



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: **1099/2012**

In the matter between:

RUDOLF ANTONIE COETZER

Second Plaintiff

and

VERMAAK & DENNIS
LEON VERMAAK
JACO ELS

First Defendant
Second Defendant
Third Defendant

and

AB OPPERMAN
ABRAHAM JACOBUS DU PLESSIS
PAUL DE LANGE
MINETTE DU PREEZ
ADRI WIESNER HECHTER

First Third Party
Second Third Party
Third Third Party
Fourth Third Party
Fifth Third Party

HEARD ON: 7 JUNE 2018

JUDGMENT BY: EDELING, AJ

DELIVERED ON: 21 JUNE 2018

A. INTRODUCTION

- [1] This is an application to obtain an order to compel the First and Second Defendants for discovery of documents sought by the Fourth Third Party (as Applicant) from the First and Second Defendant (as Respondents), to file their reply to the Fourth Third Party (Applicant) in terms of and under Uniform Rule of Court 35 (14), within 5 (five) days of an order calling upon the First and Second Defendants (Respondents) to make available for inspection five (5) types or groups of documents.
- [2] In his replying affidavit the attorney of Fourth Third Party (Applicant) indicated that the Rule 35 (14) Notice was in fact provided to the Fourth Third Party (Applicant) by the attorney of the Second Plaintiff, but that given the circumstances the Fourth Third Party (Applicant) persisted with prayer 3 of the Notice of Motion, the First and Second Defendants (Respondents) to pay the costs of this application.
- [3] In this judgment I will refer to the Fourth Third Party as “the Applicant” and to the First and more specifically, the Second Defendant as “the Respondent”.
- [4] Respondent opposes the application and I am called upon to only rule on prayer 3 of the Notice of Motion.

B. FACTUAL BACKGROUND

- [5] The Applicant launched the application on 10 April 2018 to compel the Respondent to comply with the Notice in terms of Uniform Rule 35 (14) dated the 9th of February 2018.
- [6] The Respondent's attorney, Mr van Schalkwyk from Lovius Block Attorneys, indicated in a letter dated 22 February 2018 to the Applicant's attorney, ("Annexure A" of the opposing affidavit) that "Mr Buchner (from Honey Attorneys) is acting on behalf of the 2nd plaintiff" and that "The liquidators of the first defendant are Functus Officio and for all practical reasons they are no longer involved in this matter." He further indicated that he "already" requested "Mr Buchner to provide us with the information as requested in terms of your client's Rule 35 (14) Notice."
- [7] On 10 April 2018 a further letter, Annexure "B" of the opposing affidavit, was written by Mr van Schalkwyk to the Applicant's attorney indicating that although he had "already" requested Mr Buchner on 19 February 2018 on behalf of the Plaintiff to provide them with the information and documents requested in terms of Rule 35 (14) notice, but unfortunately could not get any co-operation from Mr Buchner. He further confirmed: "The documents / information required in terms of the Rule 35 (14) notice are not at our disposal and we will once again request Mr Buchner to provide us with that information."
- [8] The Application was launched on the same day and issued by the Registrar on 11 April 2018. In his Heads of Argument, Mr Green the Applicants attorney, indicated that the Respondent did initially

indicate in his letters, that they were not in possession of the required documents as listed in the Notice and that same were in fact with the offices of Messrs Honey Attorneys, and specifically Mr H L Buckner, the attorney of record for the Second Plaintiff in the main action. He argued that it was evidently so, due to the fact that the contents of the Defendants (Respondent) entire case file had, according to the Defendants (Respondent) been handed to Mr Buchner.

- [9] On 17 April 2018 the Respondent filed the intention to oppose the application and was postponed to the opposed roll for the 7th of June 2018.
- [10] A letter of Mr Buchner dated 26 April 2018 on behalf of Second Plaintiff, Annexure "C" of the opposing affidavit, was received by Mr Green on 2 May 2018 including documentation to the satisfaction of the Notice. He requested that the application be removed from the roll which was not acceptable to Mr Green. He indicated that "that the Applicant would only agree to remove the Application against a tender for the payment of her wasted costs that she was forced to incur in having to bring the Application."

C. THE ISSUES

- [11] The issues to be determined are therefore the following:
- 11.1 Was the Defendant obliged to deliver the documents as set out in the Notice in terms of Rule 35 (14) of the Applicant and therefore

in control of the file in possession of the attorney of the Second Plaintiff?

- 11.2 Was the Applicant obliged to bring the application against the Respondent for the relief as set out in the Notice of Motion and therefore had to incur the costs to proceed with the application?
- 11.3 Did the Applicant have the necessary locus standi to bring the application?

D. THE APPLICABLE LEGAL POSITION

[12] Rule 35(14) of the Uniform Rules of Court:

“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.”

[Subrule (14) substituted by GN R2164 of 2 October 1987 and by GN R2642 of 27 November 1987.]

[13] Rule 35 of the Uniform Rules governs discovery procedure in High Court actions which allows a party after appearance to defend and for purposes of pleading, to require the other party to produce a specific document or recording in its possession that is relevant to an anticipated issue “in the action”. Although discovery is rarely ordered in applications, Rule 35 (13) provides that Rule 35 shall apply to applications insofar as the court may direct. Rule 35 (14) was added to the Rules sometime after Rule 35 (13)

and the question in the present case was whether an order under Rule 35 (14) could be made in this application.

- [14] Mr Green argued that it was not disputed that his Notice in terms of Rule 35 (14) was not complied with by the Respondent. He had given various notices in his correspondence to the Respondent to comply with his initial notice, who failed to comply within five days thereof but, however, did indicate that he was not in possession of same.

Mr Green then referred to a United Kingdom - reported matter of *AIR CANADA v SECRETARY OF STATE FOR TRADE* [1983] 2 AC 394 at 445-446:

Coram: Lord Wilberforce, Lord Scarman, Lord Fraser of Tullybelton

Ratio: The court considered the test to be applied before a document could be ordered to be discovered.

Held: (Majority) Discovery is an exception to the adversarial character of the legal process. It assists both the parties and the court to discover the truth. By so doing, it not only helps towards a just determination; it also saves costs. A party who discovers timeously a document fatal to his case is assisted as effectively, although less to his liking, as one who discovers the winning card; for he can save himself and others the heavy costs of litigation. The House was divided on the question whether, before inspection is ordered, the documents should appear likely to support the case of the party seeking discovery, or whether it is enough that they should appear likely to assist any of the parties to the proceedings; the majority favoured the first view. The purpose of discovery is to assist the parties as well as the Court in determining the truth and by doing so, not only help to discover the truth and make a just determination of the case, but also save costs. When considering the ordering of discovery for which immunity is claimed, there must be something beyond speculation, some concrete ground for belief which takes the case beyond a mere fishing expedition.

Lord Fraser of Tullybelton discussed the circumstances in which a judge should inspect documents in order to decide whether or not public interest immunity is made out, and said: 'The test is intended to be fairly strict. It ought to be so in any case where a valid claim for public interest immunity has been made. Public interest immunity is not a privilege which may be waived by the Crown or by any other party.'

Lord Scarman said that the Crown, when it puts forward a public interest immunity objection, 'is not claiming a privilege but discharging a duty'.

It is not for the Crown but for the Court to determine whether the document should be produced, and 'In my judgment documents are necessary for fairly disposing of a cause or for the due administration of justice if they give substantial assistance to the court in determining the facts on which the decision in the cause will depend.'

Jurisdiction: England and Wales"

- [15] Although the Court is not bound by that matter, I agree with the principles set out therein especially with reference to the saving of costs.
- [16] Mr. Green argued that the Respondent was in possession of the documents and although he may not have been in physical possession the Rule also intended that the possession included "control" thereof. He argued that it would be absurd that a party could hand documents so requested to any other party and allege that he was not in possession when so requested. His control of those documents handing it to someone else would be a good example of still being in possession thereof although not physically. He argued that the Respondent handed his file to the Second Plaintiff's attorney and was therefore still in control of the file and had to comply with the Rule 35 (14) Notice served upon him.

- [17] I cannot agree with him in this regard. Mr van Schalkwyk clearly indicated that he was not in possession of the requested documents before this application was launched. He responded to Mr Green that he could not get any co-operation from Mr Buchner and once again requested him to provide him with the required information or documents in terms of the Rule 35 Notice on the day the application was launched. Although Mr Green may have a good argument that possession does incorporate “control”, the facts of this matter cannot accommodate his argument. The Respondent’s attorney indicated that he was not in possession of the documents since Mr Buchner was not co-operating to supply him with the requested documents. He therefore did not have any control over the file at that stage and cannot be read into having “possession”
- [18] Rule 35 (14) clearly refers to “...require any other party to make available...”
- [19] The Second Plaintiff is a party in the action and therefore makes Rule 35 (14) applicable upon him as a party who may be required to produce documents as indicated in Rule 35 (14) “...require any other party to make available...” Mr Green, prior to the launch of the Application, knew that the documents were not in the possession of the Respondent’s attorney but with another party in the main action.

- [20] I therefore cannot find that the Respondent was in control of the requested documents at the time when the Application was launched.
- [21] It was therefore not correct to launch the Application against the Respondent with the knowledge the Applicant had on 10 February 2018. His remedy was clearly against the Second Plaintiff as a “party” in the litigation process.
- [22] The last and final issue was argued by Mr Snyman on behalf of the Respondent that the Mr Green had no locus standi to launch the Application. He referred to the matter of *LEGAL EXPENSES INSURANCE SOUTHERN AFRICA LTD V DU RANDT & LOUW* 2001 (1) SA 667 (O) and the unreported judgement of Rampai AJP in *PROFESSOR INGRID DENNIS v DIE UNIVERSITEIT VAN DIE VRYSTAAT* (Case number 451/2013).
- [23] Mr. Snyman submitted that “it is trite law that the authority of an attorney of record to launch and/or oppose applications for and on behalf of his client solely based on such status or his appointment as such, is not unfettered and for an attorney to launch an application and/or oppose an application on his client’s behalf, requires explicit and direct instruction and/or authorisation from his client to do so, authority and authorisation which are, considering the founding affidavit herein, lacking in the present interlocutory application. No general authority and/or blank authorisation can be given to a representative such as an attorney for and of behalf of a party to launch and/or oppose applications on his client’s behalf.”

[24] I could nowhere in the papers determine that the authority or the locus standi of Mr Green was in dispute. This issue was only raised in his Heads of Argument. If the authority and locus standi of Mr Green was in dispute it ought to have been raised in terms of Rule 7 of the Uniform Rules and raised in an opposing affidavit and not only during argument.

See CREATIVE CAR SOUND AND ANOTHER v AUTOMOBILE RADIO DEALERS ASSOCIATION 1989 (PTY) LTD 2007 (4) SA 546 (D) at 553 F – J, and at 551 A – H: “In Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk 1957 (2) SA 347 (C), ... where Watermeyer J said the following:

“Where a notice of motion which is issued in the name of an individual is complete and regular on the face of it and purports to be signed by an attorney acting for the applicant, then, in the absence of anything to show that the applicant has not in fact authorised the attorney to issue the notice of motion on his behalf, the Court will presume that the attorney was duly authorised to do so. An attorney is an officer of the Court and it must be presumed in the absence of any evidence to the contrary that he has satisfied himself that he has authority from the applicant to commence proceedings before doing so. By appending his signature to the notice of motion he in effect certifies that he has authority to act on behalf of the applicant. I say that the Court will presume the attorney's authority in the absence of evidence to the contrary, for it is of course always open to a respondent, if he has reason to believe that the proceedings have not been properly authorised by the applicant, to file an opposing affidavit setting out the grounds of his belief, in which case a triable issue of fact arises. I do not think that, in the case of notice of motion proceedings brought by an individual, the mere failure to file a power of attorney or a statement under

oath showing that the applicant has conferred authority upon the attorney renders the proceedings open to objection.”

[25] See also GANES AND ANOTHER v TELKOM NAMIBIA LTD 2004 (3) SA 615 (SCA)

[26] I therefore cannot agree with Mr Snyman’s submissions that attorney Green had no authority to launch the present application for and on behalf of the Fourth Third Party (Applicant), in the absence of anything indicating that the Applicant has not in fact authorised Mr Green to issue the Notice of motion on her behalf. I therefore find that Mr Green was duly authorised to do so.

E. APPLICATION

[27] In the light of the above, I am of the view that the Applicant has failed to establish circumstances justifying the granting of prayer 3 in the Notice of Motion for an order as to costs only. There is no basis that he had to bring the application against the Respondent to comply with the Rule 35 (14) Notice of the Uniform Rules.

F. ORDER

[28] In the result the following order is made:

1. The application is dismissed with costs.

W J EDELING, AJ

For the Applicant: Mr R G Green

Instructed by: Stander & Green Attorneys, Bloemfontein

For the Respondent: Advocate C Snyman

Instructed by: Lovius Block Attorneys, Bloemfontein