible, given the trusts' financial position. It is clear that there is a substantial dispute of fact on the papers. If the respondent's version is correct, they appear to have fulfilled their fiduciary duties.

[6] Nevertheless, applicant has filed a replying affidavit in which he expresses disbelief for the allegations made in the answering affidavit, and he says that he will seek disclosure of the trusts' bank statements for the period August 2020 to January 2022. On 23 March 2022 applicant delivered a notice in terms of rule 35 (14) seeking an inspection of those bank statements.

[7] The authorities are clear: the provisions of rule 35 (14) may not be invoked in motion proceedings unless a Court has previously so directed. The delivery of a rule 35 (14) notice was thus irregular.¹ At the commencement of the proceedings, Mr Kaplan, acting for applicant, conceded as much, and he indicated that applicant would not seek an order in terms of prayer 2, that respondents be compelled to reply to the rule 35 (14) notice. Applicant now confines its application to prayer 1, which seeks a directive in terms of rule 35 (13), and only to the extent that applicant is allowed access to the trusts' bank statements.

[8] Rule 35 (14) reads as follows:

"(14) After appearance to defend has been entered, any party to any action may, for purposes of pleading, require any other party to make available for inspection within five days a clearly specified document or tape recording in his possession which is relevant to a reasonably anticipated issue in the action and to allow a copy or transcription to be made thereof."

[9] Rule 35 (13) reads:

"(13) The provisions of this rule relating to discovery shall mutatis mutandis apply, insofar as the Court may direct, to applications."

[10] In principle, therefore, discovery does not apply to motion proceedings unless a Court has previously ordered otherwise.² However,

¹ Investec Bank Ltd v Blumenthal NO and others [2012]JOL 28596 (GSJ) at para 6; Loretz v Mc Kenzie 1999 2 SA 72 (T); Afrisun Mpumalanga (Pty) Ltd v Kunene NO & Others 1999 (2) SA 599 (T)

² Premier Freight (Pty) Ltd v Breathetex Corporation (Pty) Ltd 2003 (6) SA 190 (SE) at 194 C

in the words of Mabuse J in *Fargo Industries*, the instances in which a Court will allow discovery in an application are rare³:

"It is so that though the provisions of rule 35 apply to applications, as far as the court may direct in terms of rule 35 (13), discovery is rare and not a usual occurrence in application proceedings and should be ordered by the court only in exceptional circumstances. Therefore, unless it has been overruled, of which I am not aware, the case of *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another* 1979 (2) SA 457 (W) is still the authority on 'special circumstances'."

[11] In *Premier (supra)*⁴ the Court also pointed out that only in exceptional circumstances is discovery allowed to apply in applications:

"As stated above, the cases make it clear that an order in terms of rule 35 (13) is not simply there for the asking. There must be a good reason to justify a departure from the usual procedure for the launching, hearing and completion of application proceedings. Indeed, if orders are made as a matter of course in terms of rule 35 (13) much of the efficacy of motion proceedings would be lost."

[12] The Court further held that only where a case has special features that renders discovery necessary will an order be granted in terms of rule 35 (13):

"Apart from this, however, the notion of exceptional circumstances does not exist in a vacuum: it is to be gauged within the broader context of the foundational values upon

³ *Fargo Industries (Pty) Ltd v Niemcor Africa (Pty) Ltd (in liquidation) and Others* [2019] JOL 45853 (GP)

⁴ At para 10

which the rules themselves are based, namely ideas of fairness and equity and the constitutional values of openness and transparency.”⁵

[13] As was also observed in *African Bank Ltd v Buffalo City Municipality*⁶, the principles of fairness and equity play a major role in deciding whether to allow discovery. Therefore, where a respondent is prejudiced by the fact that the matter is proceeding by way of motion, and requires discovery in order properly to plead, justice may require discovery to be allowed.⁷

[14] To summarise then, discovery in motion proceedings is very rare, and will only be allowed in exceptional circumstances, and when justice will not be done unless such an order is granted.

[15] In this case the applicant chose to proceed by way of motion. He made a number of allegations relating to the manner in which the trusts are administered, allegations that were denied, and refuted by factual evidence. Applicant has persisted in the allegations in reply. Pleadings have therefore closed, and applicant does not require discovery “for purposes of pleading”. The crux of applicant’s case for discovery is set out in the heads of argument as follows:

“30.2 the only way in which the trustees’ version can be tested is by consideration of the bank statements. The bald defence raised by the trustees is unsupported by

⁵ Premier (supra) para 13

⁶ 2006 (2) SA 130 (Ck) at para 8.2

⁷ See: *Saunders Valve Co Ltd v Insamcor (Pty) Ltd* 1985 (1) SA 146 (T); Premier (supra)

any evidence and the only way to get to the truth in the interests of justice is to have sight of the bank statements."

[16] As I have said, applicant does not require discovery for purposes of pleading, rather it requires discovery in order to settle a dispute of fact. In argument Mr Bester (for respondents) made the point that it was open to applicant to seek a referral to trial, at which point discovery would follow. Mr Kaplan argued that it was not a given that the Court hearing the matter would be amenable to referring the matter to trial, and that justice would only be served if discovery was allowed at this point in time.

[17] It is a risk that every applicant takes, that irresolvable factual disputes may arise in the application. When that happens, it is not an exceptional circumstance. I know of no case where a court has ordered discovery simply because a respondent has raised a dispute of fact. If I were to allow discovery in this case, I would open the flood gates to every applicant whose allegations are denied by the respondent, to seek to go on a fact-finding exercise to test the respondent's version. That was never the purpose of rule 35 (13) and (14).

[18] Respondent sought dismissal of the application, and the costs of two counsel. In my view this was a relatively simple interlocutory matter, which did not warrant the attention of two counsel.

[18] I therefore make the following order:

[18.1] The application is dismissed with the costs of one counsel.



**SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA**

COUNSEL FOR APPLICANT:	Adv. J Kaplan
ATTORNEY FOR APPLICANT:	Aaron Stanger & Associates
COUNSEL FOR RESPONDENT:	Adv. C Bester Adv. L Nigrini
ATTORNEYS FOR RESPONDENT:	Knowles Husain Lindsay Attorneys
DATE HEARD:	30 January 2023
DATE OF JUDGMENT:	21 February 2023