



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

CASE NO: 31092/14

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	
(3) REVISED	
02/08/2023	[REDACTED]
DATE	SIGNATURE

In the matter between:-

AMALGAMATED BEVERAGE INDUSTRIES,

The soft drink Division of the South African Breweries Ltd

Plaintiff

and

**M MKHONDO TRANSPORT CC
t/a MLP TEMBISA NORTH**

First Defendant

MOSES MOSHE MKHONDO

Second Defendant

Summary: Rule 35(3) provides for better discovery of specific documents requested by the other party. In this case, the respondents admitted to have confiscated certain documents from the applicants' business premises. Later, the respondents (as plaintiffs) instituted a claim against the applicant (as defendant) for payment of goods purchased by the applicant from the respondents and delivered. After the respondents had discovered in terms of Rule 35(1), the applicant sought better discovery of specific documents including those that were confiscated by the respondents in terms of Rule 35(3). It has not been denied that such documents are relevant and crucial for the applicant's defence.

The respondents contend that all they had to do to satisfy the requirements of Rule 35(3) was to state without further ado that they are not in possession of such documents.

Held: That in the circumstances of the present case, the interests of justice require that they state, not only that they are not in possession but also where the documents can be located or, if unknown, state unequivocally that they do not know their whereabouts. The preremptory wording of the sub-rule ("*shall state their whereabouts, if known*") connotes a duty to express the lack of knowledge or to expressly disaffirm such knowledge in the latter circumstances. The respondents failed to do so.

Held: Further, that the non-compliance which may be visited by a penalty of dismissal of a claim or strike out of a defence in terms of Rule 35(7), is broad enough to encompass the failure to satisfy the requirements of sub-rule(3).

JUDGMENT

SKOSANA AJ

[1] This matter concerns an interlocutory application to compel the respondent/plaintiff to discover certain documents following a Rule 35(3) notice and, upon failure to do so, to grant the applicants/defendants leave to apply for the striking out of the claim as contemplated in Rule 35(7).

BACKGROUND

[2] The plaintiff's action concerns the recovery of payment by the plaintiff from the defendant after purchase and sale of goods. The present interlocutory application emanates from a request by the defendants for a better discovery of specific documents by the plaintiff. Of relevance is the defendants' Rule 35(3) request dated 07 March 2022 in which the defendant stated that they believe that the plaintiff is in possession of the following documents or that such documents are under its control:

[2.1] All documents that were confiscated when the defendants' operation was closed down;

[2.2] Audit report compiled by the plaintiff's auditors;

[2.3] The confiscated computer; and

[2.4] Deposit slips taken by Tshepo Tilo.

[3] The defendants aver that such documents are relevant and crucial for their defence against the plaintiff's main claim. On 31 March 2022, the plaintiff responded by stating that the first item on the list is not specified and therefore the request is vague and embarrassing, that as to the audit report and the computer, such documents are not in the plaintiff's possession. Similarly, with regard to the deposit slips, the plaintiff stated that it is not in possession thereof.

[4] In addition, the plaintiff's credit manager had deposed to an affidavit on 30 March 2022 in which it was stated that the plaintiff is not in possession of the documents requested. It is apposite that earlier on, the defendants had requested a broader scope of documents from the plaintiff under the same Rule and was met with a similar response that either the documents requested were vague or not in plaintiff's possession. In that response (dated 24 March 2017), the plaintiff's legal representatives had stated that the huge volume of documents requested had been moved to a different location in Midrand and arrangements could be made for inspection thereat.

[5] The defendants brought the present application supporting it with an affidavit in which it is stated ,among others, that:

[5.1] After a series of follow-up letters, the defendants issued the Rule 35(3) notice in March 2022 followed by the plaintiff's answers as stated earlier on.

[5.2] The defendants gave details of the documents that had been used in their business with the plaintiff.

[5.3] Of importance is that, as averred by the defendants, when the relationship between the parties soured, the plaintiff locked the defendants' business premises and confiscated the plaintiff's business records, files and computers through its agents or employees and such items were never returned nor were the defendants informed as to where they had been kept. The defendants require such documents in order to prepare for the case and to conduct their defence.

[5.4] In its answering affidavit, whose existence was initially erroneously denied by the defendants' counsel, the plaintiff admits that the documents were confiscated by the plaintiff in the manner alleged by the plaintiff. It however denies that the documents are in its possession and aver that the defendants' contract was terminated for non-payment and that it has been long since the confiscation had taken place.

[6] In particular, and on paragraph 15 of its answering affidavit, the plaintiff maintains that the documents were not kept and are no longer in its possession in view of the time that has lapsed, that it has discovered all documents in its possession and that it has not deliberately kept the documents from the

defendants. The plaintiff concludes that the defendants have not made out a case and that they are not entitled to the relief contemplated in Rule 35(7).

[7] **FINDINGS**

I find it necessary to quote the provisions of sub-rules (3) and (7) of Rule 35 which provide:

“(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 such party to make the same available for inspection in accordance with subrule (6), or to state on oath within 10 days that such documents or tape recordings are not in such party's possession, in which event the party making the disclosure shall state their whereabouts, if known.

(7) If any party fails to give discovery as aforesaid or, having been served with a notice under subrule (6), omits to give notice of a time for inspection as aforesaid or fails to give inspection as required by that subrule, the party desiring discovery or inspection may apply to a court, which may order compliance with this rule and, failing such compliance, may dismiss the claim or strike out the defence.”

[8] The plaintiff's counsel submitted that Rule 35(3) requires no more than that a party should state that it is not in possession of the requested additional documentation and where they can be found, if it so knows. It need not state that it does not know where the documents are. I disagree for the following reasons:

[8.1] The Rule requires a party who states that the documents are not in its possession, to disclose the whereabouts of the documents, if such is known to it. In my view, it is paramount for a party who does not know the whereabouts of the documents to indicate in unequivocal terms that he does not know where they can be found. Otherwise, its knowledge of the whereabouts or the lack thereof will remain a speculation. The plaintiff did not declare in any of its responses that it does not know the whereabouts of the requested documents and instead insists that it is not required to do so.

[8.2] Moreover, in the present case, the documents¹ in question had been seized by the plaintiff from the defendants' business premises, a fact brazenly admitted by the plaintiff. Except for alleging that a long time had lapsed since such confiscation had taken place, the plaintiff proffers no information whatsoever as to what would have happened to the documents, which were clearly in its possession at some stage nor is it explained how they would have disappeared.

¹ It is trite and was common cause that 'documents' in terms of the Rule include computers

[8.3] Even if I am wrong in my finding as a proposition for the general application of the sub-rule, the dictates of fairness and justice in the circumstances of the present case require the plaintiff to either disclose the whereabouts of the documents or what happened to them or at least to commit under oath that he does not know their location or about their riddance.

[9] The requirement to state the whereabouts of such documents is couched in peremptory terms in this sub-rule. In my view, that imperative injunction cannot be evaded through tactical silence. The condition for dispelling obligation to state the whereabouts of the specially requested documents, cannot be inexpression. In my view, the satisfaction of the requirements of the sub-rule and its palpable purpose require that a party who, on reasonable grounds, is believed by the other to be in possession, be obligated to indicate at the least whether or not it knows where the documents can be located. After all, the concept of discovery is founded on *bona fides*.

[10] I am well aware that the court should not lightly go behind a discovery affidavit. However, there are exceptions to that principle which include situations where there are reasonable grounds that the party has or has had other relevant documents in its possession or has misconceived the relevant principles. This 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, or (v) the nature of the

case or the documents in issue². Moreover, if *mala fides* are alleged, the applicant is entitled to establish his case for better discovery on extraneous facts³.

[11] In the present case, the following has been established by the defendants:

[11.1] That the plaintiff has had possession of the documents in question and that appears clearly from the plaintiff's answer to the Rule 35(3) notice as well as the documents referred to in the plaintiff's affidavit;

[11.2] The admissions made by the plaintiff as well as the nature of the documents including the plaintiff's auditor's report also support the questioning of the plaintiff's discovery affidavit; and

[11.3] There is clearly well supported grounds for *malafides* on the part of the plaintiff.

[12] It is therefore my view that the plaintiff's discovery affidavit which merely states, without further ado, that it is not in possession of the documents, cannot be regarded as fulfilling the requirements of Rule 35(3).

² Federal Wine & Brandy Co. Ltd v Kantor 1958 (3) SA 735 (E) at 749; Swissborough Diamond Mines Pty Ltd v Government of the RSA 1999 (2) SA 279 (T) at 320-321

³ Greenberg v Pearson 1994 (3) SA 264 (W); See Swissborough Diamond Mines (supra) at 320(F)-321(E)

[13] The defendants made a compelling case as to their grounds for believing that the plaintiff is either in possession or ought reasonable to know the whereabouts of such documents. That includes the fact that the auditor's report in question was compiled by the plaintiff's auditors. That case was not dispelled by the plaintiff. I am not impressed by the argument that the defendants ought to have requested further particulars. Rules 21 and 37 have their own different spheres of operation.

[14] Further, the plaintiff has argued that Rule 35(7) finds no application in the circumstances of the case. As I understand the argument, it is based on the fact that the plaintiff is in no possession of the documents and therefore cannot be compelled to discover what is not in its possession. *A fortiori* the claim cannot be dismissed on that basis. I am in disagreement once again.

[15] Sub-Rule (7) states that “[i]f any party fails to give discovery as aforesaid, ...the party desiring discovery or inspection may apply to a court, which may order compliance with this rule and, failing such compliance, may dismiss the claim....” [my underlining]. The first underlined portion of the quotation signifies a reference to the previous sub-rules including sub-rule (3). The second underlined part continues to confirm that, as a consequence of such failure, the court may dismiss the claim or strikeout a defense.

[16] It is clear from the above excerpt from sub-rule (7) that the failure for which compliance may be ordered is in relation to the whole Rule 35. As already pointed out above, the plaintiff has failed to comply with sub-rule (3) in general and/or in relation to the circumstances of this case.

[17] The adage "*the Rules are for the court and not the court for the Rules*" is apposite in this regard. The mechanical application of the Rules cannot be used to limit the court's inherent power especially where the interest of justice will otherwise be compromised.

[18] The order I propose to give is not merely to compel the plaintiff to furnish the requested documents as couched in paragraph 1 of the defendants' notice of motion. The order will compel the plaintiff to comply with sub-rule (3) either by furnishing the requested documents, disclosing their whereabouts or unequivocally stating that their whereabouts are to the plaintiff unknown. If the plaintiff fails to comply with such compelling order, then the consequences of dismissal as contemplated in paragraph 2 of the notice of motion will have to follow. Such an order is competent and may be given as part of further and/or alternative relief that the defendants have prayed for as well as under the inherent jurisdiction of this court to regulate its own process.

[19] I do not see why the costs should not follow the result. The recalcitrance displayed by the plaintiff that it is not required to either declare the whereabouts

of the documents or its lack of knowledge of their whereabouts, is unreasonable in my view and justifies a costs order against it.

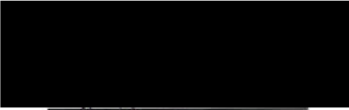
[20] In the result, I make the following order:

[20.1] The plaintiff is hereby compelled to comply with the requirements of Rule 35(3) by either furnishing to the plaintiff the requested documents or alternatively stating their whereabouts or further alternatively unequivocally indicating that their whereabouts are unknown to it.

[20.2] Sub-paragraph 17.1 above must be complied with within 10 days of the date of this order.

[20.3] In the event of the plaintiff failing to comply with the order as stated in paragraphs 20.1 and 20.2 above, the defendants are granted leave to apply to this court on the same papers, as may be duly supplemented, for an order dismissing the plaintiff's claim.

[20.4] The plaintiff is to pay the costs of this application.



DT SKOSANA
Acting Judge of the High Court
Pretoria

Date of hearing: 26 July 2023

Date of judgment: 02 August 2023

APPEARANCES

Counsel for the Applicant: Advocate Brown

Counsel for the Respondent: Advocate Rip

Instructing attorneys: Burden Swart & Botha Attorneys